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# Problems with Relocations: Is the Fifth Amendment a Possible Solution?

Kendra R. Howard\*

## I. INTRODUCTION

“Environmental justice” theory asserts that minority and low-income communities bear a disproportionate number of environmental burdens and undesirable land uses.<sup>1</sup> Recent studies show that minorities suffer excessively from exposure to environmental risks caused by pesticides, hazardous wastes, water pollutants, and airborne pollutants.<sup>2</sup> Minorities’ lack of political and economic power, or even outright racial bias, affecting both siting and permitting decisions may cause this disproportionate burden.<sup>3</sup> In 1994 President Clinton signed an Executive Order entitled “Federal Actions to Address Environmental Justice in Minority Populations”

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1. Karen Smith, *How the Legal System Has Failed the Environmental Justice Movement*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 325 (1997).

2. *Id.* at 327-30.

3. *Id.* at 331-32. Some politically powerless communities with high unemployment rates welcome locally undesirable land use sites (LULUs) because of their potential to provide employment or other economic incentives:

A recent example of community support for a LULU designation occurred in the predominately African-American town of Convent, Louisiana. Residents of Convent complained that the environmental justice advocates opposing the approval of a proposed plastics plant never bothered to ask residents if they wanted the plant in their community. Most residents welcomed the plant because of the hundreds of jobs and millions of dollars in school revenue that could be generated by its designation. In situations like the one in Convent, environmental justice advocates surmise poor and minority residents’ support for LULUs because of limited economic opportunities available in their communities. Concerned that communities like Convent may be vulnerable to the promise of economic prosperity made by facility owners seeking a home for their undesirable land use, the federal government becomes an active participant in the environmental justice movement.

*See* William Michael Treanor, *The Original Understanding of the Taking Clause and the Political Process*, 95 COLUM. L. REV. 782, 834 (1995). A siting decision is selecting where a LULU will be located. A permitting decision is selecting a license or permit to allow the LULU to operate.

in an effort to promote environmental justice.<sup>4</sup> The Executive Order stated that federal agencies should determine which of their activities adversely affect minority and low-income populations and make an effort to address these concerns.<sup>5</sup> The Executive Order strongly encouraged the consideration of demographic impacts in environmental decisions. However, it made clear that there is no legally enforceable right to equitable distribution of environmental risks, at least not under the Executive Order.<sup>6</sup> Part I of this Note discusses the problems associated with relocating neighborhoods and explores the possibility of applying the Takings Clause of the Fifth Amendment to cases involving problems with relocations. Part II of this Note examines the background of relocations including the actions of the EPA, communities, and industry to correct the problems involved in relocations. Part III analyzes the idea that the Takings Clause presents a distributive justice issue applicable in an environmental justice context. Part IV examines the Takings Clause and its possible application to correcting problems with relocations. Part V proposes that the Takings Clause should apply to relocation situations. Finally, Part VI concludes that problems exist with applying the Takings Clause to relocations involving private entities.

## II. BACKGROUND ON RELOCATIONS

Communities relocate as a result of solid and hazardous waste disposal, mining wastes, underground mine fires, application of waste oils on dirt roads, military dumps, and industrial plant discharges.<sup>7</sup>

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4. Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1995).

5. *Id.* §1-101. The Executive order stated that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” *Id.*

6. *Id.* § 6-609. Equitable distribution refers to ameliorating the disproportionate burden on low-income populations and minority populations when making decisions regarding LULUs.

7. The terms “relocation” and “buyout” are used interchangeably. A community is relocated in two situations. The first situation is where the community rallies for and desires relocation because of pollution. The other situation is where an expanding company desires the community’s land and forces the community to move, or a company squeezes out members of a community by buying only a few of the abandoned homes. This Note will address the first situation in which communities want a permanent move.

No one agency, level of government, or set of rules dictates the direction of relocation. The Environmental Protection Agency (EPA), federal government, state governments, local governments, and industries blamed for the contamination all provide funds to relocate communities.

### A. EPA Actions

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>8</sup> in 1980. CERCLA authorizes the EPA to respond to threatened and actual releases of hazardous substances.<sup>9</sup> In 1982 the EPA promulgated the National Oil and Hazardous Substances Pollution Contingency Plan (NCP)<sup>10</sup> pursuant to CERCLA and Executive Order 12316.<sup>11</sup> The NCP sets forth regulations to implement CERCLA provisions.<sup>12</sup> The Superfund

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8. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994). CERCLA, commonly known as the Superfund, was enacted by Congress on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad federal authority to respond directly to real or threatened releases of hazardous substances that may endanger public health or the environment. Over five years, \$1.6 billion was collected and the tax went to a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites. CERCLA established prohibitions and requirements for closed and abandoned hazardous waste sites, § 9621, provided liability for persons responsible for the release of hazardous waste at these sites, § 9607, and established a trust fund to provide for clean up when no responsible party was identified, § 9611.

9. National Superfund Permanent Relocation Interim Policy, 64 Fed. Reg. 37,012 (July 8, 1999).

10. 40 C.F.R. §300 (1982). The National Oil and Hazardous Substances Pollution Contingency Plan, more commonly called the National Contingency Plan or NCP, is the federal government's blueprint for responding to both oil spills and hazardous substance releases. The National Contingency Plan is a national response capability and promotes overall coordination among the hierarchy of responders and contingency plans.

11. 46 Fed. Reg. 42,237 (Aug. 20, 1981). The Executive Order states:

1(a) The NCP, which was originally published pursuant to § 311 of the Federal Water Pollution Control Act, shall be amended to contain the implementing procedures for the coordination of response actions to releases of hazardous substances into the environment. 1(c) The responsibility for the amendment of the NCP and all of the other functions vested in the President by § 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, is delegated to the Administrator of the Environmental Protection Agency.

*Id.*

12. *Id.*

Amendments and Reauthorization Act (SARA) amended CERCLA in 1986.<sup>13</sup> CERCLA outlines two types of response actions: removal actions, used when immediate action is required;<sup>14</sup> and remedial actions, used in longer-term, non-time critical events.<sup>15</sup> CERCLA authorizes temporary relocations in both remedial and removal actions,<sup>16</sup> while it considers permanent relocations only in remedial actions.<sup>17</sup> The two primary rationales behind selecting relocation as a remedy are health considerations and engineering considerations.<sup>18</sup>

The Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) sets out regulations for use by all federal agencies when implementing relocations.<sup>19</sup> The Department of Transportation developed and oversees the URA<sup>20</sup> to ensure fair and equitable treatment in cases of relocation.<sup>21</sup> The URA covers property acquisition procedures and relocation benefits, and it requires that the residents receive the fair market value of their property at the time of the acquisition.<sup>22</sup> The Army Corps of Engineers and the Bureau of Reclamation perform the relocations for the EPA.<sup>23</sup> Of the many problems and concerns involved in relocations, balancing health concerns with the huge costs involved in relocations remains the primary concern.<sup>24</sup>

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13. *Id.* The Superfund Amendments and Reauthorization Act (SARA) amended CERCLA on October 17, 1986. SARA reflected the EPA's experience in administering the complex Superfund program during its first six years and made several important changes and additions to the program.

14. CERCLA, 42 U.S.C. § 9610(23) (1994).

15. § 9601(24).

16. § 9601(23).

17. § 9601(24).

18. Health considerations are risks that could not be addressed in a timely manner without relocation. Engineering considerations include the fact that a proper clean-up of a site may require the demolition of homes.

19. ENVTL. PROT. AGENCY, MEETING SUMMARIES FROM THE EPA/ICMA RELOCATION STAKEHOLDER FORUMS 1, 3 (May 1998).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 3.

## 1. Escambia Pilot Project

In order to understand the issues involved in relocating a community, the EPA selected the Escambia Wood Treating Plant in Pensacola, Florida as a national relocation pilot project.<sup>25</sup> The plant began operation in 1942 as a manufacturing facility for the treatment of wood products with creosote. In 1963 PCP-treated No. 6 diesel fuel replaced creosote.<sup>26</sup> The plant produced considerable amounts of contaminated wastewater, which it sent to an unlined impoundment on the site. After the plant had operated for thirty-eight years, the EPA requested that the plant file a notice of its hazardous waste activity and issue a report on its processes.<sup>27</sup> In 1985 the plant received a warning letter from the EPA because of its violation of the Resource Conservation and Recovery Act financial requirements.<sup>28</sup> After the plant failed to respond to the warning letter, the EPA sent a Notice of Violation.<sup>29</sup> Over the next four years, the plant committed more violations and the EPA and the Florida Department of Environmental Protection took enforcement actions and, finally, in 1991 Escambia declared bankruptcy and left the site.<sup>30</sup> An Environmental Response Team assessed the site and found that a removal action was necessary. In October of 1991 the EPA began removal action and placed the site on the National Priorities List.<sup>31</sup>

Throughout the clean-up and relocation process, contentions grew between the EPA and the community surrounding the site.<sup>32</sup> The line of communication between the EPA and the community remained closed.<sup>33</sup> The EPA continually shifted its position regarding the

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25. National Superfund Permanent Relocation Interim Policy, 64 Fed. Reg. at 37,012.

26. ENVTL. PROT. AGENCY, *supra* note 19, at 26.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Sites are listed on the National Priorities List (NPL) upon completion of a Hazard Ranking System (HRS) screening, and public solicitation of comments about the proposed site. Final placement of the site on the NPL occurs after all comments have been addressed. Issues in this process include how sites are placed on the NPL, the public comment process, and how sites are deleted from the NPL. The NPL primarily serves as an information and management tool. It is a part of the Superfund clean-up process and is updated periodically.

32. ENVTL. PROT. AGENCY, *supra* note 19, at 26.

33. *Id.*

relocation, initially contending that relocation was unnecessary, and then deciding to implement a full relocation.<sup>34</sup> This shift in policy eroded the trust of the community.

## 2. Stakeholder's Forums

The EPA learned from the Escambia pilot project experience and noted the problems in the community's attitude toward the EPA. As a result, the EPA decided to hold a series of forums with representatives from those affected by relocations.<sup>35</sup> Participants represented industry, local government, state government, environmental organizations, public health organizations, federal agencies, and environmental justice groups.<sup>36</sup>

In July, 1999 the EPA used the feedback generated by the forums to establish an Interim Policy on Relocations. Although this policy addresses many key issues, there are critical issues that still need resolving.

## 3. Interim Policy on Relocations

The Interim Policy on the Use of Permanent Relocations as Part of Superfund Remedial Actions (the Policy) provides guidance to EPA regional decision makers on when to consider permanent relocations as part of a Superfund remedial action.<sup>37</sup> The EPA prefers to address contamination by utilizing clean-up methods that allow people to remain in their homes.<sup>38</sup>

However, the Policy lists examples of the types of situations where the EPA may consider permanent relocation. The list includes situations where the contamination cannot be cleaned up because of structures on the property, structures that cannot be decontaminated to safe levels, and treatment options that would require unreasonable restrictions on community members—like not allowing children to

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34. *Id.*

35. National Superfund Permanent Relocation Interim Policy, 64 Fed. Reg. at 37,013.

36. *Id.*

37. *Id.* at 37,012.

38. *Id.* at 37,013.

play in their yards.<sup>39</sup> Furthermore, the Policy stresses the importance of working with the affected stakeholders to identify major issues that need consideration in the remedy selection evaluation.<sup>40</sup>

The Army Corps of Engineers and the U.S. Bureau of Reclamation conduct relocations for the EPA because of their expertise in applying the URA.<sup>41</sup> The EPA also provides relocation counseling services as required under the URA.<sup>42</sup> When potentially responsible parties fund relocations, they should follow procedures comparable to the URA.<sup>43</sup> As soon as the EPA becomes involved at a site, it should involve community members.<sup>44</sup> Communities wishing to use a relocation expert or advisor can access one through the EPA's Technical Assistance Grant Program.<sup>45</sup> The EPA also recommends formation of a community group to discuss the issues involved with relocating.<sup>46</sup> The Policy also suggests that the EPA should explore opportunities to partner with other agencies and organizations such as the Department of Housing and Urban Development or the Red Cross to help identify other potential assistance.<sup>47</sup>

### *B. Community and Industry Actions*

Many communities find strength in community organizing. A solid, unified community group provides a good bargaining position to demand results.<sup>48</sup>

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39. *Id.*

40. *Id.*

41. National Superfund Permanent Relocation Interim Policy, 64 Fed. Reg. at 37,014. These groups developed expertise in applying the URA because many government agencies utilized them to handle numerous property acquisitions.

42. *Id.* Available services include moving costs, utility deposits, interest differentials, transportation costs, school costs, and cemetery relocation costs. CTR. FOR HEALTH, ENV'T AND JUSTICE, GETTING ORGANIZED AND GETTING OUT: A CITIZEN'S GUIDE TO CONTAMINATION, COMPENSATION AND RELOCATION (1994).

43. National Superfund Permanent Relocation Interim Policy, 64 Fed. Reg. at 37,014.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. CTR. FOR HEALTH, ENV'T AND JUSTICE, *supra* note 42. The Center for Health, Environment and Justice identified steps to successfully form a strong and organized community group. Step one is to identify who lives and works in the community. It is important



From the industry's prospective, a proactive buyout is the most economical option.<sup>49</sup> A company that is forced to participate in a buyout may incur expense as a result of litigation costs and damage to their reputation in the community.<sup>50</sup> Companies also believe that,

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to find out whether everyone wants relocation or if some want to stay regardless of the risks. Step one also considers churches and businesses that depend on the community for financial support, and then decides where to draw the lines of the evacuation.

The second step entails identifying the problem by noting where the strange smells originate, and the symptoms of those who suffer from illness as a result of the toxins.

Step three outlines building people power. The group must educate the community about the problem through print media or television. Door-to-door contact is extremely effective in gaining a person's complete attention and addressing any concerns they have immediately. Petitions also effectively rally support, especially when combined with door-to-door activities.

Step four is a community meeting. Selecting both a good location and date prove key when organizing a large community meeting. The meeting must have an agenda that covers pertinent issues and gives the meeting substance and direction.

Step five is setting goals. Goal setting should include the entire group and goals should never be set solely by a core group of leaders.

Step six is setting up the organization. The authors suggest a wheel and spoke design for setting up the organization. At the center of the wheel lies the hub, or community group, and the spokes of the wheel represent standing committees. Each committee has a chair that guides the committee in meetings and courses of action. Each committee then presents its ideas to the hub. This is the best way of organizing because the spokes offer diverse groups for each person to join so they are not forced to agree on one specific approach.

Step seven focuses on relocating the community. This step includes identifying all issues associated with relocating, like moving costs and what to do with the land when people choose to stay in the community. Vacant homes attract vandals, making security an issue for those who remain. The community should also make arrangements for the maintenance of vacant areas to prevent overgrown grass or litter.

Step eight is identifying targets. Once the community knows the origin of the problem, they must decide how to implement change. They may choose legal, scientific, or political strategies or a combination of the three. However, the plan of action the community chooses is useless if the public is not made aware. *Id.*

49. Telephone Interview with John Mitchell, Vice President of Consulting Service, Prudential Interaction Consulting (Nov. 17, 1999) (on file with author).

50. *Id.* A company is in a better situation in a proactive buyout because it may negotiate a more satisfactory deal. If the company is forced to buyout a community, a court may force it to pay more money to move the community. Also, the community will probably look upon the company unfavorably because of its reluctance to voluntarily settle the matter. The company would then incur costs to control the damage done to its name because of the negative perception of its unwillingness to voluntarily participate in a buyout.

A Louisiana district judge upheld a water permit for a plastics company planning to build a \$700 million plant in a minority, low-income neighborhood, but stated that the company must compensate nearby residents for any drop in property value. William Pack, *Shintech Gets Permit, May Have To Pay Compensation*, THE ADVOCATE (Baton Rouge, La), Jan. 24, 1998, at 1B. The oral ruling confused the parties to the dispute. The judge did not state how to determine the amount for compensation, nor how far one could live away from the plant and still receive compensation. *Id.* The company needed the water permit and other air permits from the

rather than spending millions to fight local residents, they may avoid lawsuits and gain favorable publicity by relocating the residents.<sup>51</sup> However, companies typically do not want to establish a precedent of relocating communities that complain about living near plants. They fear that the prospect of relocating may encourage people to move near plants and then blame the plants for illnesses they may have already had.

### C. Case Study—Wagner’s Point

Wagner’s Point in Baltimore, Maryland, illustrates how the community, government, and industry can effectuate a relocation. After forty years of living in what they called an “industrial ghetto,” the 249 residents of Wagner’s Point in Baltimore, Maryland wanted out.<sup>52</sup> Community residents felt that they were forced to endure horrible living conditions that wealthy neighborhoods would never experience.<sup>53</sup> Every day community residents inhaled noxious odors from the sewer plant and oil refinery located in their backyards.<sup>54</sup> The warning sirens from the twenty-plus chemical plants near their homes terrified the community residents, and they suffered as loved ones died of cancer.<sup>55</sup> This neighborhood of twelve-square blocks

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Louisiana Department of Environmental Quality to begin construction of the plant. *Id.* Residents tried to stop issuance of the permit stating environmental justice as the basis their argument. *Id.* The judge ruled that although many of the community’s residents were black, the site selection was race-neutral. *Id.* The judge also stated that the permitting process failed to adequately consider the impact the plant would have on the value of the surrounding property. *Id.*

51. Joe Mathews, *Paying Neighbors to Move; Mossville*, BALT. SUN, Dec. 6, 1998, at 1A. Some companies fear that buyouts will get out of hand with the prospect that people will be encouraged to move near a plant. *Id.*

Five elements provide successful relocations conducted by private industry: (1) the base offer is established by appraisal; (2) a premium over the appraisal price; (3) allowances (miscellaneous expenses like driver’s licenses and other special moving expenses); (4) a bonus (not in all programs) to sign up early, accept the offer, or to clear the lot; and (5) an information center staffed with people with real estate skills to help find new housing for residents (the sponsor maintains these centers rather than the attorneys because the sponsor must maintain a relationship with the people even after the attorneys leave). *Id.*

52. Heather Dewar & Joe Mathews, *Residents Want Out of Industrial Ghetto*, BALT. SUN, Apr. 19, 1998, at 1A.

53. *Id.*

54. *Id.*

55. *Id.*

experienced an abnormally high cancer rate, particularly lung cancer, lymphoma, and leukemia.<sup>56</sup>

A test of the neighborhood's air showed three cancer-causing chemicals at levels up to thirty times higher than levels the EPA considers safe.<sup>57</sup> Wagner's Point's cancer rate scored above the citywide average, which was higher than the state's average. Moreover, the state's average ranked the highest in the nation.<sup>58</sup> Despite this evidence, the industries refused to offer financial support for the buyout<sup>59</sup> and adamantly denied causing the residents' health problems.<sup>60</sup>

Because there was only one road leading into the neighborhood, in the event of an emergency, plans called for residents to shut themselves in their homes.<sup>61</sup> Consequently, community residents lived in constant fear of chemical accidents because the city had no plan by which to evacuate the residents.<sup>62</sup>

The residents wanted the city, state, and the responsible industries to help move them out of the neighborhood in order to attain a better quality of life.<sup>63</sup> The noxious industrial factories significantly lowered the property values in the neighborhood, so residents could only afford decent housing elsewhere if they received well above market value for their homes.<sup>64</sup> The residents argued that it would cost the government more to provide services and health care to the people in the neighborhood than it would to relocate them.<sup>65</sup> The residents gained the support of the Center for Health, Environment and Justice, an organization that helps communities fight the pollution in their neighborhoods.<sup>66</sup> They also had the University of Maryland

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56. Joe Mathews, *Hopkins Professor Prepared to Proceed with Cancer Research in Wagner's Point; Study Needs Government Funding*, BALT. SUN, June 5, 1998, at 3B.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Joe Mathews, *City Denies Wagner's Point Request; Schmoke Refuses Plan to Relocate Residents Out of Industrial Area*, BALT. SUN, June 20, 1998 at 1A.

63. *See* Dewar & Matthews, *supra* note 52.

64. *See id.*

65. *Id.*

66. *Id.*

Environmental Law Clinic as their counsel.<sup>67</sup> In addition, the residents had the support of many politicians.<sup>68</sup>

The residents approached the city, state, and various industries proposing that the three entities combine to pay \$15.2 million to relocate the residents of Wagner's Point.<sup>69</sup> Each of the ninety-eight homeowners would receive \$115,000 and the twenty-six renters would receive \$30,000 each.<sup>70</sup> The proposal also requested payment of moving expenses.<sup>71</sup> The city responded that as a matter of law and public policy they could not pay residents more than the market value of their homes.<sup>72</sup> According to city records, the highest property value in Wagner's Point between 1993 and 1997 was \$30,000.<sup>73</sup> The city rejected the proposal, explaining that the mayor's office received calls from people in Wagner's Point who did not want to move.<sup>74</sup> In addition to six families that expressed reluctance to relocate, two family-owned businesses did not want to move away from the petrochemical companies they served.<sup>75</sup>

The mayor soon changed his mind and decided to purchase the homes in the neighborhood, but under different terms than the residents' proposal.<sup>76</sup> The mayor offered to buy the land under the city's eminent domain laws for future expansion of a city sewage treatment plant.<sup>77</sup> The mayor stated that the city would pay only market value and that any additional payment money must come from other sources.<sup>78</sup> Otherwise, the city would not participate in a buyout.<sup>79</sup>

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67. *Id.*

68. *See id.*

69. Joe Mathews, *Wagner's Point Awaits Reply From Mayor on Proposal*, BALT. SUN, June 16, 1998, at 3B.

70. *Id.*

71. *Id.*

72. Joe Mathews, *City Denies Wagner's Point Request*, BALT. SUN, June 20, 1998, at 1A.

73. *Id.*

74. Joe Mathews, *Wagner's Point Residents Protest*, BALT. SUN, July 2, 1998, at 1B.

75. Joe Mathews, *Wagner's Point Buyout Plan is Revived*, BALT. SUN, July 8, 1998, at 1A [hereinafter Mathews, *Buyout*]; Joe Mathews, *Wagner's Point Bill Introduced*, BALT. SUN, Oct. 20, 1998, at 1B.

76. Mathews, *Buyout*, *supra* note 75.

77. *Id.*

78. *Id.*

79. Joe Mathews and Gerard Shields, *Wagner's Point Thrown A Curve*, BALT. SUN, July 17, 1998, at 1A.

The decision met with mixed emotions. The plant's expansion required all the residents to leave their homes.<sup>80</sup> However, the residents wanted to move somewhere to obtain a better quality of life, and not just move for the sake of moving.<sup>81</sup> The residents feared that industry and government no longer would have an incentive to help them once the city condemned the property.<sup>82</sup> The residents sent letters to companies such as Shell Oil, Condea Vista, FMC Corporation, and Chevron requesting money to buy homes of similar condition and size in a neighborhood without heavy industry.<sup>83</sup> The U.S. Senate approved a spending bill that included \$750,000 for the buyout.<sup>84</sup> The money came from a federal Department of Housing and Urban Development grant to Maryland's Department of Housing and Community Development<sup>85</sup> and required residents to apply for the money from the state.<sup>86</sup>

On October 13, 1998 an explosion occurred at the Condea Vista chemical plant located in the neighborhood.<sup>87</sup> The residents panicked because there were no emergency procedures in place.<sup>88</sup> The company contended that the blast emitted nothing dangerous into the environment.<sup>89</sup> However, many residents complained of eye and throat irritation after the accident, and three people went to the hospital.<sup>90</sup> The attorneys from the University of Maryland Environmental Law Clinic advised the government that the community needed emergency planning reform,<sup>91</sup> but no one

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80. *Id.*

81. *Id.* One woman stated, "I would rather see my kids get cancer when they're 50 than have us move into the project . . . and take a chance of them getting shot." *Id.*

82. Joe Mathews, *Wagner's Point Negotiations End Abruptly*, BALT. SUN, Sept. 18, 1998, at 12B.

83. Joe Mathews, *Money Sought From Chemical Companies*, BALT. SUN, Oct. 8, 1998, at 3B.

84. Joe Mathews, *Senate OKs Bill to Give \$750,000 for Buyout*, BALT. SUN, Oct. 9, 1998, at 4C.

85. *Id.*

86. *Id.*

87. Joe Mathews, *UM Analysis Faults Officials After Oct. Blast*, BALT. SUN, Nov. 21, 1998, at 2B.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

addressed the issue.<sup>92</sup>

In November of 1998, Condea Vista decided to contribute to the relocation.<sup>93</sup> This relocation by government and industry set a national precedent.<sup>94</sup> The state promised up to \$2 million to help residents find comparable homes elsewhere.<sup>95</sup> This allowed the residents to locate more expensive housing than their current Wagner's Point homes. Later, Condea Vista, a detergent ingredient producer, and FMC Corporation, a herbicide maker, decided to offer \$5,000 as settlement to everyone who lived in Wagner's Point the previous year.<sup>96</sup> However, the \$5,000 per person was taxable and was attached to the residents' release of the companies' liability.<sup>97</sup> By signing the release, the residents relinquished any future right to sue the companies even if they later could prove that the companies contributed to their illnesses. Residents criticized the offer as an attempt by the companies to put a price on the loss of loved ones who died as a result of these very companies' negligence.<sup>98</sup>

FMC and Condea Vista hired Prudential Community Interaction Consulting to administer the relocation program.<sup>99</sup> The chemical industry's decision to act stemmed from a combination of sympathy for the residents; weariness from a year of news coverage; and fear of the residents' attorney, Peter Angelos, the Orioles owner and one of the state's foremost plaintiffs' lawyers.<sup>100</sup> Most of the residents,

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92. *Id.*

93. Joe Mathews, *Chemical Plant to Help Move Neighborhood*, BALT. SUN, Nov. 26, 1998, at 1B.

94. *Id.*

95. *Id.*

96. Joe Mathews, *Companies, Community Discuss Offer*, BALT. SUN, June 15, 1999, at 3B.

97. *Id.*

98. *Id.*

99. *Id.*

100. Joe Mathews, *Chemical Companies Make Offer*, BALT. SUN, June 9, 1999, at 1B. Angelos agreed to work pro bono. The residents long had stated their desires to compromise and not to involve legal action; however, the residents were frustrated by the lack of cooperation by the plants. After the city, state, and federal government agreed to help, the residents began to think about suing the plants. Angelos was willing to help them make a deal; however, that would be difficult because there was little or no evidence of a connection between the illnesses and the industrial pollution. Joe Mathews, *Angelos Takes Up Wagner's Point Cause; Residents Want Influence as They Consider Lawsuits*, BALT. SUN, Mar. 18, 1999, at 3B.

excited about moving to their new homes, found the process slowed by the confusion and the inability of the state and federal officials, who were providing discount loans and other assistance, to work with the city.<sup>101</sup> The exact terms of the takeover remained uncertain for the residents.<sup>102</sup> Many of them had made offers on other homes, but they did not know for certain how much they needed to spend or when they could move.<sup>103</sup>

In the end, each resident received approximately \$25,000 plus the market value of their homes in their devalued state. Emotions ran high as the residents left their homes.<sup>104</sup> Many had lived there all of their lives.<sup>105</sup> A wave of nostalgia hit as the community held a going-away party.<sup>106</sup> Although the community members did not negotiate their relocation terms, most were grateful that the time finally arrived when they could move away from the heavily industrialized zone.<sup>107</sup>

#### *D. The Fifth Amendment Takings Clause*

Money is the main problem for people who want to relocate. Usually, the residents of these communities are too poor to move without first selling their property. However, pollution often has rendered their property unmarketable. The people in Wagner's Point were moved because the city applied its local eminent domain law to acquire the property.<sup>108</sup> A possible solution to the problem of financing the relocations of neighborhoods lies in the application of the Fifth Amendment Takings Clause,<sup>109</sup> or its state counterpart, in a

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101. Joe Mathews, *Barely Looking Back at Old Wagner's Point*, BALT. SUN, July 20, 1999, at 1B.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Mathews, *supra* note 101.

107. *Id.*

108. "Eminent Domain is a sovereign power like that of the power to tax, or the police power. Not only the Federal and State governments enjoy this power but also subdivisions of government like towns, villages, school districts, and counties. Most public utilities also have this power delegated to them by the U.S. Congress or by State legislatures." Sydney Z. Searles, *The Law of Eminent Domain*, in SB48 ALI-ABA COURSE OF STUDY MATERIALS, EMINENT DOMAIN AND LAND VALUATION LITIGATION 1, 6 (1997).

109. The Takings Clause of the Fifth Amendment of the United States Constitution reads, in part: "private property [shall not] be taken for public use, without just compensation." U.S.

different manner from that used in Wagner's Point.<sup>110</sup> The community members would receive relocation funding from the government if they could demonstrate that the government took their land for public use by contaminating the land itself or by permitting companies to contaminate the land. Thus, the taking would require the government to pay just compensation to the community.<sup>111</sup>

### III. ANALYSIS: TAKINGS CLAUSE AS APPLIED TO ENVIRONMENTAL JUSTICE

The property rights of persons with historically vulnerable interests require more protection.<sup>112</sup> The Takings Clause reflects the Framers' belief that the rights of private property were especially vulnerable to failures of the political process.<sup>113</sup> The Takings Clause should protect those "who have been singled out and to discrete and insular minorities."<sup>114</sup> Underrepresentation of minorities in legislative bodies<sup>115</sup> and a lack of political or economic power help explain this failure. Courts initially interpreted the Takings Clause to defer to decision makers in most instances, but also to defend the most likely victims of political process failure.<sup>116</sup> Studies conducted to determine

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CONST. amend. V.

110. The Takings Clause ensures that the government does not confiscate the property of some and give it to others. It also spreads individual loss to society if that individual's loss benefits society. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981). The Supreme Court explained that a principal purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

111. The Supreme Court expansively defined "public use" so that virtually any taking will meet the requirement. The Supreme Court indicated that a taking is for public use if it meets a rational basis tests. It is for public use so long as the government acts on a reasonable belief that the taking will benefit the public. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-41 (1984); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

112. Sandra L. Geiger, Note, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. L. REV. 201 (1995).

113. Treanor, *supra* note 3, at 834.

114. *Id.* at 856.

115. Danial A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 705-06 (1991).

116. *See* Treanor, *supra* note 3.



whether minorities moved into the areas of locally undesirable land use sites (LULUs) because the land was cheaper, or if companies chose the sites because the land rested in a minority neighborhood<sup>117</sup> indicated that original siting decisions placed the sites in minority communities.<sup>118</sup>

Courts have not expressed a concern for protecting these victims of political process failure who have remained a concern of the Constitution since its framing.<sup>119</sup> Courts instead take the approach set forth in *Armstrong v. United States*.<sup>120</sup> Chief Justice Rehnquist,<sup>121</sup> Justice Scalia,<sup>122</sup> and Justice Stevens<sup>123</sup> applied this approach, which dictates that courts should read the Takings Clause “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>124</sup> When courts apply this approach, they fairly balance public need against private harm in situations where minority property rights would most likely be treated unfairly.<sup>125</sup>

The environmental justice movement seeks to eliminate disproportionate adverse effects on both minority and low-income populations.<sup>126</sup> Advocates of this movement usually seek race-conscious judicial remedies, such as Section 1983 and the Equal Protection Clause, to prevent the placement of LULUs in poor and minority communities.<sup>127</sup> Thus far, these remedies have failed.<sup>128</sup> Some scholars suggest moving away from using civil rights and environmental law statutes as a solution, and instead using the

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117. *See id.* at 875.

118. *See id.*

119. *See id.* at 877.

120. *See id.*

121. *See Dolan v. City of Tigard*, 512 U.S. 374, 383-86 (1994); *Pennell v. San Jose*, 485 U.S. 1, 9 (1988); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 318-19 (1987).

122. *See Pennell*, 485 U.S. at 19 (Scalia, J. dissenting); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835-36 & n.4 (1987).

123. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071-76 (1992) (Stevens, J., dissenting); *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987).

124. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

125. *Id.*

126. *See Geiger, supra* note 112, at 203.

127. *See id.*

128. *See id.*

Takings Clause as a solution for residents living near LULUs who seek compensation.<sup>129</sup> Such a compensation scheme could create a buffer zone around the LULU, creating a viable alternative for residents unable to enjoin the location of a LULU in their community and who cannot financially afford to relocate.<sup>130</sup>

Civil rights statutes and environmental laws fail to provide a solution<sup>131</sup> as the problem of environmental racism perseveres.<sup>132</sup> The Takings Clause may help only in a limited number of cases.<sup>133</sup> A challenge to a LULU is more likely to succeed as a state claim than as a federal claim because many state provisions encompass a broader range of property interests. In addition, a claim is more likely to prevail if the case is argued as a physical taking of property rather than a regulatory taking.<sup>134</sup>

Many reported cases involve landowners seeking compensation for an alleged taking of their property because a LULU was placed in their neighborhoods by local county boards or commissions.<sup>135</sup>

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129. *See id.* at 204.

130. *Id.*

Just compensation is a method of allowing affected residents to “vote with their feet” if their opposition against the siting of a LULU does not succeed. *Id.* “Voting with Feet,” also known as the Tiebout Model, is a model that shows the role of consumer choice in the development of the fragmented systems of local government. The idea is that people vote with their feet, choosing the local government that provides the best combination of taxes and local public goods. If they are dissatisfied with their current municipality, they move to another one.

*Id.* at 204 n.18 (citing Arthur O’Sullivan, *Voting with Ballots and Feet*, URB. ECON., 520-21 (1993)).

131. *See Geiger, supra* note 112, at 208-24.

132. *See id.* at 225-26.

133. *See id.* at 231-45.

134. *Id.* at 245-46.

135. *See East-Bibb Twiggs Neighborhood Ass’n. v. Macon Bibb Planning & Zoning Comm.*, 896 F.2d 1264 (11th Cir. 1989); *Smith v. City of Brenham*, 865 F.2d 662 (5th Cir. 1989); *Varjabedian v. City of Madera*, 20 Cal.3d 285 (Cal. 1977); *Aiello v. Browning-Ferris, Inc.*, 24 Env’tl. L. Rep. 20771 (N.D. Cal. 1993); *Langley Land Co. v. Monroe County*, 738 F. Supp. 1571 (Ga. 1990).

In most cases, either states have established a committee to oversee the issuance of permits to hazardous facilities or have left such siting decisions to the local county boards. For example, in California, the Permitting and Enforcement Committee of the State Waste Management Board oversees the approval of landfill permits. In addition, each local county board of supervisors is responsible for the approval of commercial toxic waste incinerators for their cities. Therefore, it is not surprising that an increasing

However, only a few reported cases reached the takings issue.<sup>136</sup> In *Smith v. City of Brenham*, the property owners alleged a taking by the siting of a proposed city landfill near their property.<sup>137</sup> The court held that the takings argument was weak because the government decision did not encompass their property. The decision only involved nearby property.<sup>138</sup> In addition, the court stated that fluctuations in value are incidents of property ownership.<sup>139</sup>

In the similar case of *Mongrue v. Monsanto*, the property owners claimed that waste water from Monsanto Company's injection wells damaged their subsurface property.<sup>140</sup> The court stated that Monsanto "cannot be liable for a taking under Louisiana law because it is not a private entity authorized by Louisiana law to expropriate private property for a public and necessary purpose."<sup>141</sup>

In *Smith*, the court easily answered the question of government action because the landfill was city-owned. However, in the case of private industry LULUs such as in *Mongrue*, state action may not exist. Therefore, in situations where the government is directly involved in a siting decision and the siting actually encompasses the owner's property, the Takings Clause may apply.

#### IV. APPLICATION OF THE TAKINGS CLAUSE TO RELOCATION SITUATIONS

##### A. *Physical Acquisition by Government Required*

The Takings Clause requires that the government physically take private property. The Supreme Court noted in *Loretto v. Teleprompter CATV* that a physical occupation authorized by the government is a taking regardless of whether the government, or a

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number of environmental groups have accused local and state government agencies of environmental racism. Generally, these agencies are the defendants in complaints filed on behalf of the affected landowners residing near the designated sites.

Geiger, *supra* note 112, at 208.

136. *Smith v. City of Brenham*, 865 F.2d 662 (5th Cir. 1989).

137. *Id.*

138. *Id.* at 663.

139. *Id.*

140. 1999 U.S. Dist. LEXIS 16663 at \*1 (E.D. La. Oct. 21, 1999).

141. *Id.*

party authorized by the government, is the occupant.<sup>142</sup> Advocates may argue that pollution of the land constitutes a physical taking.<sup>143</sup> Contamination of the air, soil, or water can render the land uninhabitable.<sup>144</sup> A compensable taking occurs if the pollution directly interferes with or disturbs owners' property rights.<sup>145</sup> The residents' health and the diminution of their property disturbs their property rights.<sup>146</sup> The "stigma" of environmental contamination detrimentally affects on the property and its value.<sup>147</sup>

The Supreme Court case of *Causby v. United States* bolsters this theory of physical invasion by environmental contamination.<sup>148</sup> The *Causby* Court held that continuous invasions of airspace superadjacent to the property that directly and immediately interfere with the enjoyment and use of the property constitutes a taking within the meaning of the Fifth Amendment to the U.S. Constitution.<sup>149</sup> Moreover, when industries emit toxins that contaminate the soil, air, and water, the emissions constitute permanent invasions.<sup>150</sup>

The Tenth Circuit criticized this theory of physical invasion in *Batten v. United States*.<sup>151</sup> In *Batten*, property owners living next to an air base complained of strong vibrations, loud noise, and smoke.<sup>152</sup> The court held that the military operations did not constitute a compensable taking. The court stated that the plaintiffs did not claim that the military operations rendered their homes uninhabitable; thus,

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142. 458 U.S. 419, 432 n.9 (1982). *See also* *Store Safe Redlands Ass'n v. United States*, 35 Fed. C. 726, 728 (1996).

143. *See supra* note 109.

144. *See* Geiger, *supra* note at 112, at 236.

145. *See* *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977).

146. Geiger, *supra* note 112, at 236.

147. *See, e.g.,* *Finkelstein v. Dep't of Transp.*, 656 So. 2d 921, 924 (Fla. 1995) (" 'Stigma' may be defined as the reduction in value caused by contamination resulting from the increased risk associated with the contaminated property.' In sum, many prospective buyers are afraid of the financial risk associated with contaminated or even previously contaminated properties and would therefore pay less for the property.") (citing MELVIN A. RESKIN & PATRICK J. RDHAN NICHOLS, *THE LAW OF EMINENT DOMAIN* § 14C.06 [1], at 14C-52-53 (1994)).

148. 328 U.S. 256 (1946).

149. *Id.* at 266.

150. *Id.*

151. 306 F.2d 580.

152. *Id.* at 581-83.

the disturbances were merely interference.<sup>153</sup> Federal courts traditionally recognize that property owners need more than mere consequential damages to require compensation.<sup>154</sup> Property owners receive compensation for damages to property not taken only as a consequence of or incidental to an actual taking.<sup>155</sup> The court also denied recovery because no regular flights ran over the property and thus the military operations could not constitute a physical invasion.<sup>156</sup>

Applying the rationales used in *Causby* and *Batten*, contamination of the soil and water by chemical plants constitutes a taking because environmental contamination regularly occurs and consequently renders the homes uninhabitable. However, the main question remains: What is the government's participation?<sup>157</sup> In *Causby* and *Batten*, the government participation was clear because the complaints stemmed from military operations. Does this reasoning apply in situations where the government merely authorizes and licenses a private entity to operate and pollute nearby property?

The best-known case confronting licensing as state action is *Moose Lodge No. 107 v. Irvis*. In *Moose Lodge*, a club restricted membership to whites and refused to allow guests to bring blacks into the dining room and bar.<sup>158</sup> A member's guest argued that by granting a liquor license, the club's act of discrimination became the state's act. However, the Court stated that in order to establish state action, there must be "significant involvement" by the state.<sup>159</sup> The Court

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153. *Id.* at 585.

154. *Id.* at 583.

155. Because of this rule, many state constitutions provide that private property shall not be taken or damaged for public use without compensation. *Id.*

156. *Id.* at 584.

157. The state action doctrine states that the Constitution's protection of individual liberties apply only to the government, not to private entities. Except for the Thirteenth Amendment, none of the Constitution's provisions are directed at private actors. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 511-16 (1985).

There are two exceptions to the state action doctrine. One says that a private entity must comply with the Constitution if it is performing a task that has been traditionally and exclusively done by the Government. The other says that private conduct must comply with the Constitution if the Government has authorized, encouraged, or facilitated the unconstitutional conduct.

158. 407 U.S. 163 (1972).

159. *Id.* at 173.

held that issuing a license did not constitute significant involvement by the state.<sup>160</sup> Therefore, the application of the Takings Clause to private industry action may not be possible without more direct government involvement than licensing, such as government authorization, encouragement, or facilitation of an act that would not otherwise occur without government intervention.<sup>161</sup>

### *B. Just Compensation Required*

The owner of taken land should receive just compensation. No set formula limits just compensation.<sup>162</sup> The initial inquiry, however, focuses on the fair market value of the property on the date of the taking,<sup>163</sup> which represents the price that a willing seller reasonably would demand and a willing buyer reasonably would pay for the property.<sup>164</sup> Courts find that the value of property depends on its present condition and use and its reasonable use in the future.<sup>165</sup> Thus, compensation for residents roughly equals an amount comparable to what the property would be worth had it not been contaminated, or what the property would be worth if it were in another area. Therefore, residents would receive enough compensation for their homes to allow them to find comparable housing elsewhere.

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160. *Id.* The Court emphasized that the Pennsylvania Liquor Control Board played no role in establishing or enforcing the membership or guest policies of the Lodge. *Id.* The Court concluded that “there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*.” *Id.* at 175.

161. Professor Charles Black called that state action doctrine “a conceptual disaster area: because the Court has made a series of inconsistent rulings in determining what constitutes state action. Charles L. Black, Jr., *Foreward: State Action, Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 75 (1967).

162. The Supreme Court has ruled that just compensation is measured in terms of the loss to the owner; the gain to the taker is irrelevant. *Boston Chamber of Com. v. Boston*, 217 U.S. 189, 195 (1910) (stating that the measure is “what has the owner lost, not what the taker has gained.”).

163. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). “Just compensation” must provide a party a full and perfect equivalent in money. *Id.*

164. *United States v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9th Cir. 1980).

165. *Board of County Comm’rs v. Nobel*, 184 P.2d 142, 143 (Colo. 1947).

## V. PROPOSAL: THE TAKINGS CLAUSE SHOULD APPLY TO RELOCATIONS

Courts generally construe a “taking” in a very narrow context. However, courts should view a taking in a broader context to encompass property owners whose property rights are interfered with by neighboring LULUs. If a homeowner cannot enjoy his property rights because of noxious odors coming from a nearby plant, a taking has occurred.

Relocation situations in which there is a substantial connection between the contamination and the government may fulfill the public use requirement. Thus, the Takings Clause can solve many of the cases that involve government participation, but the cases that involve private entities remain problematic. However, no clear-cut answer exists as to how much government participation is needed to apply the Takings Clause.

## VI. CONCLUSION

Relocation is a long, hard fight for a community. A community must appeal to the government and industry for help with funding. This proves a challenging task considering that the government and industries have their own interests to consider. The difficulty comes in balancing the health concerns of community members, who are breathing carcinogens and watching their children play in contaminated soil, with the huge costs of relocating an entire community. The Takings Clause may offer a solution in situations with significant governmental involvement. Forcing the government to purchase the land may not impose a strain on the government because of the government’s option to sell the land to developers or other industries after contamination clean up. However, this theory of the Takings Clause may be considered a tenuous argument for establishing public use. Even if the argument for public use is accepted, imposing financial responsibility on the government in situations where the government merely issues a permit to a private industry responsible for the contamination remains a difficult issue to resolve.







