

William & Mary Environmental Law and Policy Review

Volume 26 (2001-2002)
Issue 3

Article 8

April 2002

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Anne C. Dowling, *"Un-Locke-Ing" a "Just Right" Environmental Regime: Overcoming the Three Bears of International Environmentalism - Sovereignty, Locke, and Compensation*, 26 Wm. & Mary Env'tl. L. & Pol'y Rev. 891 (2002), <https://scholarship.law.wm.edu/wmelpr/vol26/iss3/8>

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“UN-LOCKE-ING” A “JUST RIGHT” ENVIRONMENTAL REGIME: OVERCOMING THE THREE BEARS OF INTERNATIONAL ENVIRONMENTALISM—SOVEREIGNTY, LOCKE, AND COMPENSATION

ANNE C. DOWLING*

INTRODUCTION

[N]ature has its own methods of showing us its teeth, of letting us know when we have transgressed limits. The very land, air and water on which we rely begins to turn sterile and toxic. The sum of our transgressions push ecosystems and species beyond the threshold of adaptation, and they begin to die and disappear. This sterility, toxicity and extinction, in turn, degrades not only our natural environment but also our economic prospects. It is because of nature's sharp teeth that we must create laws and institutions with sharp teeth of their own.¹

The concept of “sovereignty” in international law and Lockean theories respecting the rights of private property owners in domestic law, would both appear to constitute an impenetrable barrier to the development of environmental regulations.

For centuries, sovereignty has been “king,” recognized as the *sine qua non* of international law. The civil actions of states have focused only on activities occurring within their own well-defined territorial borders. Thus, the fact that historically, nations have not acted extraterritorially when making environmental decisions should come as no surprise. Traditional understandings of sovereignty have ascribed to that concept the characteristics of unlimited freedom and absolute authority for each state within its own territories. Sovereignty also, traditionally, has been

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¹ PAUL STANTON KIBEL, *THE EARTH ON TRIAL: ENVIRONMENTAL LAW ON THE INTERNATIONAL STAGE* xxi-xxii (1999).

interpreted to include exclusive control for the state over the natural resources within its own borders. Thus, any overarching international regulatory regime attempting to govern trans-boundary environmental issues appears doomed to certain foundering on the shoals of sovereignty.

Just so, on the American domestic front, Locke's theories respecting property have served as a key lynchpin of liberal democratic governance and, as supplemented by Bentham's utilitarian philosophy, have been uniquely resonant within American constitutional democracy. And, as with sovereignty, these property theories have, over the years, been assumed to arrogate to such owners the same degrees of absolute control, authority, and freedom over their own lands as traditional definitions of sovereignty have provided to states. Thus, any government environmental regulations attempting to penetrate that doctrinal barricade would seem destined to failure.

However, an effective regulatory system is in place in the United States—the Lockean private property concept was in fact breached. How did that happen? First, Lockean property principles turn out, upon examination, never to have been as absolute as many interpretations portrayed. Further, new philosophy, especially the public-trust doctrine, American societal changes reflected in the domestic environmental movement, and particularly the jurisprudence developed in the United States on government land use restrictions under United States regulatory “Takings” law, all contributed to the “taming” of Locke. It can hardly be said that the American environmental regime has completely eradicated the older “totalitarian” property rights concepts; in fact, as will be discussed, those concepts are currently enjoying, in the United States, a “comeback” fueled largely by the “compensation issue” in Takings law.²

The American achievement does, however, offer reason for optimism; that is, hope for similar environmental success on the international front despite the apparent roadblock which sovereignty represents.

Sovereignty, like the Lockean concept, also appears to have been much more limited *ab initio* than apparent. Further, new philosophy, in particular the “global commons” or “common heritage of mankind” theories are now broadly coming to be recognized in international law, as are new “enviro-friendly” usages of older principles of international law.

² For a discussion of this comeback and its causes, see generally *infra* note 266, particularly the works of William L. Inden and Richard Minitier. Additionally, the appointment of Gail Norton, a well-known property rights advocate, as Secretary of the Interior, may well give that comeback a great deal of extra political fuel.

And again, as occurred in the United States, worldwide societal changes are reflected in the international environmental movement.

Although there is, obviously, no set of international "statutes" like those in the United States, there are a great number of treaties addressing aspects of the subject, and there is a real possibility of developing clear and effective enviro-jurisprudence thereunder and within the framework of international law.

This Note will examine, in Parts I and II, the background and development of both concepts of sovereignty and Lockean property rights theory. It will then examine key factors that have led to the current redefining of those concepts to include an implied recognition of the need to answer to the "higher responsibility" of environmentalism. Neither concept is now at all averse to environmentalism; in fact, both are necessary—and can be significant—tools for the development of successful international eco-legal systems. In Part III, this paper proffers some suggestions as to how environmentalism can work with both theories, and vice-versa, towards international environmental problem solving and how the problems that have led to the current property-rights backlash in America might be avoided on the international front.

I. SOVEREIGNTY

A. *Background and Development*

If we want to understand change and detect the emerging dialects we need to break out of the constructs of obsolescent paradigms. We will have to see beyond the old order that is still guiding our tentative glimpses into the baffling future . . . we will not see the new if we remain hostages to the old context and its image of reality. It is therefore important that we stretch our imagination, and take a critical look at the conceptual apparatus that governs our thinking.³

³ Matti Wouri, *On the Formative Side of History: The Role of Non-Governmental Organizations*, in INTERNATIONAL GOVERNANCE ON ENVIRONMENTAL ISSUES 159, 161 (Mats Rolén, Helen Sjöberg & Uno Svedin eds., 1997).

The concept of sovereignty is at the heart of the old order and is the fundamental building block of international law.⁴ It is a concept that has been firmly embedded in governing principles of international law since 1648:

Contemporary international law is predicated upon the international state system that grew out of the Peace of Westphalia in 1648 that ended the Thirty Years War in Europe. Key to making this international political arrangement work has been the notion of sovereignty, the critical legal quality that endows a state with its own autonomy and controlling influence, and that asserts the state's freedom from external control⁵

The theoretical underpinnings of traditional notions of sovereignty can be traced to late medieval Europe. Jean Bodin's definition of sovereignty as "the absolute and perpetual power of a state" in particular has continuing resonance and has been a foundational reference for many ensuing theories on sovereignty.⁶

Building on Bodin's definition, the term sovereignty was conceived as an absolute concept implying that states are totally independent with respect to the community of nations as a whole and above the rules of international law. Thus, later authors have held that sovereign states are "perfectly independent totalities," that sovereignty is the characteristic of a state to be legally bound only by its own will, and that therefore, as a sovereign state is subject to no will other than its own, it can never be bound by a legal order. It was argued that a sovereign state has the complete freedom to determine the extend [sic] of its rights and obligations Under this perspective, sovereignty was

⁴ Franz Xavier Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation not to Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1187, 1188 & n.1 (1996).

⁵ ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY xxx (1986).

⁶ JEAN BODIN, SECHS BÜCHER ÜBER DEN STAAT (BUCH I-III) 205 (P.C. Mayer-Tasch ed., Bernd Wimmer trans., 1981) (1576).

understood as "complete freedom of a state from control by any higher power claiming authority to regulate its acts."⁷

Today, definitions of sovereignty have come to reject such absolutism as having been void *ab initio*. Nevertheless, this older, more "mythical" view still permeates much of the political and legal writing proffered today.

Many writers still "essentially equate sovereignty with independence, the fundamental authority of a state to exercise its powers without being subservient to any outside authority." Thus, governments still raise "the iron curtains of sovereignty to resist international cooperation and frustrate international norms." Sovereignty became the "the cornerstone of international rhetoric about state independence and freedom of action, and the most common response to initiatives which seek to limit a state's action in any way is that such initiatives constitute an impermissible limitation on that state's sovereignty."⁸

In order to understand the pervasiveness of the "mythical" absolutist definition of sovereignty, it is necessary to understand the evolution of the term from the 16th through the 21st centuries.⁹ Sovereignty has undergone four phases—the 16th and 17th century definition (defined by thinkers such as Bodin; sovereignty means limited independence); the classical 18th and 19th century definition (defined by Hegel and Jellinek; sovereignty is defined as absolute and unlimited); the traditional 20th century definition (defined by The League of Nations; sovereignty adopts a relative/neighborly concept) and finally, the new understanding of the late 20th and early 21st century (defined by the United Nations and the growing general public awareness of global problems; sovereignty takes on a more participatory role emphasizing cooperation).¹⁰

The concept of sovereignty was first espoused in the Middle Ages—when Christianity and feudalism were supreme. Christianity

⁷ FRANZ XAVER PERREZ, COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW 14-15 (2000) (internal citations omitted).

⁸ *Id.* at 16-17.

⁹ For an in-depth discussion of that evolution, see generally *id.* from 17-67.

¹⁰ *Id.* at 344.

embraced a global-world view in which religion, law and politics were interdependent and interlocked. Sovereignty first emerged as a personal concept describing the independence of the prince.¹¹ Its origins were political and only later became legal. The personal nature of sovereignty was reinforced by the prevailing organizational system of the day—feudalism.

[T]he liens of feudality, vassalage and personal allegiance criss-crossing the universal Christian community living under the roof of a divine order contradicted the idea that law could be territorial . . . Thus . . . treaties between commanders of an army, dukes and kings created only personal relations, obligations and rights having larger effects solely because of the duty of allegiance that existed between rulers and their subjects.”¹²

Social, agricultural, economic, scientific, and political changes caused the slow collapse of the static feudal system and allowed the concept of “territorialization” to emerge. This move towards territorialization was enhanced by the rise of cities and the codification of laws within those cities. No longer was the world-view one that was governed by the divine will of the Creator. Rather, humans began to see themselves as the center of the universe, and the universe was a “reservoir of resources” ready for human consumption.¹³ The Thirty Years War’s culmination in the Peace of Westphalia in 1648 may be considered the end of the medieval era and marks the beginnings of international law, in which notions of state sovereignty were accepted as normative¹⁴:

As the religious conflicts were the most fundamental questions to be resolved, religious issues were a major concern of the Peace of Westphalia. But at the same time, it marked the beginning of a shift of paradigms in setting the bases for transforming person oriented law into a territory oriented law. Thus the political tensions were settled by organizing Europe on the principles of particularism, sovereign equality and balance of power.

¹¹ OTTO KIMMINICH, *EINFÜHRUNG IN DAS VOLKERRECHT* 64 (6th ed., 1997).

¹² *Id.* at 57.

¹³ PERREZ, *supra* note 7, at 21 (internal citations omitted).

¹⁴ *Id.* at 19.

And a system based on the coexistence of a plurality of states exercising unlimited authority within their territories was established...The independence of over three hundred political entities was recognized, each with its own principal, its own capital, its own bureaucracy . . . This significantly changed the pattern of international relations in Europe and introduced a concept accepting the principle of sovereignty This development paved the way from the concept of a global order that was ordained by God to a system characterized by the coexistence of free and independent political entities. The understanding of the international system as an universal and hierarchical order kept together by a binding universal force was successfully destroyed and the idea of the Empire was replaced with the idea of the sovereign state.¹⁵

Nevertheless, it was broadly acknowledged at that time that external sovereignty was not in fact absolute. Bodin and other 16th/17th century thinkers, including the Westphalia peacemakers, understood sovereignty as a limited doctrine—limited by both divine and natural law and by concepts arising in international law, such as the Just War doctrine limiting the authority of the state to launch war.¹⁶ The freedom of the state was understood to be subjected to the supremacy of the above mentioned concepts.¹⁷ Sovereignty as an "absolutist" concept was really an internal concept, not an external one, designed to allow a state to function internally and to manage its own affairs. "Thus, sovereignty had the function of overcoming civil war and enable [sic] peace and welfare, and the absolute character of (internal) sovereignty was seen as a necessary means to reach this aim, and not an aim in itself."¹⁸ Bodin and other 15th and 16th century thinkers understood sovereignty as a limited doctrine—limited externally by divine, natural and international law.

Jean Bodin's definition of sovereignty has thus been taken out of context and distorted through a false application to the external affairs of a state. When sovereignty is allowed to escape its internal restraints, it

¹⁵ *Id.* at 22-23 (internal citations omitted).

¹⁶ *Id.* at 344.

¹⁷ *Id.* at 38.

¹⁸ *Id.* at 39 (citing Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L. L.J. 1685, 1687 (1995)).

becomes a principle that is antithetical to environmentalism¹⁹ and then as Matt Wouri writes, the concept of sovereignty becomes a concept that "ecologically makes no sense."²⁰ This distortion unfortunately still has adherence; however, the myth of the unrestrained state is not supported by sovereignty's genesis.

B. *Sovereignty's Sea Change: The Adoption of the Mythical Definition*

This mythical definition would find increased application in the 19th and earlier 20th century classical phase of sovereignty. As the concepts of divine and natural law withered on the vine, the idea of absolutism again reared its ugly head:

The term sovereignty was extended further until it reached in the 19th century an absolute content implying that states are, with respect to the community of nations as a whole, totally independent. This absolute conception of sovereignty replaced the acceptance of international law as binding and restricting the states and sovereignty as a characteristic of the state was seen as the "highest externally . . . independent power free from any higher authority." Thus, sovereignty degenerated into a principle postulating the total independence and freedom from higher binding norms.²¹

¹⁹ A world of sovereign states is unable to cope with endangered-planet problems. Each government is mainly concerned with the pursuit of national goals. These goals are defined in relation to economic growth, political stability, and international prestige. The political logic of nationalism generates a system of international relations that is dominated by conflict and competition. Such a system exhibits only a modest capacity for international cooperation and coordination. The distribution of power and authority, as well as the organization of human effort, is overwhelmingly guided by the selfish drives of nations. RICHARD FALK, *THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL* 37-38 (Random House, 1971).

²⁰ Matti Wouri, *On the Formative Side of History: The Role of Non-Governmental Organizations*, in *INTERNATIONAL GOVERNANCE ON ENVIRONMENTAL ISSUES* 159, 163 (Mats Rolén, Helen Sjöberg & Uno Svedin eds., 1997). "Ecologically speaking the nation state—or any type of state—makes little sense." *Id.*

²¹ PERREZ, *supra* note 7, at 40.

Thinkers such as Georg Freidrich Hegel and his student, Adolf Lasson, built upon this absolute definition.²² According to them, international law and sovereignty cannot coexist, because the egoistic self-interest of the state excludes any possibility that it could subject itself to the higher binding principles of international law.²³ Consequently, the state can never subject itself to a will other than its own and even treaties are not seen as binding but merely as reflecting interest and power.²⁴ Hegel and Lasson intimate that sovereignty means that states are unfettered by international law and deny the obligatory quality of international law.²⁵

This extreme viewpoint was tempered by the writing of Georg Jellinek.²⁶ Jellinek, by postulating the idea of auto or self-limitation, sought to avoid the conclusions of his predecessors.²⁷ As maintained by Jellinek, the state can bind itself and thus limit its freedom without losing its sovereignty because sovereignty encompasses the ability and right to be bound exclusively through a state's own will. According to Jellinek, once a state binds itself, it binds not only itself but also its subjects. Once bound, only legal reason can free it from its commitment.²⁸ Thus, sovereignty does not equate to "unlimited power" and because sovereignty embraces the concept of self-limitation, there is no contradiction between it and international law.²⁹ Jellinek's theory proved to be an indicator of the definitions of sovereignty that would rise to the fore in the 20th century.

C. *From Myth to Reality*

²² See GEORG WILHELM FREIDRICH HEGEL, *GRUNDZUGE DER PHILOSOPHIE DES RECHTS* (1821); ADOLPH LASSON, *PRINZIP UND ZUKUNFT DES VOLKERRECHTS* 8 (1871).

²³ See *id.*

²⁴ LASSON *supra* note 22, at 22.

²⁵ Martti Koskeniemi, *Sovereignty: Prolegomena to a Study of the Structure of International Law as Discourse*, 4 KANSAINOIKEUS IUSGENTIUM 71, 71-72, 106 (Nos. ½, 1987).

²⁶ Concerning Georg Jellinek and his theory, see generally, HANS-PETER ALBERT, *DER STAAT ALS "HANDLUNGSSUBJEKT": INTERPRETATION AND KRITIK DER STAATSLHRE GEORG JELLINEK*, esp. 115-125 (1988).

²⁷ GEORG JELLINEK, *ALLGEMEINE STAATSLHRE* 475 (3d ed., 1921); GEORG JELLINEK, *DIE LEHRE VON DEN STAATENVERBINDUNGEN* 34 (Kipe Verlag, Goldbach 1996) (1882) [hereinafter *STAATENVERBINDUNGEN*].

²⁸ *STAATENVERBINDUNGEN supra* note 27, at 29.

²⁹ *Id.* at 36.

It was not “mere” theories that ultimately undid the absolutist underpinnings of sovereignty—it was war, specifically, World War I:

The horrors of the first World War underlined definitively the limitations of the classical international law of understanding sovereignty as unrestricted authority. As it became apparent that the classical understanding of sovereignty as absolute was a threat to the international community, to international peace and to the maintenance of independent nation states itself, a new understanding of sovereignty and of international law emerged.³⁰

After World War I, the idea that sovereignty included the absolute freedom to engage in war was replaced by the prohibition of the threat or use of force and an obligation to seek peaceful settlement of disputes.³¹ This idea was codified in the *Covenant of the League of Nations*³², later in the Briand-Kellogg Pact's *General Treaty for the Renunciation of War in 1928*³³ and after World War II in the *United Nations Charter*.³⁴ Current writings emphasize the point that today the use of armed force and the resort to war is largely prohibited.³⁵ This, sovereignty became limited in the sense that the unfettered right to initiate war was replaced by the obligation to maintain peace.³⁶

More important, for the purposes of this paper, is the “subjugation” of states to principles of international law. In reverse, this can be viewed as the triumph and acceptance of a definition of sovereignty in which states recognize their limitations and subject themselves willingly to international law. This acceptance of substantial limitations on states’ freedom and independence and the willingness of states to subject themselves to the rule of international law “may prove to be one of the 20th century’s more valuable achievements”:³⁷

³⁰ PERREZ, *supra* note 7, at 46 (internal citations omitted).

³¹ Thomas M. Franck, *Three Major Innovations of International Law in the Twentieth Century*, 17 QLR 139, 139, 148-152 (1997) (positing that the outlawing of war is one of the three major innovations of international law in the twentieth century).

³² LEAGUE OF NATIONS COVENANT arts. 12-16.

³³ General Treaty for the Renunciation of War of 1928.

³⁴ U.N. CHARTER art. 2, para. 4.

³⁵ Bruno Simma, *NATO, the UN and the Use of Force, Legal Aspects*, 10 EJIL 1, 2-3 (1999) (arguing that prohibition of threat or use of force is part of *jus cogens*).

³⁶ KIMMINICH, *supra* note 11, at 75-82.

³⁷ Arthur Watts, *The International Rule of Law*, 36 GERMAN YIL 15, 24 (1993).

The acceptance of the binding force of international law, and the right to enter into binding international agreements and to be a subject of international law was no longer seen as a rejection or denial of sovereignty, but became the fulfillment of state sovereignty. [This] . . . fact . . . is underlined by the reality that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." This overwhelming compliance of the states with international law is seen as evidence for their confidence in international law and the existence of an international rule of law Thus: the right to be a subject of—and to be subject to—international law became a key element of international sovereignty.³⁸

D. *Sovereignty in the Modern Age—Friend not Foe*

Sovereignty post-World War II underwent further significant transformations. Perhaps the most significant "infringement" on sovereignty arose out of the recognition of human rights.³⁹ These rights were recognized in the United Nations Charter when it was supplemented in 1948 by the Universal Declaration of Human Rights, in 1966 by the International Covenant on Civil and Political Rights and the International Covenant on the Economic, Social and Cultural Rights,⁴⁰ all three of which combine to form what is known as the *International Bill of Rights*.⁴¹ Prior to this recognition, internal sovereignty was unquestioned—a state

³⁸ PERREZ, *supra* note 7, at 48 (2000) (quoting LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed., 1979)).

³⁹ Brand, *supra* note 18, at 1693-94.

⁴⁰ HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 118-120 (2000). The emergence of human rights, only briefly mentioned here, has had huge implications for international law in terms of the erosion of sovereignty by allowing individuals and not just states to bring suits and as a tool embraced by environmentalists. Thus, states were able to foster the idea that the right to a clean environment is a human right. This is one of the theoretical bases for sustainable development discussed *infra*. For an excellent discussion of Human Rights and the Environment, see A. Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* (A. Boyle & M. Anderson eds., 1996) (The discussion includes the pros and the cons of tying the environment to human rights.).

⁴¹ STEINER & ALSTON *supra* note 40, at 121-122.

could treat its nationals as it pleased. With the recognition of human rights, not only was the relationship of individual to state revolutionized, but state to state relationships were also changed.⁴² States now had to answer to their own citizens and to other states for violations stemming from the "International Bill of Human Rights."

Perhaps no other institution has had more influence on the decline of "the absolutist" aspect of sovereignty than the United Nations by confirming a limited concept of sovereignty in which sovereignty must "answer to" international law in UN Charter Article 2(2).⁴³ Or, as Jost Delbrück so succinctly put it, the UN established the "definitive inroad into the once sacred principle of sovereignty."⁴⁴

Case law supports the conclusion that sovereignty in the 20th century includes a duty to respect other's sovereignty.⁴⁵ Thus, states

⁴² Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387, 391 (1997) (positing that human rights law is an abrupt departure from the classical understanding of international law as law between nations on two levels—first by providing individuals with rights versus their own governments and then by allowing other states or international organizations to intervene to enforce and protect these rights).

⁴³ This may seem ironic, because the United Nations emphasizes sovereignty in terms of dispute resolution (discussed in this Note *infra*), yet it embraces a definition of sovereignty that would be unrecognizable to those scholars of the previous centuries who viewed sovereignty as absolute independence:

The Charter not only introduced a new international system, it also legally ascertained that sovereignty inherently includes the respect of other's sovereignty and means freedom within and limited by international law. This affirmed definitively the change of paradigms that emerged after World War I: sovereignty as absolute independence was replaced by a relative and limited concept. This change of paradigms enabled . . . the emergence of principles . . . [that] . . . would have been incompatible with the classical approach basing international law on a concept of sovereignty as absolute independence.

PERREZ, *supra* note 7, at 52.

⁴⁴ Jost Delbrück, *The Role of the United Nations in Dealing with Global Problems*, 4 IND. J. OF GLOBAL LEGAL STUD. 277, 283 (1997).

⁴⁵ See generally PRUE TAYLOR, AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW: RESPONDING TO THE CHALLENGES OF CLIMATE CHANGE 61-123 (1998). Ms. Taylor in Chapter 3 of her book illustrates this point by extended and detailed discussion of several cases including: *The Island of Palmas Arbitral Award* (1928) (United States v. Netherlands) 2 R. INT'L. ARB. AWARDS 829; *El Salvador v. Nicaragua* (Central American Court of Justice) 11 A. J. INT'L. LAW 674 (1917); *Trail Smelter Case* (United States v. Canada) 3 R. INT'L. ARB. AWARDS 1905 (1908); and, e.g., *The Corfu Channel Case* (United Kingdom v. Albania) 4 ICJ Reports (1949); see also PERREZ, *supra* note 7, from 55-64 (in which he reviews a series of cases (some overlapping with Taylor) to illustrate that:

became constrained in the exercise of their sovereign authority by the existence of the same sovereign authority in other states. This notion can be extrapolated to include the idea of equality among states through sovereignty (no matter how big or small a state is, its concerns must be addressed), and the requirement of respect toward one's neighboring sovereign state. In taking an action, a state is forced to weigh an opposing state's interests and concerns; thus, a state can no longer act as it pleases, but must take an accounting of its actions.⁴⁶ If its actions are harmful and it proceeds, the state will answer to the rest of the international community. Thus, "sovereignty can only exist—and sovereignties can only coexist—if sovereignty includes the respect of the sovereignty of others. Therefore . . . [the] neighborly approach sees the limitation of sovereignty as an inherent element of sovereignty itself, enabling a peaceful coexistence."⁴⁷

Good neighbors do not trash one another's backyards, they work together to ensure that the entire neighborhood remains tidy. If the neighborhood is the entire earth, cooperation between states must be the rule and not the exception. As we have demonstrated above, this good neighbor definition has become this century's working definition of sovereignty. It is against this definitional backdrop that the remainder of this Note must be read.

E. *Sovereignty Circumscribed*

As discussed above, an overview of decisions "has demonstrated that [it is] a constant and uniform practice of international arbitral courts,

Since the beginning of this century, international tribunals have accepted in a long and constant practice that sovereignty is limited . . . these decisions . . . illustrate the rejection of the classical theory of unlimited sovereignty and the shift towards a neighborly approach on which the 20th century . . . understanding of sovereignty is based. These decisions also portray the typical characteristics of this neighborly approach to sovereignty, i.e. the limitation of sovereignty to state territory, the subjection of sovereignty to treaty law and general international law, and the inclusion of the obligation to respect the other's sovereignty in the principle of sovereignty.).

Id. at 55.

⁴⁶ "The function of sovereignty is neither unrestricted nor unlimited. It extends as far as the sovereign rights of other states . . . [A] state may not claim more than such independence and liberty as is compatible with the necessary organization of humanity, with the independence of other states, and with the ties that bind States together." TAYLOR, *supra* note 45, at 64-65 (internal citations omitted).

⁴⁷ PERREZ, *supra* note 7, at 65.

the Permanent Court of International Justice and the International Court of Justice . . . have supported . . . and affirmed . . . the conclusion that sovereignty is limited"⁴⁸ However, these decisions were not created in a vacuum; they were supported by international legal notions and concepts. A brief overview of several prevalent such notions and concepts will demonstrate how they, as well as the case law as discussed above have helped to circumscribe sovereignty. Key among those concepts are developed and recognized customary law; the concepts known as the "duty to cooperate," customary law, "sustainable development," and the development of the theory of the "international commons" or the "heritage of mankind."⁴⁹

⁴⁸ *Id.* at 60.

⁴⁹ See generally Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT'L. L.J. 223-266 (1996). With the exception of customary law, these concepts are primarily considered "soft law." One of the problems that international environmentalism must overcome is the fact that many of the international legal concepts most favorable to fostering environmentalism can be found only in the form of soft law. Soft law lacks the bite of hard law, and therefore is more easily ignored.

"Hard law" is represented by treaties, custom, and principles of international law that mandate compliance by states and are enforced by procedures such as arbitration or recognized by and enforceable through international tribunals. Some hard law examples include: UN Security Council Resolutions (binding on all) and the North American Free Trade Agreement ("NAFTA"). NAFTA disputes are resolved with binding arbitration. NAFTA is unique in that it is the first trade agreement to incorporate environmental protections; unfortunately, however, the environment only plays second fiddle to trade in general.

"Soft law" includes recommendations and resolutions of international organizations, declarations of international conferences, which recommend, propose or suggest but create no mandate and have no force of law. Some soft law examples include: Resolutions of the UN General Assembly, e.g., the 1982 "World Charter for Nature" which includes an affirmation by the General Assembly that "mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients" (World Charter for Nations, GA Res. 37/7, Annex, UN GAOR, 37th Sess., Supp. No. 51 at 17, UN Doc. A/37/51(1983)) and incorporates the recommendation that all states should avoid "activities likely to cause irreversible damage to nature," but includes neither a mandate nor any specific directives to states re how to identify such "activities." The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management Conservation and Sustainable Development of All Types of Forests." (Global Consensus on the Management Conservation and Sustainable Development of All Types of Forests, 4th Sess., Provisional Agenda Item 9, at 2, UN Doc A/Conf. 151/6 (1992)). Although this sets out certain general principles concerning managing and conserving forest resources, it merely suggests that states "should" utilize the recommended procedures. No mandates or penalties for failure to comply are included.

The concepts discussed herein often arise in the context of treaties and non-binding instruments. The last half of the twentieth century witnessed a dramatic increase in the number of international treaties and non-binding instruments covering an array of environmental issues.⁵⁰ The mere presence of these instruments is indicative of not only the rising importance of environmentalism, but also recognition that in order to institute an environmental regime with a chance of success cooperation is required between states. This need for cooperation first became apparent in order to insure peace—and over the years, cooperation became the fundamental principle in efforts of the states and the United Nations to promote and ensure international peace.⁵¹

This duty to cooperate can also be found in the United Nations Charter, specifically Articles 55 and 56.⁵² As found in the UN Charter, the

Feminists and others criticize "soft" international law as a tool, describing same as "a system of empty promises that tantalizes . . . with international aspirations...but one that fails notably short on real results." Joyner & Little *supra* note 49, at 246-7. Their criticism applies as well to "soft law" in respect to development of international environmental law. "Soft law" resolutions, agendas and pronouncements on international environmental issues are multitudinous, but there is a great deal less of "hard" international environmental law. A right is nothing but a chimera to such feminists unless backed up by such "hard law" aspects as legal implementation—enforceability, access to procedural enforceability, and widespread support by decision/policy makers (who many women point out are men). Such feminists point out that these results have not occurred with respect to international environmental law and point toward male priorities (emphasis on civil and political rights; de-emphasis on economic, social and cultural rights) as the culprit. These feminists fear that the environment will occupy an even lower rung on the male ladder of priorities. *Id.* at 256.

These "declarations" of "rights" without force of law are useful tools and not without merit. They: (1) highlight and publicize issues of broad concern; (2) indicate consensus thinking of participants; (3) influence judicial decisions; (4) raise the expectations of the public so as to deter potential violators; and (5) most hopefully, can, over time, become actual tenets of international law through custom—see, for example, Advisory Opinion on the Western Sahara, 1975 ICJ 12 (Oct 16) (ICJ holds that GA declarations re de-colonization and self-determinism were an expression of a norm of customary international law.). "Soft law" is therefore valuable and cannot be ignored because of its potential. But currently, it is not yet capable of giving eco-globalism the legal teeth it needs.

⁵⁰ PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* xix-xi (1995). It is well beyond the scope of this Note to examine in detail the plethora of environmental treaties and instruments that have been created during the 20th Century.

⁵¹ See Alan James, *The Principles of Co-operation: United Nations Peacekeeping, in THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW* 160, 172 (Vaughn Lowe & Colin Warbrick eds., 1994).

⁵² UN CHARTER, arts. 55-56.

duty to cooperate is too general to force states to do anything more than adopt a cooperative attitude towards one another in their dealings.⁵³ However, it is argued that the UN General Assembly in the Declaration on the Friendly Relations and Cooperation Among the States has reaffirmed this duty.⁵⁴ When expressed in this form, it is generally accepted that the duty to cooperate is evidence of binding international law.⁵⁵ This Note proceeds under the premise of its acceptance as binding. This acceptance of the duty to cooperate has important implications for the development of international environmental law and the role of the state.

Implicit within the duty to cooperate is the concept of good neighborliness. This concept has been discussed *supra* in terms of sovereignty, and is substantially similar environmentally, that is, "states are under an obligation to prevent activities within their jurisdiction or control from causing extra-territorial environmental harm."⁵⁶ If a state has

⁵³ Rüdiger Wolfrum, *Commentary on Article 56, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 793, 794 (Bruno Simma, et al. eds., 1994).

⁵⁴ U.N. G.A. Res. 2625 (XXV) (1970).

⁵⁵ PERREZ, *supra* note 7, at 270 n.177.

⁵⁶ See TAYLOR, *supra* note 45, at 65. There is debate as to whether or not this concept is a principle of international law; however the majority of opinion seems to favor its acceptance as such and case law only enhances this notion, see *supra* footnote 44 discussing the *Trail Smelter Case*. One concept that had the potential to scuttle ecologicalism is the often cited notion of permanent sovereignty. Generally, permanent sovereignty refers to the concept that a state has the right to decide freely and independently about the use and exploitation of its own wealth and natural resources. This right seems directly at odds with the duty to cooperate and the principle of good neighborliness, however, if viewed in the proper historical context as a kind of economic sovereignty concept created to help developing countries control their own resources, then permanent sovereignty does not represent the stumbling block to international environmentalism that it appears to at first blush. This is because "... it is well accepted that the principle of permanent sovereignty over natural resources underlined the states' authority and jurisdiction over their natural resources 'without however exempting it from the application of the relevant principles and rules of international law Thus the principle of permanent sovereignty inherently includes the neighborly limitation" PERREZ, *supra* note 7, at 99-100. In short, permanent sovereignty cannot be used to trump cooperation or neighborliness. See Principle 21 of the Stockholm Declaration from the 1972 United Nations Conference on the Human Environment as proof of this. Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Report of the U.N. Conference on the Human Environment, Stockholm, June 5-16, 1972. U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1973), U.N. Doc. A/CONF.48/14 at 2-65, and Corr. 1 (1972), 11 I.L.M. 1416 (1972).

Principle 21 says:

States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the

an obligation to control what it does within so as not to harm those outside of its borders, its absolute authority is undermined. Its sovereignty can no longer be said to be absolute. A brief look at the principle of customary international law supports this proposition.

Customary norms are created by the "general principles of law recognized by civilized nations."⁵⁷ Customary law is considered "hard law," which has more bite than soft law.⁵⁸ The general requirement for the emergence of an international customary rule is state practice coupled with *opinio juris*—the subjective belief that the practice is obligatory.⁵⁹ The frequency or duration of the practice is not as important as the number of states adhering to it—the greater the number, the stronger the argument that a custom exists. Thus, "the more often the General Assembly recites a principle, the greater the likelihood that legal expectations will be created and a nation's behavior will be affected."⁶⁰ The implications for international environmentalism can be expressed as follows:

There is extensive practice of international cooperation concerning the protection of the environment and regarding the use of natural resources And the fact that so many international environmental treaties and conventions have been adopted is also the result of intense cooperation. This profound cooperation is accompanied by multiple statements that the states are bound by a duty to cooperate . . . the UN General Assembly has repeatedly affirmed the desirability, necessity and obligation of international

responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.

Principle 21 has been re-affirmed and reiterated in a myriad of documents. TAYLOR, *ECOLOGICAL APPROACH* *supra* note 45, at 75-78. Most notably in Principle 2 of the Rio Declaration, which was adopted in 1992 at the UN Conference on Environment and Development in Rio de Janeiro; *But see* Somendu Kumar Banjeree, *The Concept of Permanent Sovereignty over Natural Resources—An Analysis*, 8 *IJIL* 515 (1968) (Banjeree argues that the concept of permanent sovereignty is not qualified by any limitations of international responsibility). Indeed, today, it is understood that Principle 21, as codified in UN General Assembly Resolution 1996 (XXVII) (UN GA Res. 2996 (XXVII) of Dec. 15, 1972), reflects a general rule of customary international law. PERREZ, *supra* note 7, at 102. The role of custom will be discussed *infra*.

⁵⁷ See Statute of the International Court of Justice, 59 Stat. 1055 (1945), TS No. 993, Art. 38(1)(c).

⁵⁸ See *supra* note 48 for a discussion of hard versus soft law.

⁵⁹ See Michael Akehurst, *Custom as a Source of International Law*, 47 *BYIL* 1 (1974-75).

⁶⁰ PERREZ, *supra* note 7, at 278 (internal citations omitted).

cooperation . . . Thus, the duty to cooperate, especially with regard to the protection of the environment, is enacted not only in many treaties, but it is also acknowledged and affirmed by numerous non-binding instruments like resolutions of the UN General Assembly or declarations of UN Conferences . . . It can therefore be concluded that the duty to cooperate, especially concerning environmental issues, is today a principle of customary international law.⁶¹

Customary international law supports the premise that via cooperation the sovereignty of states has been sharply curtailed. Further, customary international law, as "hard law," provides eco-globalism with the beginnings of a set of teeth that have the potential to become quite sharp.

Sustainable development is another concept broadly recognized in International law and supported by both free marketers and environmental nongovernmental organizations ("NGOs"). The concept of sustainability emerged in the early 1980's and stresses the need to reconcile and integrate environmental and developmental goals in order to ensure human survival. Sustainable development is based on the idea that "human progress must conform to basic ecological precepts and human needs in order to endure."⁶² Sustainable development received widespread notice and immediate acceptance with the publication of *Our Common Future by the World Commission on Environment and Development*,⁶³ which defined sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs . . ."⁶⁴ Thus, sustainable development stands for the idea of responsible development, recognizing that development is inevitable, yet, subjecting developers to a duty to maintain a viable environment for the future. Perhaps most importantly, sustainable development as a concept requires interaction and cooperation between states in order to be achieved. States, the traditional actors on the international law scene, have recognized this in the formation of numerous "bilateral, regional and global declarations, decisions and agreements affirming the principle of

⁶¹ *Id.* at 278-79 (quoting SANDS, PRINCIPLES, *supra* note 49, at 198).

⁶² *Id.* at 284.

⁶³ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987).

⁶⁴ *Id.* at 43.

sustainability.”⁶⁵ In the beginning, the concept of sustainability was applied to discrete activities, however, recent documents embracing sustainable development stress the “interconnected nature of environmental problems”⁶⁶ requiring a more integrated approach—not only between the environment and development/industry, but between states. Thus:

The concept of sustainable development “holds promise for a new form of international law. It has the potential to transcend traditional boundaries, which hold the rights of individual nation states as virtually sacrosanct.” Sustainable development can modify the concept of exclusive territorial sovereignty by making clear “that nations have primary but not exclusive control over resource decisions with extraterritorial impacts and that nations owe duties to the international community.” It “emphasizes the need for more equitable relations among and within nations and generations and the need for global partnership” and thus places a growing importance on cooperation to deal with the problems of environmental degradation and economic development, problems, which are increasingly understood as collective problems.⁶⁷

According to most modern International law scholars the principle of sustainable development, which began as a non-legally binding statement, has gained enough widespread acceptance to be accepted as customary international law.⁶⁸ As customary international law, sustainable development has the teeth needed to give an international environmental regime a bite as big as its bark.

Lastly, the concept of the international commons or the “common heritage of mankind” (“CHM”) is beginning to make important inroads in

⁶⁵ PERREZ, *supra* note 7, at 286.

⁶⁶ *Id.* at 287.

⁶⁷ *Id.* at 288-89. Perrez cites Dan Tarlock for the idea that “the principle of sustainable development can provide a rationale for eliminating deeply entrenched per se rules and form the basis . . . for new intellectual property rights regimes that create global incentives . . .” *Id.* at 289 n.297.

⁶⁸ See, e.g., Catherine Tinker, *Responsibility for Biological Diversity Conservation Under International Law*, 28 VAND. J. TRANSNAT’L. L. 777 (1995) (arguing that international obligations and rules related to international environmental law now encompass the concept of sustainable development).

international thinking. As Prue Taylor writes, "CHM raises some interesting prospects for overcoming the problems associated with sovereignty" she continues that if CHM were a working principle, "states would retain sovereignty . . . but would be obliged to exercise sovereignty in a manner consistent with the common interests of all humanity."⁶⁹ CHM is not a new concept; it has been in existence for almost half a century.⁷⁰ Its most recent definition stems from a speech made by UN Ambassador Arvid Pardo of Malta in which he proposed a "declaration recognizing the sea-bed and ocean floor resources, beyond national jurisdiction, as the '*common heritage of mankind*.'"⁷¹ Today, this notion extends to other realms, such as outer space and Antarctica.⁷² According to Perrez the principle of common heritage of mankind embraces the following objectives and elements⁷³:

The principle of common heritage of mankind embraces the following objectives and elements: it internationalizes the interest in, the authority over and the benefits of a certain issue, it reserves the issue for future generations, and limits the use of certain resources for the benefit of mankind and for peaceful purposes . . . an area or resource that has been internationalized . . . can't be appropriated by states or individuals. Furthermore, the principle of common

⁶⁹ TAYLOR, *supra* note 45, at 295.

⁷⁰ *Id.* at 259.

⁷¹ *Id.*

⁷² PERREZ, *supra* note 7, at 293. Perrez tells a slightly different story concerning the actual origins of the phrase, attributing it to President Truman; however, the thrust of his argument conceptually mirrors that of Ms. Taylor's.

⁷³ CHM is generally accepted as a principle of customary international law. *Id.* at 294; however, the exact definition and resulting legal responsibilities stemming from that definition have been questioned. For example, Prue Taylor mentions a potential threat from property rights advocates to convert CHM from a potentially liberating global legal principle stressing cooperation into one that actually reinforces sovereignty and property rights. She writes, in sum, that property rights advocates have transformed the idea of *res communes* from the notion of "open to all" into the notion of "property of all." If the latter definition, infused with the notion of ownership, is accepted, "It could . . . be dangerous: if the common heritage of mankind is *owned* it can be *used and abused by the owners* . . ." She goes on to say that, "Until this contention is resolved, CHM may be left to languish, leaving its true potential as a useful principle of international law unrealized." TAYLOR, *supra* note 45, at 270-71. When defined by property rightists, CHM smacks of early definitions of permanent sovereignty. It is interesting to note, yet well beyond the scope of this paper, that it is the developing nations, those same nations concerned with permanent sovereignty, who are advancing the property rights definition.

heritage calls for international management, i.e., for international cooperation in the efforts to use and preserve such areas or resources. Hence, recognition that certain areas, issues or resources are a . . . common heritage of mankind of common concern to all states and peoples undercuts the traditional understanding of sovereignty and permanent sovereignty The principle of common heritage thereby makes it clear that the "states will increasingly be required to take into account the needs of all members of the international community" ⁷⁴

CHM offers perhaps the greatest hope of turning sovereignty on its head without eliminating it completely; that is, states could still maintain authority over their resources, but would be required to keep a greater global good in mind when making decisions affecting such. As Prue Taylor writes, "CHM raises some interesting prospects for overcoming the problems associated with sovereignty." ⁷⁵ She then outlines four separate approaches for using CHM as the basis for addressing environmental concerns, all of which affect sovereignty, but in varying degrees – from the relatively benign, to the truly radical. Even in the most benign form, states would be "obliged to exercise sovereignty in a manner consistent with the common interests of humanity" and with growing concern for the protection of the global environment. ⁷⁶ Of the secondary form, Ms. Taylor writes:

It encourages states to perceive the existence of one shared global environment and to recognize that activities undertaken in the name of an exercise of sovereign jurisdiction can no longer be conducted in a self-interested fashion, but carry with them a global environmental responsibility If this process should emerge, it is possible that . . . CHM would form part of a transition from sovereignty to a new international order. ⁷⁷

Sovereignty is eroded by the psychological shift from selfish sovereignty to the acknowledgement that ecologically speaking a state is

⁷⁴ PERREZ, *supra* note 7, at 294 (internal citations omitted).

⁷⁵ TAYLOR, *supra* note 45, at 295.

⁷⁶ *Id.*

⁷⁷ *Id.* at 296.

not an island unto itself, but part of a larger global community. Sovereignty is maintained however in terms of management (see further discussion *infra*). In addressing global environmental issues, decision-making would occur at the international level but implementation would be accomplished at the local level. As Ms. Taylor writes, "In this case rational management might involve international management criteria decided by the international community as a whole or by a decision-making institution, and implemented at the international, regional and national level by states according to their own policies . . . Such a regime . . . does implement the fundamental principle 'think globally and act locally.'"⁷⁸

Again, psychologically speaking, CHM offers a model for phasing in a paradigm shift. Ms. Taylor offers four different CHM regimes; however, if viewed as part of a four stage plan rather than four different regimes, CHM would offer the perfect way to slowly make states view themselves less as sovereigns and more as members of a connected global community.⁷⁹

Thus, sovereignty is not inherently adverse to environmentalism at the global level. As discussed in Section III, sovereignty in its current form can serve as a tool to implement a new global environmental regime.

II. PROPERTY RIGHTS

A. *Lockean Property Rights Theories—Background*

If John Locke's *Second Treatise of Civil Government*⁸⁰ ("*Second Treatise*") seems tailor-made for the American Founding Fathers, it may well be because he wrote it for the primary purpose of validating the English Revolution of 1688, which overthrew the Stewart King, James II, and installed William of Orange and his wife, Mary, on the English throne. Indeed, dedication of the *Second Treatise* includes Locke's statement that the work was intended to "establish the Throne of our Great Restorer, our present King William, to make good his Title in the Consent of the People."⁸¹

⁷⁸ *Id.* at 296-97.

⁷⁹ See generally TAYLOR, *supra* note 45, chap. 6.

⁸⁰ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 137 (C.B. MacPherson ed., 1980) (1689).

⁸¹ *Id.*, Dedication.

Of Puritan background, Locke naturally tended to support the Parliament against the King, and, although he was not physically active in the various plots and machinations characteristic of that period of English history, his respective mentors were accused of direct involvement and the suspicion of the court also therefore reflected onto Locke. In 1683, he left England for the safety of Holland, which was at the time the destination of choice for many who fled other spots in Europe hoping to enjoy more freedom of thought and association with like minded individuals. Never attracted by the intricacies of theological arguments or the dogmatic aspects of religion, he was instead an ardent defender of religious tolerance. He was not opposed to a state religious establishment, so long as it was capable of avoiding dogmatic impositions and sponsored only the most basic and simple tenets of Scripture.⁸²

Living as he did in an age when principles of toleration and democracy were locked in combat with the notion of the divine right of kings, it is perhaps not surprising that his *First Treatise* on Government concerned itself largely with the refutation of the latter notion and the promotion of religious tolerance.⁸³ The *First Treatise* was a response to the Hobbesian view that men required an all-powerful ruler to protect themselves against their own selfish tendencies to seek power and to fear others.⁸⁴ Hobbes posited that without strong sovereigns men's lives would therefore be "poor, nasty, brutish and short."⁸⁵ The divine right of kings had also been ardently supported in Robert Filmer's theories of absolute monarchy and the divine right of kings.⁸⁶ Locke's *First Treatise* directly attacked Filmer's theories. Locke elaborated later, explaining that subjects have a God-given duty to obey rulers, but that a ruler's sovereignty is not God-given, nor absolute, and is conditioned by duties to his subjects. Resistance to the sovereign's commands, therefore, may be justified if those commands do not justify obedience.⁸⁷ Obviously the *First Treatise* would only have been found most appealing to American Revolutionaries.

⁸² See generally MASTERPIECES OF WORLD PHILOSOPHY (Frank N. Magill, ed., 1990) [hereinafter MASTERPIECES]; JOHN DUNN, JOHN LOCKE (1984).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ MASTERPIECES, *supra* note 82, at 395 (discussing THOMAS HOBBS, LEVIATHAN, OR THE MATTER, FORM AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL (1651)).

⁸⁶ DUNN, *supra* note 82, at 9, 41 (discussing ROBERT FILMER, PATRIARCHIA (1680)).

⁸⁷ *Id.* at 44-52.

But it is his *Second Treatise* that most strongly resonated with Americans because it virtually defined for them the civil ideals of liberal democracy. In his *Second Treatise*, Locke posited that man, by nature, had certain innate rights that pre-dated the existence of any state governments, primary among them being life, liberty (meaning political equality), and the ownership of property.⁸⁸ The only essential function of government therefore was to protect these natural rights. Men were entitled to rid themselves of governments that did not effectively perform these essential functions.⁸⁹

American thinkers enthusiastically espoused Locke's theories during the Revolution and the later adoption of the Constitution as amended by the Bill of Rights.⁹⁰

In the Declaration of Independence, the American colonists proclaimed that men had natural rights granted them by their Creator, that governments were instituted by men with their consent to protect these rights. Locke . . . held these rights to be life, liberty, and property, whereas the Declaration proclaims them to be life, liberty and the pursuit of happiness. It is interesting that Jefferson pondered whether to use "property" or "pursuit of happiness" and in an earlier draft actually had the former set down. Much of Locke's discussion in this [second] treatise influenced the statesmen and leaders of the Colonies during the period of the American Revolution⁹¹

Further, as Whittemore puts it:

All men, Locke had declared, are entitled to life, liberty, and *property* and in approving the changing of this last to read "pursuit of happiness" the sponsors of the American Declaration of Independence intended no slight to the inalienable right of property. All were men of means, and of those among them who a decade later assembled at Philadelphia to write a constitution for the American States,

⁸⁸ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

⁸⁹ *Id.* at 330-31.

⁹⁰ MASTERPIECES, *supra* note 82, at 269.

⁹¹ *Id.*

there was hardly a man whose political philosophy was out of tune with . . . Locke.⁹²

Jefferson himself, discussing the methodology he used in preparing the American Declaration of Independence, ties Locke directly to the American psyche. Jefferson states that he was not trying to write a document made up of his own creative new ideas, but rather:

Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it [the Declaration] was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke.⁹³

Arthur Lee's comments are typical of the thinking of the time. He opined that, "The right of property . . . is the guardian of every other right and to deprive a people of this, is in fact to deprive them of every other liberty."⁹⁴

Among the Founding Fathers, many, like Lee, feared any power that might allow government to impinge on their property rights. Many also feared that such rights might be threatened by their own less fortunate fellow citizens. Thus, they viewed "too much democracy" as an invitation to repression by the majority—or to the redistribution of property, the major wealth source in America at the time. John Adams' recommendations that power be reserved to land holders indicate a firm conception of property and liberty as so closely associated as to be interdependent. He wrote, "[t]he moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a

⁹² ROBERT C. WHITTEMORE, *MAKERS OF THE AMERICAN MIND* 118-19 (Books for Libraries Press 1971) (1964).

⁹³ *Id.* at 147 (quoting XVI THE WRITINGS OF THOMAS JEFFERSON 118-119 (Albert Ellery Bergh ed., 1903)).

⁹⁴ JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (Oxford Univ. Press, 1992) (quoting ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTEREST OF THE PEOPLE OF GREAT BRITAIN IN THE PRESENT DISPUTE WITH AMERICA* 14 (1775)).

force of law and public justice to protect it, anarchy and tyranny commence."⁹⁵

Property rights have thus segued in America from one of man's inherent natural rights to his most essential and primary right in civil society—and his only real guarantee of liberty. "As heirs of Locke, then, for us property also means liberty, in particular liberty from intrusion by the government."⁹⁶ As James W. Ely, Jr. rather succinctly put it, "it is difficult to overstate the impact of the Lockean concept of property."⁹⁷

These notions still resonate deeply within the American consciousness despite the vast changes in the social, legal, philosophical, and political sciences that have occurred since the late 18th century. None of these changes have "as yet . . . shaken the popular force of the idea of property as a limit to the legitimate power of government."⁹⁸

The impact of Locke's ideas on American conceptions of the relationship between man and land has substantially affected the currently ongoing intellectual, social, and legal debates focused on identifying the essential ethical ingredients that should serve as the framework of a sound regime for the handling of environmental issues. The most essential element to the formulation of a particular human ethic is the nature of the subject thereof—and its true relationship to man. Locke's thinking, influenced by Descartes dualism,⁹⁹ separates man from nature, gives man dominion over nature and suggests that man's best use of nature is its exploitation to his own ends.¹⁰⁰ It is an entirely anthropocentric value, as

⁹⁵ WHITTEMORE, *supra* note 92, at 131 (quoting VI THE WORKS OF JOHN ADAMS 9 (1851)).

⁹⁶ Zev Trachtenberg, *The Takings Clause and the Meanings of Land*, in SPACE, PLACE & ENVIRONMENTAL ETHICS 63, 73 (Andrew Light & Jonathan M. Smith eds., 1997).

⁹⁷ ELY, *supra* note 94, at 17.

⁹⁸ Trachtenberg, *supra* note 96, at 73 (quoting Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 263 (Jen Elster & Rune Slagstad eds., 1988)).

⁹⁹ "It is necessary for a gentleman in this learned age to look into some of [the various writers on natural philosophy] to fit himself for conversation: but whether that of Descartes be put into his hands, as that which is most in fashion, or it be thought fit to give him a short view of that and several others also . . ." John Locke, *Some Thoughts Concerning Education* ¶ 193, in XXXVII THE HARVARD CLASSICS 9, 165 (Charles W. Eliot ed., 1938).

¹⁰⁰ Even the concept of "sustainable development" currently in vogue as a workable solution to environmental problems, places man as the numerator in the man/nature equation and stresses that nature should be saved for man's sake, not for its own sake. For a further discussion of this, see Anne C. Dowling, *From Rachel to Rio: Ecofeminism's Political Potential* (unpublished paper, on file with the author).

it ascribes no benefit to nature other than its utility to man. A Lockean land ethic would also imply the absoluteness of the rights of the property owner and his dominatory relationship to the environment.

Although Lockean philosophy clearly supports the notion of land as personally owned and beloved,¹⁰¹ i.e., the notion of a deep and sentimental attachment to one's own land¹⁰²—the primary Lockean concept is that land is a commodity, and fungible.

For Locke, the individual acquires land by working it—mixing his sweat with the soil so to speak. He has a duty to develop it. Locke sees land as the natural source of wealth for man; however, he deems it naturally unjust for one to amass too much land; thus, the real source of wealth derived from land is, for Locke, the owner's opportunity to exchange the perishable items land produces for more durable forms of wealth—the most durable of which, to Locke, was money. Thus, a man:

Might heap up as much of these durable things as he pleased; the *exceeding of the bounds of his just Property* not lying in the largeness of his possession, but the perishing of any thing uselessly in it . . . and thus *came in the use of Money*, some lasting thing that Men might keep without spoiling, and that by mutual consent Men would take in exchange for the truly useful, but perishable Supports of Life.¹⁰³

As Trachtenburg writes:

As C.B. MacPherson argues, Locke valorizes the making of profitable exchanges as the clearest evidence of rationality, hence, as the fulfillment of God's intentions for human beings. The meaning of land emerges from this broad conception: for Locke, land means the possibility of producing value for use in exchange. That is, for Locke,

¹⁰¹ Land's meaning as personal property is “knotted to Locke's labor theory of property.” Trachtenberg, *supra* note 96, at 71.

¹⁰² Margaret Jane Radin nicely describes this type of land value: “the scene of one's history and future, one's life and growth . . . one embodies or constitutes oneself there.” Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 992 (1982).

¹⁰³ LOCKE, *supra* note 88, at 300-01.

ultimately land means fungible property—it is to be understood as a commodity.¹⁰⁴

Although Jeremy Bentham's utilitarian theories were not published until about a century after Locke's works, Locke might be lumped with the utilitarians in some respects, particularly in their focus on the man/nature relationship as one of control and domination by man and the resultant concept of land as fungible commodity.

For the utilitarian, the utility of objects, including natural objects, lies in their ability to produce pleasure, good, or happiness—or prevent the reverse. Man is governed by two overwhelming motivations—pleasure and its reverse, pain. The goal of government therefore should be to produce “the greatest happiness of the greatest number.”¹⁰⁵ Because utilitarians view nature through the same anthropocentric lens as Locke, they also see the environment as a tool for men's use, though perhaps with a broader notion of the possible uses man might make of his environment.

But it should be noted that, as with sovereignty, interpreters of Locke were likely to put their own “spin” on his thoughts, taking those parts most useful for their own ends or even unwittingly rationalizing toward their own pre-conceived notions. Viewed as a whole, in reality, Locke's property theories are a great deal less “absolutist” than many interpretations thereof would have them. First, his world was ruled by God at the top—man's duties to God were sacrosanct, and certainly Locke would have put them above all things. Second, “love thy neighbor” was a tenet Locke would have been thoroughly familiar with and avoidance of the creation of harm to the property or health of one's neighbor falls clearly within that simple rule. Nuisance law would doubtless, therefore, have made great sense to him. Further, land held in common for grazing was a feature of the Lockean countryside, thus community-oriented property rights could not have been foreign to him. Last, as the good husbander of property he recommended a man be, he would undoubtedly have espoused the notion of sustainable development—just as sovereignty has done.

B. *American Environmentalism*

¹⁰⁴ Trachtenberg,, *supra* note 96, at 70 (quoting C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 221-38 (1962) (footnote omitted)).

¹⁰⁵ See generally *MASTERPIECES*, *supra* note 82.

The environmental movement in America resulted in deeply significant changes in national views on property rights. American environmentalism is a relatively new movement, its first real roots having been established only in the late 19th century.¹⁰⁶ Although some of its inspiration came from the works of earlier 19th century writings such as Emerson's *Nature* (1836) and Thoreau's *Walden* (1854) (both of which extolled the importance of nature to individuals as a source of spiritual refreshment and emphasized the notion that man is one with, rather than apart from, nature),¹⁰⁷ the "first wave" of the American environmental movement began in the late 1800s with the growing interest in the preservation of wilderness areas for the pleasure and enjoyment of humans.¹⁰⁸

The United States had expanded Westward through vast tracts of land with seemingly inexhaustible resources. It was not until the nineteenth century that a realization of exhaustibility began to spread:

Environmental concerns in some sense date back in American history to before the turn of the twentieth century, particularly to reactions to what from the 1880s into this century people saw as settlement and population moved westward . . . forests being clear-cut for timber and left bare, grazing land being overused for sheep or cattle and left naked.¹⁰⁹

It was at this time that conservationism and preservationism began to take hold in the American consciousness.¹¹⁰ Men like Gifford Pinchot,

¹⁰⁶ For a brief overview of the development of American environmentalism, see CLARE PALMER, *ENVIRONMENTAL ETHICS* (ABC-CLIO, Inc., 1997).

¹⁰⁷ *Id.* at 32, 35.

¹⁰⁸ "Commentators often describe the environmental movement . . . as having occurred in waves. The first wave grew out of the preservation and conservation movements of the 1890's and was marked by the efforts of John Muir, Theodore Roosevelt and other outdoor enthusiasts to protect American wilderness." Robert R. M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23, 38 (1996) (footnote omitted).

¹⁰⁹ Steven Kelman, *Moral Domains, Economic Instrumentalism, and the Roots of Environmental Values*, in *ENVIRONMENTAL RISK, ENVIRONMENTAL VALUES, AND POLITICAL CHOICES* 35 (John Martin Gillroy ed., 1993).

¹¹⁰ "The most successful area of environmental initiatives before the mid-twentieth century was undoubtedly the preservationist-conservationist ethic of Teddy Roosevelt, Gifford Pinchot and other mavericks." Zygmunt J.B. Plater, *From the Beginning, A*

the first head of the United States Forest Service, championed conservation as the antidote to exhaustion of resources, urging slower usage of resources like timber; that is, usage no faster than would be consistent with a forest's ability to regenerate itself.¹¹¹

The other major strand in first wave environmentalism, which paralleled conservation, was the concept of preservation.¹¹² The chief spokesman of which was John Muir.¹¹³ Although the first national park—Yellowstone—was created in 1872,¹¹⁴ Yosemite, Sequoia and General Grant National Parks were created in 1890, largely due to the efforts of John Muir, a naturalist whose prolific writings were strongly influential in raising public and political interest in wilderness preservation.¹¹⁵ Muir was keenly attracted to the aesthetics of unspoiled wilderness and focused his energies on encouraging support for the preservation of such untouched areas, looking to the federal government as the likeliest candidate to serve as savior of such locales. "God had cared for these trees and saved them from all manner of natural disasters. But 'he cannot save them from fools, only Uncle Sam can do that.'"¹¹⁶

Muir's views represented a distinct departure from previous American values respecting wilderness. American historical and cultural roots were entrenched in the conquest and domination of nature, first for survival and later for growth and development; thus, in America, untamed wilderness was traditionally seen as wilderness that people had not yet defeated or brought under useful and productive human control.¹¹⁷ As Caspersen put it, "The frontier mentality of a land of infinite resources, where one could make a mistake and move onto fresh ground, led to a vision of our resources as disposable."¹¹⁸ She goes on to posit that as the

Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law, 27 LOY. L.A. L. REV. 981, 996 (1994).

¹¹¹ See Robert Cameron Mitchell, *From Conservation to Environment Movement*, in GOVERNMENT AND ENVIRONMENTAL POLITICS 81, 84 (Michael J. Lacey ed., 1989).

¹¹² Plater, *supra* note 110, at 996.

¹¹³ FREDERICK TURNER, REDISCOVERING AMERICA: JOHN MUIR IN HIS TIME AND OURS (1985).

¹¹⁴ PALMER, *supra* note 106, at 24.

¹¹⁵ "By the time Muir died in 1914 . . . he was a man with a well known face. And he had become a well known symbol for an alternative set of values about what made life worth living." Kelman, *supra* note 109, at 36.

¹¹⁶ TURNER, REDISCOVERING, *supra* note 113 (quoting Muir (citation omitted) at 311).

¹¹⁷ Kelman, *supra* note 109, at 36.

¹¹⁸ Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings"* by Wildlife, 23 B.C. ENVTL. AFFAIRS L.REV. 357, 365 (1996).

reality of the possibility of exhaustion and depletion began to set in, Americans were faced with the "Tragedy of the Commons."¹¹⁹

Muir founded the now very large and well-known Sierra Club in 1892 with 184 members, guiding and nurturing it until his death in 1914.¹²⁰ Other environmentally oriented groups such as the National Audubon Society, which was founded in 1905, soon formed thereafter.¹²¹

If Muir was the icon of the first wave of environmentalists, Rachel Carson was equally revered by the second wave. Her book *Silent Spring*, published in 1962, was broadly and immediately influential.¹²² Pesticide controls and the banning of DDT were significant results, but, more importantly, *Silent Spring* and other books Carson wrote helped to raise the public's general level of ecological consciousness.¹²³ Even more importantly, *Silent Spring* fell on the most fertile soil possible—the world of 1960s American citizen activism:

Silent Spring, an essentially scientific disquisition, found a remarkably broad, energetic, and engaged public audience. In the 1960s citizens had suddenly begun to discover themselves, thanks to the civil rights movement, Vietnam, Ralph Nader's consumerism and the media . . . the citizens grabbed *Silent Spring* and ran with it.¹²⁴

The second wave, fueled by that citizen activism, which continued during the 1960s and 1970s, quickly spread into existing United States

¹¹⁹ See, Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (a famous and oft-cited piece in which Hardin cogently argues that with respect to property held in common—or in this American scenario—property that seems to be available for everyone, no one user has an incentive to conserve same, and each has an incentive to maximize his own use, as if one restrains his own over-use, another will make additional demands on the property for his immediate benefit; thus, property held in common is likely to be exploited to depletion level).

¹²⁰ PALMER, *supra* note 106, at 33-34.

¹²¹ *Id.* at 148.

¹²² RACHEL CARSON, *SILENT SPRING* (1962).

¹²³ "The publication of Rachel Carson's *Silent Spring* in 1962 led to an immense public outcry against pollution. This outrage sparked a mass mobilization drive that resulted in cleaner air, rivers, and lakes for many Americans [and] euphoria over the new environmental consciousness sweeping the country . . ." Dorceta E. Taylor, *Women of Color, Environmental Justice, and Ecofeminism*, in *ECOFEMINISM: WOMEN, CULTURE, NATURE* 38, 39 (Karen J. Warren ed., 1997).

¹²⁴ Plater, *supra* note 110, at 1000-01.

environmental associations¹²⁵ and eventually resulted in the body of federal and state law currently governing our environment.¹²⁶

Second wave environmentalism had much broader concerns than the preservation/conservation of the wilderness that had been the chief focus of the first wave. Although those interests remained strong, health-related issues, such as air pollution and toxins in waterways, became very important as well. Another type of broadening also marked this wave—people began to think in terms of the dangers to earth itself that might lurk in thoughtless conceptions of, or treatment of, the environment. There “appeared . . . during the 1960s and 1970s . . . a more apocalyptic apprehension about ecological balance . . . concern spread that because of untrammelled industrialization we were destroying the entire planet . . . [T]here were worries about ‘limits to growth’ and ‘zero population growth.’”¹²⁷

Over the last forty years, environmentalism has woven itself into our societal fabric, making itself heard in manners as diverse as the simple recycling and water/fuel conservation steps taken at home by millions of individuals; a plethora of local “grass roots” operations focused on a singular issue such as cleaning up a toxic river or preserving a particular wetlands area and Ralph Nadar’s Green Party campaign in 2000. Second wave environmentalism was also characterized by the rapid growth of existing environmental associations such as the Sierra Club and the foundation of many new environmental associations or centers focused on particular concerns or methodologies, such as the George Perkins Marsh Institute founded on the original Earth Day in 1970¹²⁸ as a center for scientific ecologists interested in working on discrete environmental projects with a sound ethical basis; the Environmental Defense Fund, founded in 1967, which takes an activist stance within the United States legal framework by lobbying and bringing lawsuits on environmental issues; and the World Wildlife Fund, founded in 1961, which focuses on the preservation of biodiversity, sustainable development of resources, and public education on environmental issues.¹²⁹

¹²⁵ Verchick, *supra* note 108, at 38.

¹²⁶ “The ‘second wave’ arose from individual activism in the late 1960s and early 1970s and was eventually embraced by national environmental organizations in a broad campaign to protect natural resources and the environment. This wave culminated in the canon of environmental legislation that now regulates much of our nation’s air, water, and waste.” *Id.* (footnotes omitted).

¹²⁷ Kelman, *supra* note 109, at 38.

¹²⁸ PALMER, *supra* note 106, at 144.

¹²⁹ *Id.* at 149.

Most significantly, however, the second wave culminated in the rapid adoption of a series of federal statutes designed to reduce toxic pollutants, protect significant habitats or endangered species, and addressing other environmental concerns. This series of substantive pieces of legislation now constitutes the regulatory regime governing environmental issues in the United States.¹³⁰

Such legislation includes the National Environmental Policy Act ("NEPA") passed in 1969, the Clean Air Act (1970), the Clean Water Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Coastal Zone Management Act and the Ocean Dumping Act (all passed in 1972), the Endangered Species Act (1973), the Safe Drinking Water Act (1974), the Toxic Substances Control Act and the Solid Waste Disposal Act, both enacted in 1976 and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," including 'Superfund') enacted in 1980.¹³¹ After passage of NEPA, the Environmental Protection Agency ("EPA") was established in 1970 with broad powers to create environmental regulations and enforce environmental laws.¹³²

The achievements of the second-waveists were nothing less than the establishment of a powerful new, broad, social/cultural norm, reflected in a set of new federal laws that regulated American private property in ways never before conceived.

Although the speed with which second wave environmentalism took root and ripened into a broad enviro-legal framework would seem to have required a monolithic unanimity and cohesiveness among environmentalists, the opposite is in fact true. Second wave environmentalists had differing—indeed, often conflicting—concerns, methodologies, and, particularly, philosophies. These differences, which

¹³⁰ Verchick, *supra* note 108, at 27.

¹³¹ The National Environmental Policy Act (NEPA), 42 U.S.C.A. §§ 4321-70c (1995) (passed in 1969); the Endangered Species Act, 16 U.S.C.A. §§ 1531-44 (1995) (passed in 1973); the Clean Air Act (CAA), 42 U.S.C.A. §§ 4321-70c(1995) (passed in 1970); the Clean Water Act (CWA), 33 U.S.C.A. §§ 1251-1387 (1995); the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C.A. §§ 136-136y (1995), the Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-64 (1995), the Ocean Dumping Act, 33 U.S.C.A. §§ 1401-45 (1995) (all passed in 1972); the Safe Drinking Water Act (SDWA) 42 U.S.C.A. §§ 300f to 300j-26 (1995) (passed in 1974), the Toxic Substances Control Act (ToSCA), 15 U.S.C.A. §§ 2601-71 (1995), and the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA)), 42 U.S.C.A. §§ 6901-92k (1995), were enacted in 1976 and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, including 'Superfund'), 42 U.S.C.A. §§ 9601-75 (1995), was passed in 1980.

¹³² PALMER, *supra* note 106, at 149.

were originally subsumed in the activist euphoria of "taking on the establishment" and watching themselves do so in the media, became considerably more pronounced after the rather spectacular achievements of the second-wavers were secured by the legislation discussed and their successful influence on the jurisprudence that gave those statutes the force second wavers had hoped for.¹³³

The various environmental groups, as well as scholarly writers focusing on environmentalism—lawyers, economists, philosophers, ecologists, and others in what might be called current "third wave" environmentalism—reflect the broad United States political spectrum. Conservatives, Libertarians, Liberals, Socialists, Marxists, and various other "radicals" are all well represented within the environmental movement (each group espousing an environmental ethic in keeping with its own political bent).¹³⁴ Even within these separate "camps," there is intense disagreement. Radical Socialist/Marxists, for example, divide themselves into separate schools of thought, including "social ecology,"¹³⁵ "deep-ecology,"¹³⁶ land community advocacy,¹³⁷ and "eco-feminism,"¹³⁸

¹³³ On the role of citizen activists pressing for federal environmental legislation in the 1960s and 1970s and bringing multiple suits, see generally Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994).

¹³⁴ For a brief overview of Conservative thought, through the less radical socialist environmentalist thinking, see Eric T. Freyfogle, *Five Paths of Environmental Scholarship*, 2000 U. ILL. L. REV. 115 (2000).

¹³⁵ Drawing on Marxist and anarchist works, social ecology, a movement dominated by Murray Bookchin, argues that mankind's environmental problems are caused primarily by hierarchical relationships within human society, which result in the oppression of some members of society by those with the power to control or dominate. Societies fixated on domination of other human beings are naturally exploiters of nature as well; therefore, only by changing society's hierarchical norms can one hope to end human exploitation of nature and address existing environmental problems. For a full exposition of social environmentalism, see Murray Bookchin, *Open Letter to the Ecology Movement*, in *TOWARD AN ECOLOGICAL SOCIETY* (1980) and other works by the same author: *THE ECOLOGY OF FREEDOM* (1982); *REMAKING SOCIETY* (South End Press 1989); and *THE PHILOSOPHY OF SOCIAL ECOLOGY* (1990).

¹³⁶ Although deep ecologists also disagree among themselves, the basic tenets of deep ecology may be said to be: Self-realization; i.e., each human is not separate. She or he is interconnected with all other humans and with all parts of nature around them. All parts of nature including man have an intrinsic and equal value. Self-realization is recognizing and appreciating this web-like interconnectedness. Deep ecologists also call for biocentrism, radical egalitarianism, new anti-hierarchical socio-economic norms, reduction of the human population, and human use of nature, including killing living parts thereof, only to meet basic human needs. For an in-depth discussion of the tenets briefly outlined here, see Arne Naess, *The Shallow and the Deep, Long Range Ecology*

all of which advocate a non-androcentric environmental ethic; that is, one that (1) ascribes to nature an intrinsic value of its own, independent of its value to mankind, (2) views man as part of, rather than "above" or "different from" nature, and (3) calls for radical societal and institutional change in order to achieve environmental soundness.

Not all feminists are ecofeminists—those from the liberal tradition reject it for its "essentialism" aspects (basically: women are natural nurturers and therefore may be best suited to care for the environment) and its unwillingness to compromise. Indeed, even among those feminists who use the label, essentialism is viewed warily.¹³⁹

In addition to political differences, environmentalists in the United States disagree on the primacy of their interests. Animal rightists, for example, or those interested in preserving wild areas for hunting and fishing purposes, may have no interest in, issues of waste disposal or in developing a morally valid philosophical ethic to govern the relationship

Movement: A Summary, in INQUIRY 16, 95 (1973); BILL DEVAL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED (1985); ARNE NAESS, ECOLOGY, COMMUNITY AND LIFESTYLE (1989); and WARWICK FOX, TOWARDS A TRANSPERSONAL ECOLOGY: DEVELOPING NEW FOUNDATIONS FOR ENVIRONMENTALISTS (1990).

¹³⁷ For an overview of the tenets of this movement, see Freyfogle, *supra* note 134.

¹³⁸ Ecofeminists believe that the domination of women and nature are interconnected. Their fates are interwoven. As feminists, ecofeminists view the oppression of both women and nature as rooted in one source—patriarchalism. According to ecofeminism:

[T]he connections between the oppression of women and the oppression of nature ultimately are conceptual: they are embedded in a patriarchal conceptual framework and reflect a logic of domination which functions to explain, justify and maintain the subordination of both women and nature. Ecofeminism, therefore, encourages us to think ourselves out of "patriarchal conceptual traps," by re-conceptualizing ourselves and our relation to the non-human natural world in non-patriarchal ways.

Karen J. Warren, *Feminism and Ecology: Making Connections*, 9 ENVTL. ETHICS 3, 7 (1987). Ms. Warren in footnote 10 of her article borrows the term "conceptual trap" from Elizabeth Dodson Gray. Ms. Gray describes a conceptual trap as a "set of outmoded beliefs" and "a way of thinking that is like a room which—once inside—you cannot imagine a world outside." See also ARJEL SALLEH, ECOFEMINISM AS POLITICS: NATURE, MARX AND THE POSTMODERN (1997); REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM (Irene Diamond & Gloria Feman Orenstein eds., 1990).

¹³⁹ Ms. Sturgeon writes, "I certainly can attest to numerous occasions when, in presenting my work in academic feminist contexts, I was assumed to be making 'essentialist' and therefore useless arguments just because I was writing about 'ecofeminism.'" NOEL STURGEON, ECOFEMINIST NATURES, RACE, GENDER, FEMINIST THEORY AND POLITICAL ACTION 168 (1997). She goes on to write of a widespread assumption, "among my academic peers that such essentialisms permanently and thoroughly tarnish ecofeminism as a political position." *Id.*

between people and nature. Further, modalities differ sharply. There are writers who are not activists at all and activists who operate within the existing legal and institutional framework by lobbying or initiating legal procedures or by conducting legal and peaceful demonstrations and rallies. And there are activists who believe firmly in civil disobedience and who act on those principles.¹⁴⁰

Philosophically, some of the more important and interesting legal issues under debate among various environmentalists include issues such as whether flora and fauna should have "rights" of their own.¹⁴¹ Christopher Stone's 1972 *Should Trees Have Standing* was an influential work that gained a good deal of attention in environmental ethics circles.¹⁴²

No legal topic appears more compelling, however, than the arguments among environmentalists over what form or forms our enviro-legal infrastructure should take.

As the rising second wave public and political interest in ecology was translated into legislation, regulation and ensuing judicial interpretation, it became clear that the rights of property owners had suffered a considerable turn for the worse from the owners' perspective because essentially—if we can say that generally speaking, a society's legal system reflects its basic mores—then the enviro-legal structures created between 1969-1980 reflected a basic shift in American perceptions about property ownership rights.

C. *Other Philosophical/Ethical Limitations in Lockean Absolutism*

In stark contrast to Lockean utilitarian land values are the "community oriented" land ethics developed by later thinkers such as Joseph Sax and the "organic" approaches taken by writers such as J. Baird Callicott, Ernst Schumacher, Albert Schweitzer, Alfred North Whitehead, and James Lovelock, as well as the Socialist environmental groups discussed in Section B, *supra*, and many other writers and thinkers whose interests focus on environmental ethics.

¹⁴⁰ Earth First!, for example, is an organization that advocates civil disobedience and sabotage in support of its environmentalist concerns, which chiefly focus on the preservation of wilderness from development. PALMER, *supra* note 106, at 147.

¹⁴¹ CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1972) (updating an earlier 1972 article published in the *Southern California Law Review*).

¹⁴² PALMER, *supra* note 106, at 161. See also PETER SINGER, *ANIMAL LIBERATION* (1975).

These writers and thinkers have, in effect, broken the monopoly of the Lockean/Utilitarian tradition in property rights theory and in the American popular consciousness, helping to broaden the concept of property rights to add correlative responsibilities to land owners' rights, making it more amenable to environmentalism.

Aldo Leopold's¹⁴³ *A Sand County Almanac and Sketches Here and There*¹⁴⁴ was published posthumously in 1948.¹⁴⁵ The book is a collection of essays, beautifully and accessibly written, the most famous of which was his essay entitled, "The Land Ethic," in which he suggested that human beings should view themselves not as separate observers of nature, but rather as "plain members and citizens"¹⁴⁶ of the entire ecological community and measure the rightness of human actions affecting the environment by determining whether such actions would further the "stability, integrity and beauty of the biotic community."¹⁴⁷ Leopold's land value not only eliminates Cartesian dualism and internalism, it also completely rejects the Lockean/Utilitarian ethic of land-as-commodity. It places man within the environment, not as its superior entitled to possessory exploitation, but only as, another part of it. To Leopold, the message was limpidly clear and beautifully simple: "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively the land."¹⁴⁸

Leopold's new ethic was not only promptly espoused by many within the environmental movement, it also found its way into American courtrooms, and with the strong support of legal scholar Joseph Sax, into the federal regulatory environmental statutes discussed above.

Leopold was cited by Justice Douglas in his dissent in the famous 1972 *Sierra Club v. Morton* case, in which the Sierra Club as an association was denied standing to sue the United States Forest Service to prevent it from selling a wilderness area to Disney for development—but which opened the door to the notion that an Association could sue as the representative of individuals who could establish injury to themselves

¹⁴³ Aldo Leopold (1887-1948) was an American forester educated at Yale's School of Forestry. He worked for the United States Forestry Service for a twenty-two years before becoming the University of Wisconsin's Professor of Wildlife Management. See generally PALMER, *supra* note 106.

¹⁴⁴ ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (1949).

¹⁴⁵ PALMER, *supra* note 106, at 33.

¹⁴⁶ LEOPOLD, *supra* note 144, at 201.

¹⁴⁷ See generally *id.*

¹⁴⁸ *Id.* at 204.

were such development to occur.¹⁴⁹ The case achieved a good deal of notoriety because Christopher Stone, a law professor, published his startling proposal about how to decide such standing issues before the Supreme Court issued its decision.¹⁵⁰ His article argues that legal rights, such as standing—should be given to objects in, or areas of the environment, so that they would be considered legal persons, just as are corporations and ships. The Court did not accept Stone's reasoning, but Justice Douglas did, in an eloquent and lyrical dissent in which he not only referenced Stone, but also quoted Leopold.

The Leopoldian ethic clearly trumped Locke's in a regulatory takings case in California—in fact one might say Locke was literally thrown out of court! In that case, *Sierra Club v. Department of Forestry and Fire Protection*,¹⁵¹ the Sierra Club successfully challenged the logging plans of a lumber company on its lands because the plans, known as "THPs" or timber harvest plans under California's regulatory system, had insufficient protection plans for some rare species situated there. *Pacific Lumber* cited Locke in support of its position. The Court, however, brusquely squelched the lumber company: "Locke's 300 year old essay . . . has very little to say regarding California's system of THP's."¹⁵² As Zev Trachtenburg points out:

Leopold's ethical prescription was given legal force in the well known Wisconsin takings decision *Just v. Marinette County*, 201 N.W.2d 761 (1972). In that case, the Wisconsin Supreme Court held that the owners of a lakeside wetland had no right to alter the natural character of their land (by filling it), because "the changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of land," hence could be legally prevented by regulation.¹⁵³

The Utilitarian land ethic has suffered an equally ignominious defeat at the hands of the Supreme Court. In an important test case for the Federal Endangered Species Act ("ESA"), *Tennessee Valley Authority v.*

¹⁴⁹ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

¹⁵⁰ STONE, *supra* note 141.

¹⁵¹ *Sierra Club v. Dept. of Forestry and Fire Prot.*, 26 Cal. Rptr.2d 338, 344 n.2. (1993).

¹⁵² *Id.*

¹⁵³ Trachtenburg, *supra* note 96, at 88.

Hill,¹⁵⁴ the TVA had nearly finished construction of the Tellico Dam when the snail darter, a fish, was added to the endangered list under the ESA. The snail darter's only habitat in the United States would be destroyed if the dam were to be opened. But many millions had already been spent on the new dam. The Supreme Court, holding against the TVA in an opinion written by Chief Justice Warren Burger, stated that although an argument could be made that:

In this case the burden on the public though the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered Species Act, nor article 3 of the Constitution provide federal courts with the authority to make such fine utilitarian calculations.¹⁵⁵

Leopold's ethic also infused Sax's successful efforts to revitalize the public trust doctrine¹⁵⁶ in legal scholarship, in the courts, and in statutory law.

Sax's prolific scholarship on Takings law, which began with his 1964 article, *Takings and the Police Power*¹⁵⁷ and particularly his Public Trust theories introduced in 1970,¹⁵⁸ is infused with a Leopoldian/"organic" concept of the man/nature ethic. "It is driven by a distinctive vision—one in which the earth's resources are becoming increasingly interconnected and in which there is an increasing need for the government to resolve conflicts regarding the use of these resources."¹⁵⁹

His public trust concept received immediate, broad attention and was widely influential in regulatory takings jurisprudence and on the

¹⁵⁴ *Tennessee Valley Authority v. Hill*, 453 U.S. 153 (1978).

¹⁵⁵ *Id.* at 187.

¹⁵⁶ "Leopold's vision of land as community has been developed by legal scholar Joseph Sax to defend the existence of 'public rights' over certain kinds of land use." Trachtenberg, *supra* note 96, at 78.

¹⁵⁷ Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

¹⁵⁸ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

¹⁵⁹ Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 ECOLOGY L.Q. 327, 327 (1998).

structure of several of the federal environmental statutes enacted during the 1970s and 80s.¹⁶⁰

The public trust doctrine, when imported into American common law from England, originally applied to navigable waters and shorelines touched by tides.¹⁶¹ Although its origins in American law appear murky,¹⁶² Sax traces it back internationally to ancient Roman law.¹⁶³ According to Sax, the public trust doctrine is rooted in the concept that the government holds some common property in trust for the public and therefore has a fiduciary duty to protect such properties for the benefit of the public.¹⁶⁴ Private property owned by individuals has been found subject to the public trust doctrine so as to prevent the owner from taking actions thereon deemed injurious to the public.¹⁶⁵

¹⁶⁰ "Sax's idea (the public trust doctrine) caught on quickly influencing the National Environmental Policy Act, whose history reflects trust considerations at various points . . . as [does] the Clean Water Act, Endangered Species Act and environmental statutes in many states. His article is discussed in virtually every environmental law casebook, hornbook, and law review article . . ." Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1213 (1991); see also Fred Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1551, 1553 (1985) (including Sax's public trust article among the forty law review articles most often cited in other law review articles); Thomas A. Campbell, *The Public Trust, What's It Worth?*, 34 NAT. RESOURCES J. 73, 86-9 (1994) (discussing environmental statutes intended to prevent irresponsible private use of resources as "trustee statutes").

¹⁶¹ Royal C. Gardner, *Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty and the Cost of Environmental Protection*, 65 U. CIN. L. REV. 539 (1997).

¹⁶² See, e.g., Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 713-15 (1995) (covering several possible sources of the law doctrine as including common law, state constitutions/statutes, and federal law arising out of acts which admitted states to the union); but see James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 528-29 (1989) (positing that the doctrine is rooted in property law).

¹⁶³ JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 163-64 (1971).

¹⁶⁴ Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 185 (1980).

¹⁶⁵ See, e.g., *National Audubon Society v. City of Los Angeles*, 658 P.2d 709 (1983). The City, in a proprietary capacity, held property rights in non-navigable tributaries of a Lake. The Audubon Society sued to prevent Los Angeles from removing water therefrom as its withdrawals had effected ecological damage. Using the public trust doctrine, the Society won, the court holding that protection of the lake's ecosystem was a public benefit and the City's property rights were limited by the public trust doctrine.

The geographical scope of the public trust doctrine and the breadth of the types of public interests, which the courts deem to be protected by the doctrine, have been growing. Non-navigable waters have been included¹⁶⁶ as have wetlands. The public uses protected—originally commercial public uses—have been expanded to include leisure activities such as swimming and the public interest in the protection of the environment.¹⁶⁷

Joseph Sax has also argued that the public trust doctrine be taken into consideration in regulatory takings law.¹⁶⁸ Trachtenberg succinctly condenses Sax's arguments and proposals as follows:

If the external effects . . . of an action taken on one person's land . . . cause substantial damage to a small number of others they are like both to recognize and take action against the responsible owner, say through a suit for nuisance. But, Sax notes, "one characteristic of external effects . . . is that they often fall quite broadly, affecting a large number of potential claimants, each in relatively small amounts." Filling a wetland . . . would be such an action that affects a "diffuse public." But with a diffuse public it is likely to be impossible, practically speaking, for all affected parties to unite to initiate a private suit. Say then the government issues a regulation to protect the . . . diffuse public. This sort of action is now challenged as a taking, insofar as it limits the right of the landowner to free use of his . . . property. But, Sax holds, "to the extent that the courts adopt this perspective, they deny recognition of extant public rights" Thus in Sax's view, rights over land ought not be vested in landowners as a matter of their property right; the public's rights deserve equal consideration . . . in legislative or judicial resolution of conflicting claims to the common resource base.¹⁶⁹

Sax strongly opposed compensation in regulatory takings cases where the actions of the landowner, if not regulated, such as wetland

¹⁶⁶ *Id.*; see also *Sacco v. Dept. of Public Works*, 227 N.E.2d 478 (Mass. 1967).

¹⁶⁷ Gardener, *supra* note 161, at 556.

¹⁶⁸ Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 155 (1971).

¹⁶⁹ Trachtenberg, *supra* note 96, at 78-79.

filling, would result in damage on other lands, on the basis of the public trust theory.¹⁷⁰ On the other hand, he suggested compensation may be appropriate where no externalities were involved.¹⁷¹

Sax-like thinking pervades the jurisprudence on regulatory wetlands takings cases, where in the vast majority of cases, the affected private property owner—one who is, for example, denied a permit to develop his land, will lose if he sues for compensation under the federal Takings clause.

The “organic” group, to give them a somewhat random label, are neither homogenous as the act of labeling them would seem to imply, nor as widely accepted as the community-oriented thinkers. Organic thinkers view the earth and man as one interactive organism, with humans occupying a role therein no more important than any other element in nature. These thinkers demand an ecocentric ethic in environmentalism and many (though far from all) go well beyond community oriented thinkers in terms of their demands for societal change and reverence for the environment as essential to ecological success. These groups are discussed *supra*. Although they remain at the fringe of awareness in legislative or judicial thinking, they are very well known and respected within philosophical scholarship focused on environmental ethics and, to a lesser, but very significant degree, in academia. As the thinking of these groups is shared by many environmental associations (otherwise known as NGOs) their concepts are, therefore, very likely to begin to exert influence within our societal institutions in the future in the form of tougher environmental regulation.¹⁷²

This is not to say that the traditional Lockean notions of property rights have disappeared from the scene. In fact, the reverse is true. The “property-rightists,” if we may describe those who espouse the libertarian concept of property rights as such, and the “free-marketers,” to borrow a

¹⁷⁰ Sax, *supra* note 168, at 154-55.

¹⁷¹ *Id.* at 161.

¹⁷² TONY EVANS, *International Environmental Law and the Challenge of Globalization*, in LAW IN ENVIRONMENTAL DECISION-MAKING: NATIONAL, EUROPEAN, AND INTERNATIONAL PERSPECTIVES 207, 224 (Tim Jewell & Jenny Steele eds., 1998) (noting that despite the good possibility that through these groups' academic and frontline work inroads will be made in the current political landscape, Evans points out that many NGOs simply accept the current framework without calling it into question. He states that “[w]hile many NGOs have been successful at raising public consciousness . . . they remain committed to the ‘common sense’, international law approach and therefore tacitly accept the continuation of current forms of capital expansion and consumerism. Those that do not [such as ecofeminists] are never invited to participate.”).

term from Freyfogle,¹⁷³ remain ardent supporters thereof and both are engaged in a fierce battle with the more community-minded theorists.¹⁷⁴ This battle, as will be seen in the discussion on Takings in Section D *infra*, is fueled by the certainty of the property rightists, whose land is devalued by environmental regulations without compensation, that they are bearing an unfair and unjust portion of the societal cost for environmental regulation. The compensation issue is further exacerbated by the Supreme Court's somewhat muddled jurisprudence on Takings, as is also discussed further below.

For the "free-marketers," "environmental degradation stems chiefly from deficiencies either in the market or in modern technology . . . problems are largely solved but can be solved better, cheaper and with less government and more freedom than under current laws."¹⁷⁵

The thrust of free-market thinking is primarily anti-government regulation, and in so far as environmental regulation is a form thereof, free-marketers engage in great effort to defeat environmentalism when it interferes with continued resource development by business or efficient operation of businesses. Examples abound, but two very current battles are being fought over whether or not oil drilling in the Alaskan National Refuge should be permitted and whether CO² should be included on emission reduction requirement lists.

D. *Overview of United States Regulatory Takings Law*

Many Americans were unwilling to hand the federal government any of the monarch-like powers they had just fought a long revolutionary war over. They were uncomfortable with the proposed federal Constitution until the Bill of Rights was appended to it. The Fifth Amendment includes the provision "nor shall private property be taken for public use, without just compensation."¹⁷⁶ It also provides that "no person . . . shall be deprived of life, liberty, or property, without due process of law."¹⁷⁷ The Fourteenth Amendment provides a virtually similar due process clause applicable to the States¹⁷⁸ and the Supreme Court

¹⁷³ Freyfogle, *supra* note 134, at 118.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ U.S. CONST. amend. V.

¹⁷⁷ *Id.*

¹⁷⁸ U.S. CONST. amend. XIV, § 1.

subsequently applied the Takings Clause of the Fifth Amendment to the states through the Fourteenth Amendment.¹⁷⁹

As firmly rooted as Lockean property rights were in the American consciousness of the time, the Constitution, even as amended by the Bill of Rights, never prohibited the government from taking a citizens property—what is prohibited is a taking without “just compensation.” This provision would seem to adequately protect a property owner—if his land is taken, he will be compensated.

The first question in United States federal regulatory takings cases is whether there has in fact been a taking.

United States case law recognizes, generally, two types of takings. A physical appropriation of the property or an invasion thereof sufficient to equate it with a physical appropriation is generally recognized as a taking for which compensation is due.¹⁸⁰ Into this category fall the multitude of takings that occur yearly for road and highway construction and other public uses.

The type of taking more germane to this Note, however, is often referred to as a “regulatory taking.”¹⁸¹ In these situations, an owner of private property is prohibited, by a governmental regulation, from taking some action on his property or, in the alternative, he is forced by such a regulation to take certain actions on his property. These prohibitions—or requirements—can substantially reduce the degree of control the property owner has over his own property and can often result in a steep deterioration of the value of the property and/or severe limitations on the uses the owner may make of such property.

Takings cases can arise in several ways. Where the government takes actual possession, in the normal event the acting governmental entity brings a proceeding to condemn the property and the proper amount of compensation is determined in the course of that proceeding by the court.¹⁸² When the property is not taken, but instead the property owner's rights therein are curtailed in some manner or where, alternatively new obligations are imposed upon him as owner, the government may not condemn the property at all. In such situations, the owner may bring an inverse condemnation proceeding relying on the Fifth Amendment

¹⁷⁹ *Chi. B. & Q. R. v. Chi.*, 166 U.S. 226, 239 (1897).

¹⁸⁰ Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 ENVTL. L. 881, 884-85 (1999).

¹⁸¹ See generally David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999).

¹⁸² Stedfast, *supra* note 180, at 883.

Takings Clause to demand just compensation. On the other hand, he may not want compensation. He may instead seek to invalidate the action of the governmental entity. In such an event he would proceed under either of the due process clauses.¹⁸³

A brief overview of the United States Supreme Court regulatory takings cases of the 1970s and 1980s immediately exposes, as will be seen, a strong bias in favor of the police power and against compensation to the landowner. These cases increasingly constrain and limit the landowner's “absolute” rights over his property. Only in the late 1980s, with the more conservative Supreme Court, did the pendulum begin to swing toward a new tendency benefiting the landowner at the expense of governmental regulation.

Despite the similarity of result in the earlier cases, the Court's jurisprudence over those years is remarkably lacking in clarity for three main reasons: first, each case is decided on an ad hoc basis—a phrase that appears in almost every decision; second, new desiderata, i.e., factors to be considered in deciding such cases; are added in almost every case, and third, none of these factors are ever actually defined. During this period, landowners became increasingly frustrated with the end results, while lower courts and regulators were left with little real guidance.¹⁸⁴

When the pendulum began to swing back toward the landowner, the lack of clarity remained the only constant. Now, regulators are less pleased with the end results, but all parties remain uncertain. The Supreme Court itself has frequently acknowledged the difficulty it has experienced in achieving takings decisions.¹⁸⁵

¹⁸³ *Id.* at 184.

¹⁸⁴ Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law?*, ALI—ABA Continuing Legal Education Course 130 (Aug. 13, 1998) “The intellectual chaos that permeates much of what passes for the nation's takings jurisprudence is rooted in the Court's candidly embraced ad hocery . . . it creates utter confusion. No one can tell with any degree of reliability which facts of the controversy will prove to be the operative ones, and which insignificant . . .” *But see* Callies, *supra* note 181, at 526 “[W]hat the Court has done is clear enough for most purposes. The problem is what the states and lower federal courts have done with the Court's pronouncements.”

¹⁸⁵ *See, e.g.,* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (stating that “[t]he question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty”); *see also* Nollan v. Cal. Coastal Comm., 483 U.S. 825, 866 (1987) (in which Justice Stevens wrote in his dissent, “[e]ven the wisest of lawyers would acknowledge great uncertainty about the scope of this Court's takings jurisprudence.”); *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980).

Until 1989, the Supreme Court, with only one exception in 1922,¹⁸⁶ strongly supported the police power, almost invariably deciding regulatory takings cases in favor of the state or other local authority imposing the regulation at issue.¹⁸⁷

That 1922 decision, *Pennsylvania Coal v. Mahon*, was written by Justice Holmes. The coal company had reserved the right to mine under the surface when it sold land to Mahon, who then constructed his home thereon. Thereafter, Pennsylvania enacted a statute prohibiting coal mining that would cause the subsidence of human dwellings or other types of buildings. The coal company objected and lost in the Pennsylvania Supreme Court. The Holmes decision (Brandeis dissented) reversed the Pennsylvania decision and found for the coal company on the basis of the explicit contract reservation, and because, since only residential dwellings on the property were concerned, the anticipated damage was not "common or public." As Holmes wrote:

[T]he statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far. Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such charge in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts . . . the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.¹⁸⁸

In United States Supreme Court cases prior to *Pennsylvania Coal*, the Fifth Amendment takings clause was applied to actual physical takings

¹⁸⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹⁸⁷ See generally Robert K. Best, *Inverse Condemnation and Related Government Liability*, ALI-ABA Continuing Legal Education Course (Sept. 30, 1999) for a brief overview of U.S. Takings cases. For a detailed analysis, see Stedfast, *supra* note 180.

¹⁸⁸ *Pennsylvania Coal*, 260 U.S. at 413.

of property or such extensive damage to property as to render it totally unusable, as in the 1872 *Pumpelly* case, where the government flooded the plaintiff's property in the course of dam construction.¹⁸⁹ However, use of the Takings Clause to protest regulatory actions was generally not successful, because the Supreme Court consistently deferred to the police power of local government to act in support of a public good.¹⁹⁰

Accordingly, the 1922 *Pennsylvania Coal* case was a sharp departure and a landmark decision. However, in the 50 years thereafter, there was little further development of landowners' rights in the face of regulatory takings, and the Supreme Court continued to defer to state police powers in regulatory takings cases.¹⁹¹

One exception, the 1928 *Nectow* case,¹⁹² found overreaching in the city's new zoning plan that had restricted the property owner's business use by including the property within the edges of a more residential district, thereby significantly reducing the property's value. The owner proceeded under the Fourteenth Amendment due process clause. The Supreme Court noted that the property could just as easily have been put in the business zone, as it was virtually surrounded by that zone and held that the zoning authorities action "comes within the ban of the Fourteenth Amendment and cannot be sustained."¹⁹³ The Court stated that:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restrictions cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.¹⁹⁴

¹⁸⁹ *Pumpelly v. Greenbay & Miss. Canal Co.*, 80 U.S. 166 (1871).

¹⁹⁰ See *Mugler v. Kansas*, 123 U.S. 623 (1887) (city proscribed brewery operation); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (city prohibited livery stable business); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (city boundaries expanded to encompass claimant's land and city regulations prohibited brick yards within city).

¹⁹¹ See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (holding property owner was required to destroy his ornamental cedar trees to protect some apple orchards lying within a certain radius); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning change reduced value of property owner's land from \$10,000 an acre to \$2,500 an acre).

¹⁹² *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

¹⁹³ *Id.* at 189.

¹⁹⁴ *Id.* at 188.

Although the Supreme Court would continue to view physical invasions by the government as a taking,¹⁹⁵ with the exception of *Nectow*, the Court still deferred to the state's police power. However, regulatory jurisprudence continued to develop even as property owners lost their cases. In the 1962 *Goldblatt* case,¹⁹⁶ a property owner who excavated sand and gravel below the water table was prohibited from doing so by a new town regulation prohibiting such activity at such levels. The purpose of the ordinance was to protect against flooding. The property owner lost and the court found no taking. While the opinion did reemphasize that police powers were not unlimited and a regulation could be so deleterious as to render it unconstitutional, the Court noted that there was "no set formula"¹⁹⁷ to distinguish valid regulations from unconstitutional takings, but stated that "comparison of values before and after is relevant" and added that such comparison is "by no means conclusive."¹⁹⁸ The term "no set formula" became a basic ingredient in Supreme Court Takings decisions, thereby generating an uncertainty and vagueness frustrating to both landowners and regulators.

In the 1978 *Penn Central*¹⁹⁹ case the railroad wished to build a tower over its terminal building, but was blocked by the City Landmark Commission, which refused approval. The railroad lost, but several new elements of takings desiderata were added to existing precedent. Each case, the Court noted, necessitated an ad hoc analysis and "no set formula" could be applied.²⁰⁰ The Court, however, identified three factors that "have particular significance;"²⁰¹ "the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations" ("IBE"),²⁰² and the character of the action by the government (physical invasion vs. regulatory limitations).²⁰³

The *Penn Central* case emphasized a requirement that the property as a whole be considered in takings analysis and not by separate segments

¹⁹⁵ *United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. County of Alleghany*, 369 U.S. 84 (1962) (both involving "invasion" by overflights of airplanes).

¹⁹⁶ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

¹⁹⁷ *Id.* at 593.

¹⁹⁸ *Id.* at 594.

¹⁹⁹ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 104 (1978).

²⁰⁰ *Id.* at 124.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

of it. Thus, the court examined air rights and the terminal together, refusing to consider the effect of the air rights alone. It also found that the ability to use the terminal as the railroad had previously done, and the fact that it could, possibly, obtain approval from the Commission to sell the air rights—meant that the regulation complained of did allow “reasonable beneficial use of the landmark site”²⁰⁴ and did promote a valid public good.

While this three-prong test—the economic impact, the effect on investment-backed expectations, and the nature of the government action—appears clear on its face, Justice Brennan’s opinion in the case did not define “investment-backed expectations” and the new emphasis on the “whole property” as the denominator in the determination of the economic benefit to the landowner added another element of uncertainty both in this opinion and subsequent decisions. Although he cites Holmes’ 1922 decision in *Pennsylvania Coal v. Mahon* as the source for application of the IBE test (although the term was not used in *Pennsylvania Central* case), Brennan also cites, in a footnote, an article by Professor Frank I. Michelman written in 1967 in which Michelman used the term “some distinctly perceived, sharply crystallized, investment-backed expectation”²⁰⁵ in analyzing the impact of a less than complete taking.

Brennan’s opinion narrows IBE arguments by an application of a “whole property” rule, and further by its statement that an owner’s subjective intent to do a particular thing with property—as, say, build a tower in the air above—is not a determinative factor in establishing an IBE. He notes that “the submission that [*Penn Central*] may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development is quite simply untenable.”²⁰⁶ This “exploitation language” appears to narrow IBE considerations to exclude secondary or non-historical uses because Brennan also based his decision on the fact that the statute complained of did not affect the railroad’s “primary expectation concerning the use of the parcel,”²⁰⁷ that is, its operation as a rail terminal.

Perhaps most important, the dissent in *Penn Central* (by then Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens) acknowledged that a taking by regulation could occur and opined further that the preservation ordinance had gone too far and should be struck

²⁰⁴ *Penn Central Transportation Co. v. New York City*, 483 U.S. 104, 138 (1978).

²⁰⁵ *Id.* at 138 n.4.

²⁰⁶ *Id.* at 130.

²⁰⁷ *Id.* at 136.

down. The dissent's willingness in this respect indicated the potential of a future break from the prevailing deference to the police power. This indeed came to pass in subsequent Supreme Court cases, as will be seen.

Later, United States Supreme Court cases have provided little clarity respecting IBEs and a clear definition remains elusive, although these cases have added even more additional elements to takings analysis, some of which relate to IBEs, and some of which do not, but all of which appear to be "tacked on" to the Brennan "three prong test."²⁰⁸

In *Andrus v. Allard*, for example, decided a year after *Penn Central*, Allard, an artifacts dealer, was prosecuted for violation of several bird protection statutes because he bought and then resold artifacts that contained proscribed bird feathers. The artifacts had been made prior to the passage of the statutes. They were not taken from his possession, but he was prohibited from selling them, thus their economic value to him was lost, as was his IBE of profitable resale. The Court cited *Penn Central* for the "whole property" rule and held that only one stick of Allard's "bundle of rights" had been affected—the right to sell—and pointed out that he still had other rights—e.g., to possess, devise, exhibit, or donate them. In addressing the reduction in economic value aspect of *Penn Central*'s three-prong "test," the Court acknowledged that the statute did annihilate the most valuable use—resale—but said this was not a decisive factor. The Court wrote, "[a] reduction in the value of property is not necessarily equated with a taking."²⁰⁹ One could easily agree with the previous sentence based on precedent. However, *Allard*'s "primary expectation" was resale—yet Brennan had based his *Penn Central* decision at least partially on the fact that the railroad's "primary expectation" had not been affected. The two cases thus achieved the same result, but at the cost of clarity.

Further, the Court said that loss of anticipated profits—absent a physical taking—is very unlikely to serve as a basis for takings claim. "Loss of future profits—unaccompanied by any physical restriction—provides a slender reed upon which to rest a takings claim."²¹⁰ One wonders then, what the point of introducing IBEs in *Penn Central* had been—for certainly IBEs are "future profits." Further, the Court noted that "prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform."²¹¹ This

²⁰⁸ See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979).

²⁰⁹ *Id.* at 66.

²¹⁰ *Id.*

²¹¹ *Id.*

holding would appear to further narrow IBEs to exclude even anticipated profits from a "primary" use—which, in the case of a dealer like Allard—would be nothing other than resale. Thus it would seem that a primary use, such as the terminal operation in *Penn Central*, which has an historical record of X profit at Y% annual increase might be protected by takings law, but a "speculative" non-historical expectation will not be.

In the same year, in *Kaiser Aetna v. United States*.²¹² the Court found for a developer that had built a channel from its pond to the bay, after being assured by the Army Corps of Engineers that no permit was required. After the channel was built, the Corps told Kaiser Aetna that the pond was now, due to the channel connection, navigable water and that therefore Kaiser Aetna was required to allow the public access to the pond. The Court reiterated the "no set formula" and "ad hoc analysis" pronouncements of *Penn Central* and said it would consider "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action"²¹³—a three prong test very similar to *Penn Central's* wording. The Court found that the Corps' failure to require permits did not estop the Corps, but that it did create expectations in *Kaiser*.²¹⁴ It also found that the Corps' demand for public access denied Kaiser an important ownership element—the right to exclude others from the property. This right to exclude, the Court said, was "one of the most essential sticks in the bundle of rights that are commonly characterized as property,"²¹⁵ one "universally held to be a fundamental element of the property right."²¹⁶ Thus, it would seem, the "whole property" theory of *Penn Central* and *Andrews* will be disregarded if the "stick" taken is the "right to exclude." However, in the 1980 *Pruneyard* case, that did not hold true; although it did in the 1982 *Loretto* case.²¹⁷ Another "stick" within the property

²¹² *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

²¹³ *Id.* at 174-75.

²¹⁴ *Id.* at 167.

²¹⁵ *Id.* at 176.

²¹⁶ *Id.* at 179-80.

²¹⁷ *Pruneyard Shopping Center v. Robins*, 447 U.S. 274 (1980) (Shopping center property owner not permitted to exclude pamphleteers from entering its grounds and soliciting petition signatures because of a California Constitution provision guaranteeing the right to petition). The Court applied the *Penn Central* three-prong test but found little real economic impact on the centers owners and held the petitioners presence did not unreasonably affect the owners IBEs; *but see* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (apartment house owner required to allow cable TV company to install cable equipment on the building) in which the Court applied *Penn Central's* three-prong test as well to a taking that had little economic impact, but nevertheless

bundle subsequently deemed so essential as to derail the "whole property" concept is the right to devise.²¹⁸

Further guidelines appeared in *Agins v. City of Tiburon*, a 1980 Supreme Court zoning restriction case, which the city won.²¹⁹ *Agins* had acquired property to develop and subsequently the city rezoned it so as to permit no more than one to five houses on the property, thus dealing the developer a very significant economic blow. The Court held that a land use regulation does not become a taking so long as it "substantially advances legitimate state interests" and does not "den[y] an owner economically viable use of his land."²²⁰ This two-prong test for zoning ordinances is, obviously, different from the three-prong test in *Penn Central*, and merely adds to the confusion and uncertainty of Takings jurisprudence.

In 1984, IBEs in land use cases were further limited by the so called "notice" rule applied in *Ruckelshaus v. Monsanto Co.*²²¹ There, a federal environmental statute resulted in an alleged taking of Monsanto's trade secrets respecting its pesticides, but Monsanto's awareness of the passage of the statute was held to have put it on notice and rendered its IBEs in the pertinent trade secrets unreasonable.²²²

The constructive notice rule has been followed to deny takings in federal lower courts since *Monsanto*²²³ and promises to play a major role in the Rhode Island wetlands case in which property owner Anthony Palazzolo, with the financial and legal support of the conservative Pacific Legal Foundation,²²⁴ has appealed to the United States Supreme Court. As of this writing that case is due to be decided shortly.

It is also important to note the *Monsanto* case is not a land use case and that Monsanto's ability to protect its rights therein was a benefit to

found a taking. In *Loretto*, the Court emphasized the third prong—the nature of the government regulation—and found that where the regulation involves a permanent and physical intrusion a taking will be deemed to have occurred.

²¹⁸ See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1997).

²¹⁹ *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

²²⁰ *Id.* at 260.

²²¹ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

²²² *Id.*

²²³ See, e.g., *Furey v. City of Sacramento*, 592 F. Supp. 463 (E.D. Cal. 1984), *aff'd. on other grounds*, 780 F.2d 1448 (9th Cir. 1986); *Sucesion Suarez v. Gelabert*, 541 F. Supp. 1253 (D.P.R. 1982), *aff'd.*, 701 F.2d 231 (1st Cir. 1983).

²²⁴ Cary Goldberg, *Test Case on Property Rights Challenges Wetland Curbs*, N.Y. TIMES, Feb. 17, 2001, at A12.

Monsanto and one it "voluntarily" sought, and, in fact, these distinctions were pointed out in the *Nollan* case.²²⁵

Three 1987 cases added new tools for analysis, but still provided no clear definitions for guidance to those concerned. In *Keystone Bituminous Coal Association v. DeBenedictus*,²²⁶ despite a set of facts very similar to those of the 1922 *Pennsylvania Coal* Case, the coal company, property owner of the right to subsurface mining, was found not to have been subjected to a taking. A Pennsylvania statute prohibited subsurface mining due to the danger of subsidence under certain types of buildings. The *Keystone* court distinguished *Pennsylvania Coal* on essentially the character of the regulation; holding that the regulation in the earlier case was more focused on protecting private interests of individual homeowners while the *Keystone* regulation was aimed at protecting "the public interest in health, the environment, and the fiscal integrity of the area."²²⁷ The court viewed the police power here as having been necessitated in order to abate a public nuisance.²²⁸

The court also, applying the "whole property" analysis, found that the regulation met the second prong of the *Agins* test in that it did not "den[y] an owner economically viable use of his land."²²⁹ The "whole property" incorporated into the Court's analysis was all of the coal in the state, most of which the coal companies could continue to mine, and thus the 27 million tons rendered inaccessible by the statute were merely one stick in the bundle.²³⁰ Thus, as it had done in *Penn Central*, the Court selected an extremely broad denominator in determining whether there was sufficient damage to justify compensation.

The Court in discussing "economically viable use" made specific note that property owners claiming regulatory takings have the "heavy burden" to show sufficient property value loss to establish a taking.²³¹ But what is "sufficient" has never been defined, and that is a very key question for both landowners and regulators.

Two other cases in the same year offered property owners a bit more optimism due to the new restraints they imposed on governmental regulation.

²²⁵ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

²²⁶ *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470 (1987).

²²⁷ *Id.* at 488.

²²⁸ *Id.* at 480.

²²⁹ *Id.* at 485 (quoting *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

²³⁰ *Id.* at 498.

²³¹ *Id.* at 493.

In *First English*,²³² a church was temporarily prevented by Flood plain regulation, from re-building its buildings in a flood area. Noting that its dictum would apply only where "all use of property"²³³ was denied, the Court held that compensation was required for temporary takings. It also noted that it was aware that its holding "undoubtedly lessen[s] to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land use regulations."²³⁴

The *Nollan*²³⁵ case further restricted land use planners. The Nollans, in order to build their home on beachfront property, were required to obtain a permit from the Coastal Commission and did so. However, the permit was conditioned upon the Nollan's granting of an easement over their property to the public to enable the public to "pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side."²³⁶ The Nollans argued that the easement requirement was a taking. The Supreme Court agreed. The opinion, by Justice Scalia, this time focused on the first prong of the *Agins* test, i.e., whether it "substantially advanced legitimate state interests."²³⁷ Scalia found the state interest to be legitimate, but found no "essential nexus" between those interests and the permit requirement.²³⁸ Acknowledging that it had not theretofore established any standards respecting how to meet this "essential nexus" requirement²³⁹ and further stating that it did not intend to do it this decision, the Court simply said that it could not, on these facts, see any nexus standard at all that would be reasonable.²⁴⁰

Even more interesting, the *Nollan* decision appears to substantially weaken the *Monsanto* "constructive notice" limitation on IBEs of property owners. The Nollans, as Justice Brennan pointed out in his dissent, were on notice and should therefore have had no reasonable IBEs respecting an easement-free beachfront for themselves. They had notice because, Brennan argued, "stringent regulation of development along California the

²³² *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

²³³ *Id.* at 321.

²³⁴ *Id.*

²³⁵ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 825 (1987).

²³⁶ *Id.* at 828.

²³⁷ *Id.* at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

²³⁸ *Id.* at 837.

²³⁹ *Id.* at 837.

²⁴⁰ *Nollan*, 483 U.S. at 858-59.

coast"²⁴¹ had been in place for many years, and that a condition requiring access had been placed on all other development proposals in their tract. Scalia's opinion disagreed, and distinguished *Monsanto* on the voluntary basis of the exchange between Monsanto's registration and the consequent loss of trade secrets. The right to improve property is not bestowed by the government as a benefit, as in the product protection afforded by the opportunity to register one's product with the government, thus the requirement for an easement as a condition of permit issuance does not involve the property owner in a "voluntary" exchange. These comments of Scalia's are contained in a footnote,²⁴² which does not address IBEs per se. However, it would seem to imply that a taking can occur if the owner is prevented from building on his land even if the landowner purchased the land with some degree of awareness of pre-existing land use restrictions.

The 1992 *Lucas* decision,²⁴³ indicated even more clearly that the Court was swinging further away from the protection of police powers towards tighter protection of property owner's rights. The property owner purchased waterfront lots intending to build homes on them. Subsequently, a statute was enacted prohibiting any building whatsoever on the property. The lot owner alleged a taking and the Supreme Court agreed. After a review of takings law in which the Court reaffirmed the principles developed in previous cases, including the need to review each case on an ad hoc basis, Scalia's opinion concluded that there are at least "two discrete categories" of regulatory effects on property owners that will be deemed takings "without case-specific inquiry into the public interest advanced in support of the restraint."²⁴⁴ The first is a physical invasion ("at least with regard to permanent invasions")²⁴⁵ and the other is a regulatory effect that eliminates "all economically beneficial or productive use of land."²⁴⁶

The Scalia opinion, in establishing an entirely new rule—that a loss of "all economic beneficial or productive use of land" would work as a compensable taking, also deeply wounded well settled nuisance theory regarding police powers upon which the South Carolina Supreme Court had relied in finding for the Coastal Commission; i.e., that a taking that prevented nuisance did not require compensation even if all economic

²⁴¹ *Id.* at 843.

²⁴² *Id.* at 833 n.2.

²⁴³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

²⁴⁴ *Id.* at 1015.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

value was lost. Scalia wrote that while its previous decisions "suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation"²⁴⁷ it now viewed that theory as too subjective (this from a blithely ad hoc bench!) because whether the alleged taking was one to prevent a harm to the public, or alternatively, to confer a benefit thereunto lies mainly in the eye of the particular beholder; i.e., it depends largely on the decider's views. Scalia then simply subsumed the nuisance theory into the *Agins* "substantial advancement of legitimate state interests" test, opining that the nuisance theory was merely an earlier formulation on the way to the development of the *Agins* test.

Why "legitimate state interests" should be any less subjective than "noxious-use" was not addressed. Nor was any attempt made to address what would have been the result if less than all-economic value had been taken. In *Lucas*, the parties had both acknowledged the remainder value was zero.

The Court "cut out" one new exception to replace the "old" nuisance theory exception. It remanded the case to South Carolina, stating that a state could avoid compensation only when it could show that "the proscribed use interests were not part of his title to begin with."²⁴⁸ Lucas, then, would not have the right to fill his wetland and build upon it if his title could be shown never to have included that right anyway. To determine this, Scalia wrote, one would need to examine a) his title and b) the "background principles" of property and nuisance law in South Carolina.²⁴⁹

Although the public trust theory is a background principle of property law in America particularly as to wetlands²⁵⁰ the South Carolina court, on remand, looked only at nuisance and found nothing therein that would have blocked Lucas's development rights; accordingly the state purchased the property from Lucas.²⁵¹

The Court did not, however, "analyze possible public trust rights in the beach front property"²⁵² Why is unclear, however, the use of the public

²⁴⁷ *Id.* at 1022.

²⁴⁸ *Lucas*, 505 U.S. at 1027.

²⁴⁹ *Id.* at 1029.

²⁵⁰ See generally Casperson, *supra* note 118.

²⁵¹ *Id.* at 373.

²⁵² *Id.*

trust doctrine in this kind of a takings analysis is certainly not precluded by Lucas—as many legal scholars have pointed out.²⁵³

The 1994 *Dolan* case²⁵⁴ provides no further illumination on the Holmes 1922 question; i.e., when does a regulation go “too far?” Dolan wished to pave a parking lot for her store and enlarge the store, but when she applied for a permit the City imposed conditions thereon requiring her to dedicate two parcels to the City; i.e., that part that was in the floodplain of a nearby Creek and another 15’ strip to be used as a bicycle path. As in *Nollan*, the *Dolan* court focused on the “state interest” prong of the *Agins* test, and citing *Nollan*, reiterated the need for an “essential nexus” and found same, but now added a new element for consideration in takings analysis; i.e., “rough proportionality”²⁵⁵ or reasonableness of the connection between the imposed requirement (the dedications) and the impact of the action the property owner wished to take.²⁵⁶

This new standard was found not to have been met by the City; thus, Dolan won. The Court said that the City had not shown why Dolan had to dedicate the flood-plain strip—as opposed to just leaving it undeveloped. The dedication requirement meant she would lose the ability to exclude others from her property (one of the essential sticks the Supreme Court sometimes focuses on). As for the bikeway, the City had not quantified the additional traffic expected due to Dolan’s enlargement and parking availability.

In the 1999 *Monterey* case²⁵⁷ the landowner again prevailed, but two interesting results emerged from the Supreme Court decision. First, the Court expressly stated that the *Dolan* “rough proportionality” rule is limited. “[w]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.”²⁵⁸

²⁵³ See, e.g., Casperson, *supra* note 250; see also ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY (1992) (positing that Scalia’s opinion encourages use of the public trust doctrine in takings analysis); James L. Huffman, *A Fish Out of Water: The Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (acknowledging, while criticizing the public trust doctrine itself, that the doctrine defeats a takings claim).

²⁵⁴ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

²⁵⁵ *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 839 (1987).

²⁵⁶ “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 391.

²⁵⁷ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

²⁵⁸ *Id.* at 702.

On the other hand, in the courts below, the question of the reasonableness of the City's land use decision was allowed to go to a jury and that action had been upheld in the state's Supreme Court—the United States Supreme Court affirmed that decision, stating that the reasonableness of the City's regulations were not left up to the jury, and that the jury was only requested to decide whether “legitimate public interests” were substantially advanced.²⁵⁹

Lastly, and most startling, the Supreme Court also found that the landowner's takings claim was proper to submit to a jury, at least on the issue of whether or not any economically viable use remained, that being, the Court said, an essentially fact-laden issue. It did narrow its ruling to apply only to those cases brought under the Civil Rights Act of 1964²⁶⁰ (as was this one). Despite this narrowing, the decision appears to throw into regulatory takings claims the added uncertainties inherent in jury decisions—a factor that seems to ensure a chilling effect on regulators.

Perhaps the most radical new changes the Supreme Court has added to Takings jurisprudence to date are those reflected in *Eastern Enterprises v. Apfel*.²⁶¹ In that case, the Supreme Court found the 1992 Federal Coal Act²⁶² unconstitutional. The Coal Act provisions applicable in this case required any existing or former coal company to pay for health care coverage for miners and their dependents. The Social Security Administration was given the duty to allocate these costs among the coal companies. Eastern objected to its allocation (which exceeded \$5 million for a 12 month period) and claimed that the assessment was unconstitutional. A plurality of four justices (Rehnquist, Scalia, O'Connor, and Thomas) held the assessment unconstitutional under the Takings Clause. Thomas also argued it might violate the Ex Post Facto clause. Kennedy rejected all the above, but joined the first four agreeing it was unconstitutional—for Kennedy it violated Due Process. The remaining Justices, Breyer, Ginsburg, Souter, and Stevens felt no takings clause issue presented here, but subjected the matter to a due process analysis, opining in their dissent that the Coal Act did not violate Due Process.²⁶³ The breadth of the Court's wording in its decision is bound to open up vast new opportunities for litigation of partial takings. The Court

²⁵⁹ *Id.* at 706.

²⁶⁰ 42 U.S.C. § 1983 (2002).

²⁶¹ *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

²⁶² Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 (1994 ed. & Supp. II).

²⁶³ *Id.* at 553. (This Note confines this discussion to the Takings Clause only).

found a taking can occur whenever a "severe, disproportionate, and extremely retroactive burden on Eastern."²⁶⁴ This is indeed a radical new doctrine. Where the Court goes from there seems even less predictable than before.²⁶⁵

The uncertainties in Takings jurisprudence, and the bias against compensation that prevailed until recently at the Supreme Court level, have led to a severe backlash against environmentalism in the United States, in which property rightists, or the "wise use" movement members,²⁶⁶ and the Republican Party have taken aim at environmentalism by attempting to pass legislation that would restrict either the amount of property that can be taken before compensation is paid and/or the budgets of environmental agencies.²⁶⁷

In addition to such attempts at legislation, property rightists have brought suit after suit on regulatory takings in federal and state courts.²⁶⁸

Further, the level of vitriol between the warring camps of environmentalism and property rightists appears to be increasing

²⁶⁴ *Eastern Enterprises*, 524 U.S. 498, at 538.

²⁶⁵ Of course, the case is capable of being distinguished from future cases on several grounds, but the breadth of its holding does appear to be a significant warning to regulators.

²⁶⁶ "Although proponents of wise use do not have a common leader or agenda, they are united by their shared resentment of government regulation of privately held property." William L. Inden, *Compensation Legislation: Private Property Rights vs. Public Benefits*, 5 DICK. J. ENVTL. L. & POL'Y 119, 120 (1996). For general background on the Wise Use movement, see Richard Miniter, *You Just Can't Take It Anymore: America's Property Rights Revolt*, 123 POL'Y REV. 40, 40 (Fall 1994) (describing goals of this movement and estimating that there are "more than 500 active property rights groups across the country, with a total of some two million members.").

²⁶⁷ See, e.g., The Job Creation and Wage Enhancement Act, part of the Republican party's 1994 "Contract with America," which would have shifted much of the costs of environmental regulation from businesses, states and local governments to the EPA and other federal agencies. Section 8 available at http://www.geocities.com/way2muchsense/prior_issues/contract.html (last visited Jan. 20, 2002); Frank Clifford, *Bill Would Limit Federal Power Over Environment*, N.Y. TIMES, Dec. 28, 1994, at A1. See also Jonathan E. Rinde, *Take Me, Take Me: Can There be a Private Property Rights Bill that Environmentalists Support*, PA. L. WKLY., Aug. 14, 1995, at 56 (discussing several property rightist bills proposed in 1995); David Coursen, *Property Rights Legislation: A Survey of Federal and State Assessment and Compensation Measures*, 26 ENVTL. L. REP. 10, 239 (1996); Royal C. Gardner, *Invoking Private Property Rights for Environmental Purposes: The Takings Implications of Government-Authorized Aerial Pesticide Spraying*, 18 STAN. ENVTL. L.J. 65 (1999); Robert Meltz, *Wellands Regulation and the Law of Regulatory Takings*, 30 ENVTL. L. REP. 10468 (2000) (discussing Congressional efforts to amend sections of the Clean Air Act over the years).

²⁶⁸ See generally Gardner, *supra* note 267; Inden, *supra* note 266.

steadily.²⁶⁹ Suggestions as to how this kind of dilemma might be avoided on the international scene—and perhaps here at home too—will be discussed in Section III.

United States regulatory Takings jurisprudence did have the effect of curtailing the absolutism of property rights often attributed to Lockean theory—a benefit for the advancement of environmental programs in the United States. On the other hand, the lack of clarity left a bad taste in the mouths of both camps and led to unnecessary enmity—a distinct disadvantage to environmentalism.

III. TOOLS FOR THE ENVIRONMENT: SOVEREIGNTY AND PROPERTY RIGHTS

Success on the international front necessitates reliance on sovereignty as that concept has evolved, as discussed in Section I.

Thinkers and environmentalists have expressed great concern about sovereignty and its seeming obdurance in the face of the increasingly rapid deterioration of the earth's environment.²⁷⁰ Some are concerned that sovereignty's inaction in the face of quickly spiraling damage—or its leaden pace in attempting to deal with same—may be simply an indication that sovereignty is inherently unable to cope with the problems of earth's interconnected environment.²⁷¹ Despite these

²⁶⁹ See, e.g., Michael Grove, *The Importance of Property Rights: Capitalism Is the Process of Creative Devotion*, in 59 VITAL SPEECHES OF THE DAY 569, 571 (1993) (stating that environmental bureaucrats are worthless parasites); see also Casperson, *supra* note 118, at 357 (giving us a good example of the divide between the camps by discussing the debate, when the gray wolf was re-introduced into Yellowstone, between Secretary of the Interior Bruce Babbitt and Idaho's Republican Representative, Helen Chenoweth. "Babbitt hailed the reintroduction as 'an important and historic chapter in American history.'" Chenoweth, in stark contrast, viewed the wolves as "trespassers onto the lands of Idaho and Babbitt himself as a "trespasser onto the Constitution of the United States."").

²⁷⁰ Many environmentalists advocate the need to end sovereignty entirely before international environmentalism can succeed. See, e.g., the "social" environmental movements *supra* footnotes 116 and 117.

²⁷¹ One example that gives rise to such pessimism is the Kyoto Protocol. Twenty-two years in the making, the second (which would bind developed nations, with exceptions for China and India, to cut emissions of gases which produce global warming by 5.2 % by 2012 from 1990 levels) was finally reached in 1997. Signed by 100 nations, it remains un-ratified and the Bush Administration has recently made clear that the United States, the world's greatest producer of such emissions, will not support the agreement. See, e.g., Douglas Jehl, *U.S. Going Empty-Handed to Meeting on Global Warming*, N.Y. TIMES, March 29, 2001, at A1.

concerns, the simple fact is that there is no other choice available for the development of international agreements. Sovereignty is not only a fact of life and unlikely to disappear in the near future, but it can also be a valuable tool for international environmentalism. As we have seen, sovereignty, in the process of redefining itself, has made itself into what can and should be environmentalism's valued ally.

Sovereignty, as now defined, also appears to be the "just right" candidate for a global environmental regime in terms of implementation. This is because the state sovereign is now "weak" enough (read aware of its responsibilities to the world at large) to see itself as part of a global community; yet the state is "strong" enough (read willing and able to act) to be able to implement such a global environmental regime. To put it in fairy tale terms—Sovereignty is not too strong and it is not too weak: for the required role in international environmentalism it is "just right."

Further, the state also seems the perfect and appropriately sized, vehicle to serve as enforcer. A larger body, such as the United Nations or the European Union²⁷² may be too large and localities too small. A look at the concept of urban sprawl provides a good example of why the state seems "just right" in this capacity as well—can one imagine urban sprawl being managed from the international level? What does a diplomat from France know about the problems associated with sprawl affecting people living in Richmond, Virginia? Not very much. Very beneficial decision making can be achieved at the international level—with very efficient outcomes because of the input of experts and the ability to hear multiple solutions, but can the United Nations or some other similar body, keep on eye on Fairfax County, Virginia? The answer is no.

On the other hand, if sprawl is addressed only at the local level, for example, by Fairfax and other counties, it produces countywide infighting as counties, motivated by self-interest, wrestle with one another to secure larger portions of the finite tax base pie. Such inconsistency at the local level provides only miniscule per county gains. In the end, there is still a Wal-Mart every five miles and incoherence in planning is the norm. The United Nations is too big, the locality is too small, but the state/federal level of administration is, probably just right.

If utilized in such a fashion for implementation, states will feel as if they are invested in the process. Instead of being dictated to by an

²⁷² This is not to denigrate the United Nations or the European Union. The United Nations has contributed extensively to international developments and in many ways the European Union is light years ahead of the United States in addressing environmental problems. See generally *LAW IN ENVIRONMENTAL DECISION-MAKING: NATIONAL, EUROPEAN, AND INTERNATIONAL PERSPECTIVES* (Tim Jewell & Jenny Steele eds., 1998).

international body, state representatives could help formulate the environmental regimes and play a significant role in their implementation. Individual states have the best chance of effectively implementing such legislation and if states are allowed, as the federalist system allows in the United States, to put a local flavor on overarching decisions, it may make these decisions more palatable to locals. By providing effective implementation measures at a level that would prevent local infighting, state sovereignty becomes not a stumbling block to global environmentalism, but rather is an integral partner within it. Sovereignty's strengths are harnessed for a greater good.²⁷³

As we have seen with sovereignty, private property rights also have undergone a process of re-conceptualization, moving from absolutist Lockean interpretations to incorporate restraints and responsibilities, such as the public trust doctrine and nuisance prohibitions as supported by Takings jurisprudence in the United States. As now construed, private property is proving itself as a valid partner for environmentalism.

Even though the property rights backlash discussed *supra* would have environmentalism and private property at war, the fact is that both are better served with the other in place.

And, as with sovereignty, private property rights are a fact of life and one that environmentalism should accept on that ground alone. Further, private property can partner very well with environmentalism to produce acceptable international solutions.²⁷⁴ As Thomas Merrill points out so well, private property is not "about to wither away, like the bourgeois state after the proletarian revolution . . . private property clearly is ascendant around the world...the business corporation, owned by

²⁷³ It should be noted that states are more than willing to relinquish control when global trade is the issue, allowing the WTO, NAFTA, and GATT to be implemented at the expense of sovereign rights. However, this global trade model can provide enlightenment for reluctant states—they are more than willing to accept reduced sovereignty in return for trade dollars, so why not accept it in return for global well-being—in that it can be used to point out that most states already participate in a global trade regime that was agreed to at the international level and implemented locally, so why not participate in an environmental global regime. As Prue Taylor writes, "states have seemingly surrendered substantial portions of their sovereignty over regulation of trade, the environment, and national economic development, in the interests of global free trade." TAYLOR, *supra* note 45, at 118.

²⁷⁴ There are some compelling arguments offered by private property rights advocates that strong private property rights are the answer to environmental problems. See generally WHO OWNS THE ENVIRONMENT? (Peter J. Hill & Roger E. Meinert eds., 1998).

shareholders as a form of private property, dominates other modes for organizing . . . labor."²⁷⁵

Merrill goes on to illustrate that widespread privatization and deregulation is going on in both socialist and capitalist countries—and that, within environmentalism itself, many programs and proposals borrow ideas from private property, not all of which are "market mimicking mechanisms," as Merrill describes them.²⁷⁶ That public regulation often incorporates these ideas in aid of environmentalism is indicative of some of the possibilities for partnership between private property and the environment.²⁷⁷

The environment versus trade/development issues arising under the General Agreement on Tariffs and Trade ("GATT") and its successor, the World Trade Organization ("WTO") and under the North American Free Trade Agreement ("NAFTA") provide one good backdrop against which to examine appropriate international Takings jurisprudence as one piece—but an important piece—of an international environmental regulatory regime that is broadly accepted, both among the sovereign states and among both property rightists and free-marketers on the one hand and environmentalists on the other.²⁷⁸

²⁷⁵ Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 *ECOLOGICAL L.Q.* 327, 343 (1998).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 343-44. It is important to note that many "free-marketers" advocate that all environmental problems be left to the market for the best and most efficient solutions and that no regulation per se. is therefore necessary or appropriate, *see, e.g.*, TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (1991). The branch of law known as "Law and Economics" (whose advocates include several prominent judges such as Richard Posner and indeed, entire law schools, for example, the University of Chicago) embraces this type of philosophy. The problem with Law and Economics is that it has difficulty including "irrational" formulations into its "rational" underlying calculations usually based on cost-benefit analysis. How, for example, does one place a value on the inherent beauty of an unspoiled woodland? It is much easier to calculate the value of the woodland in terms of its benefits to man—the value of the wood, the value of the property, the potential value of the untapped natural resources beneath the land, the jobs generated in these endeavors, etc. How can simple beauty win when competing with concrete monetary values and job growth? For a critique of Law and Economics from the feminist perspective, decrying its reliance on cost/benefit analysis in the environmental arena and its to the total exclusion of inherent benefits, *see* Dowling, *supra* note 100; *see also* Freyfogle, *supra* note 134 (Freyfogle questions Law and Economics: "It is not enough, for instance to put neoclassical economic models to use as if they were value free or enjoyed unquestioned scholarly acceptance.").

²⁷⁸ A detailed discussion of all three, GATT, the WTO, and NAFTA, is beyond the scope of this Note. Untold numbers of articles have been written on aspects of each. *See*

In aid of the usefulness to each other of private property and environmentalism, it is essential that Takings jurisprudence in International Law neither create the uncertainties and lack of clarity found in United States Takings law, as discussed in Section II, nor take the kind of doctrinaire anti-compensation approach that has led to such frustration and angry backlash against environmental regulation in the United States, also discussed in Section II. Certainly, in the development of an acceptable international environmental regime, the issue of "takings" of various forms, whether so-called or not, will need to be dealt with. The North/South²⁷⁹ divide makes that inevitable and is a question the resolution of which lies at the heart of a successful international regime.

For some years, the United States has used trade embargoes or threats thereof as part of its international marine conservation policies. Through such threats, the United States attempts to bring the offending sovereign in line with United States thinking on proper conservation norms. Examples include the use of such threats to reduce the number of whales taken;²⁸⁰ prevent tuna fisherman from killing dolphin as they spread and haul in tuna nets²⁸¹; and avoid the drowning of sea turtles in shrimp fishing.²⁸² These United States threats have been the subject of proceedings brought against the United States under the WTO dispute resolution procedures.

With respect to NAFTA, corporations domiciled in one country but doing business within the territory of a second sovereign country have proceeded against that second sovereign when that country imposed or attempted to enforce one of its own internal environment regulations against the corporation, using the NAFTA dispute resolution proceedings.

generally Jeffery Atik, *Uncorking International Trade, Filling the Cup of International Law*, 15 AM. U. INT'L. L. REV. 1231 (2000).

²⁷⁹ "North/South" is used to refer to the Developed/Developing countries split. A major impediment to a global environmental regime is the chasm of differences between these two camps.

²⁸⁰ See, e.g., Gene S. Martin, Jr. & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pell and Packwood-Magnuson Amendments*, 17 DENV. J. INT'L. L. & POL'Y 293, 294-97 (1989).

²⁸¹ See, e.g., Joseph J. Urges, *Dolphin Protection and the Mammal Protection Act Have Met Their Match: The General Agreement on Tariffs and Trade*, 31 AKRON L. REV. 457, 459-60 (1998).

²⁸² For the WTO ruling against the United States in the shrimp-turtles case, see Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Oct. 12, 1998, 38 I.L.M. 118 (1999). For background and a good discussion of the case, see Susan L. Sakmar, *Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtles Case*, 10 COLO. J. INT'L ENV'T'L. L. & POL'Y 345 (1999).

These disputes reveal several important lacks that seem to present glaring obstacles to the development of just and equitable international environmental regulatory takings jurisprudence. The first and perhaps most obvious gap is the absence of a starting point or threshold. Although the Fifth Amendment Takings clause is a broad statement of principal, and open to a variety of interpretations, it, together with developed nuisance law, takings jurisprudence and existing regulation constitutes a very rich and flexible beginning point for domestic dispute resolution. It is not perfect, but it is there, and it has the strength of credibility and precedent behind it.

There is no comparable accepted base point or framework from which to begin all takings analysis in international law. Perhaps because the various bases upon which any such analysis would rely come from a multitude of sources²⁸³ within international law, and/or perhaps because such a framework would be difficult to construct, given the sovereign states' disparate viewpoints no such framework is in place. There is, however, a good deal of justifiable optimism because of organizations such as the 1996 International Organization for Standardization's ("ISO") 14000 series standards. These are limited and entirely voluntary standards, which are not currently enforceable. The standards were adopted covering environmental management systems, environmental auditing, labeling, and environmental performance evaluation. The management standard would have corporations adopting, voluntarily, a set of basic standards of operation relating to environmental issues. This is sufficiently broad in nature as to suit itself to integration with each state's domestic laws—and to encourage those laws to emulate the standards.²⁸⁴

In addition to the absence of a basic framework, observers of the dispute resolution processes in the WTO and under NAFTA cannot help

²⁸³ As briefly discussed in Section I, *supra*, sources of international law on environmental issues are more likely to constitute "soft law" rather than "hard law." Hard law on the environment is primarily contained in treaties and in "customary law" when and as it is developed. "The impressive strides that the international community has made in dealing with global environmental problems . . . have come about through traditional legal mechanisms such as treaties, progressive development of customary law, and various forms of 'soft' legal processes." Richard J. McLaughlin, *Sovereignty, Utility and Fairness: Using U.S. Takings Law To Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV. 855, 899-900 (1999).

²⁸⁴ For a discussion of ISO standards, see generally Robert Clifford, *ISO 14000: The Work I Progress*, 3 ALBANY ENVTL L. OUTLOOK, No. 2, 5 (1997); Christopher Bell & Evan van Hook, *Practical Considerations in Implementing ISO 14001*, 3 ALBANY ENVTL L. OUTLOOK, No. 2, 11 (1997).

but be struck by the “ad-hoccean” nature of the proceedings,²⁸⁵ the resultant loss of not only a precedential base, but also of the certainty of expectation so necessary to both business/development interests and the successful implementation of intra-sovereign environmental regulatory regimes.²⁸⁶

This is not to suggest that one over-arching universal, international environmental regulatory regime be installed. Such a thing may never be possible—and may not be at all desirable. Many regulations already exist via the multitude of treaties already in place and, as discussed, the many developments in customary law that are already in place. It seems only sensible, as well, that any top-down over-arching regulatory regime would be less likely to succeed than a regime that combined regulation, jurisprudence, market mechanism tools, voluntary compliance, continued technological and scientific research and development, and extensive educative knowledge dissemination.

The adoption of a very basic threshold level environmental code could go a long way toward developing credible jurisprudence. What that code would incorporate is beyond the scope of this Note, but basic principles of equity—including compensation for those asked to bear inordinate shares of responsibility for “our” environmental needs—should be incorporated to create a fair—just and right—framework.

Compensation for a truly onerous burden asked of an entity—be it an individual, corporation, or sovereign state—would seem to be a basic equitable requirement for such a code.

The duty to compensate in such cases should however, not obtain in all situations where any regulatory taking occurs, for two simple reasons: one, impracticability; and two, the clear in-equities resulting were we to compensate for negligible takings or deliberately harmful activities.

As to “negligible” takings, obviously where there is no lasting harm to the property owner or little economic damage, no compensation should be paid. In these situations however, no unnecessarily fine

²⁸⁵ For discussions of the ad-hoc nature of dispute decisions in the WTO, see McLaughlin, *supra* note 283. With respect to similar information concerning NAFTA, see Anthony DePalma, *NAFTA's Powerful Little Secret*, N.Y. TIMES, Mar. 11, 2001, at Section 3.

²⁸⁶ Certainty of outcome can never be absolute, and a certain level of “ad-hocceanism” is inevitable—and, for many reasons—often desirable. But some level of certainty is important to both sides in the development vs. the environment debate. For an excellent discussion re the importance of certainty to both “sides,” see, e.g., Gaetan Verhoosel, *Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking A “Reasonable” Balance Between Stability and Change*, 29 LAW & POL’Y INT’L BUS. 451 (1998).

distinctions should be drawn, such as results in the appearance of arbitrariness or inequities among those similarly situated. For example, the negligible harm in *Loretto* (see *supra*, Section II D) was entitled to compensation because of the "physical invasion" involved by the cable companies' installation of equipment, but the severe economic loss in *Allard* (see *supra*, Section II D), in which the plaintiff's right to sell his artifacts was taken away from him and he was not compensated. Awarding compensation for negligible harms while refusing same for substantive damages seems arbitrary and creates an appearance of unfairness. This is not to suggest that the "physical invasion" rule should be abandoned or that *Loretto* should not have been paid—it is to suggest that inequities cannot be allowed.

As to landowners—or corporations or sovereigns—who deliberately create harm, it would seem inequitable to compensate them. Cases of deliberate environmental malice would, at first blush, seem farfetched. However, with the advances scientists have made in the study of ecology, increasing degrees of knowledge must be imputed to states, corporation and individuals with regard to the potential for diffuse extraterritorial harms arising out of actions taken on their own property. Any international framework adopted should include processes for leveraging the knowledge factor so as to avoid the necessity of paying compensation. Several existing tools could be put to expanded use in this regard over time.

The developing notion of the universal commons or the "common heritage of mankind" (discussed in Section I E *supra*) could be most helpful in this regard. Certain areas of the earth—Antarctica, the deep seas, etc.—are already recognized as Earth's common areas and are the subject of various international agreements to protect them against usages harmful to all states. But much more needs to be done in this area. For example, it is known that there needs to be a good deal of forest coverage over the face of the earth. Using a universal commons theory, it might be possible to build into the international environmental framework an agreed upon number of forested acres to be maintained worldwide. Also needed, is the maintenance of particular types of forest, including rainforests—and we might do the same with those. The purposes of such a maintenance agreement—global warming problems and habitat preservation come to mind—could be acknowledged and agreed upon. Misuse of acreage included in each nation's allotment of the worldwide total would therefore become a knowledgeable act of harm, not requiring compensation. Obviously, before such allotments were set, the basic North/South argument would come into play. The developing nations who are asked to

preserve, say, a rainforest, cannot fairly be asked to bear that burden after the developing nations have themselves created much of the earth's current burden by destroying, in the process of their own development, too much of their own forestry; thus creating a need to burden the developing nation. Adjustments, including compensation, must, then, fairly be first expected prior to identifying and beginning the protection of such common areas.

Knowledge, or notice, would then provide exceptions for the requirements for compensation in cases of severe harm by regulatory taking. So too, should nuisance. Just as it has protected the development of environmental regulation in the United States, nuisance can be brought to bear on the development of international regulation. However, to avoid the type of righteous backlash against regulation that has occurred in the United States, care should be taken to avoid burdening individual entities without compensation in situations where a new nuisance regulation creates an onerous burden on an entity, who neither knew of the potential for such regulation, had no previous notice of it, nor could reasonably be expected to know or learn of it.

Compensation can take many forms, including trade-offs of various sorts, and many forms of creative remuneration can and will be devised in the future. We utilize creative forms of compensation at the national security level (e.g., compensating North Korea for not producing nuclear weapons) so there is no reason we cannot use the same creativity—and sense of urgency—in devising compensatory environmental agreements.

Another important significant lack in WTO and NAFTA dispute resolution processes is the closed-door nature of both. The secrecy, lack of openness to outsiders (including acceptance of *amicus curiae* briefs), and non-public nature of the proceedings resulting in little media reporting²⁸⁷ all breed a distinct level of skepticism that is not conducive to reasoned international environmental consensus, and, worse, can lead to the types of frustrated backlash witnessed in Seattle during the 1999 WTO meeting there where pro-environmentalists and others engaged in violent street demonstrations. Openness to advice from reputable environmental NGOs and scholarly thinkers could go a long way toward developing international environmentalism. It might also help to improve the quality of the decisions, which of course, is in turn dependent on the quality of the jurists. Openness, public access and media coverage should lead to a

²⁸⁷ For a discussion of these factors, *see, e.g.*, DePalma, *supra* note 285.

demand for excellence and an accounting for failure to create, and/or follow, precedent. It should also lead to a demand for clarity and a good degree of certainty for both business development and for sovereign states attempting to implement environmental regulations.

Perhaps, we may even arrive at a mutually acceptable answer to the 1922 Holmesian question—When does regulation go too far?