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Curbing Rent-Seeking and Inefficiency with Broad Takings Powers and Undercompensation: The Case of Singapore from a Givings Perspective

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CURBING RENT-SEEKING AND INEFFICIENCY WITH BROAD TAKINGS POWERS AND UNDERCOMPENSATION: THE CASE OF SINGAPORE FROM A GIVINGS PERSPECTIVE

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Abstract: Conventional discourses on the perils of weak property rights vis-à-vis government takings have failed to account for and respond to the rent-seeking and inefficiency problems of government actions. Singapore, with its broad takings powers, coupled with express undercompensation, has not suffered from the predicted widespread rent-seeking and inefficiency. This case study of Singapore from a givings perspective demonstrates the importance of imposing a fair charge on the various kinds of givings in curbing rent-seeking and inefficiency. There are also additional benefits of having a healthy fiscal budget and more equitable taxation arising from Singapore's givings regime. The key normative implication is that an equal, if not greater, emphasis has to be placed on the givings aspect of the equation, whether in dealing with the problems of rent-seeking and inefficiency or promoting better governance and fiscal policies.

I. Introduction

The relaxed scope of public use for land in the United States ("U.S.") has resulted in frequent abuses of eminent domain to benefit private parties.[1] These abuses are often regarded as classic examples of rent-seeking whereby legislative bodies seek favors from organized interest groups of private developers.[2] In exchange for money and votes, eminent domain is exercised

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[1] STEVEN J. EAGLE, REGULATORY TAKINGS 169-74 (3d ed. 2005) (including discussion of a case where eminent domain is exercised pursuant to the private acquirer's order); David L. Callies, *Phoenix Rising: The Rebirth of Public Use*, *in* EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 49, 50-59 (Dwight H. Merriam & Marry Massaron Ross eds., 2006) (providing various examples of abuse from 14 states); Timothy Sanderfur, *The "Backlash" so Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV 709, 753, 763, 776 (2006) (discussing the abuses in various states); Sara B. Falls, *Waking a Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After Hawaii Housing Authority v. Midkiff*, 44 WASHBURN L.J. 355, 356 (2005). *But cf.* Rachel D. Godsil & David Simunovich, *Just Compensation in an Ownership Society*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 134 (Robin Paul Malloy ed., 2008) (opining that when seen from the perspective of the number of eminent domain per state per year, the approximate forty properties being taken or threatened to be taken is not exactly widespread).

[2] Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 547-548 (2006); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 34-35 (2006); Donald J. Kochan, *"Public Use" and the Independent*

for the benefit of these interest groups, unfortunately at the expense of individual home owners and other politically weak groups.[3] Such perceived abuses, as typified by the recent eminent domain case of *Kelo v. City of New London*,[4] have prompted the outraged public,[5] academics[6] and state legislatures[7] to seek to curtail the scope of eminent domain.

Undercompensation is also often cited as an important consideration during discussion of takings.[8] While the provision of "just compensation" is sometimes used to justify the taking of property in the United States,[9] the U.S. "courts have not pretended that fair market value will" compensate for all the losses suffered as a consequence of a taking.[10] Undercompensation can cause inefficiency where the full costs of the takings are not internalized.[11] Government will be induced to acquire land or impose

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Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 85 (1998); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 139 (2006); Sanderfur, *supra* note 1, at 770.

[3] EAGLE, *supra* note 1, at 22-23; *see* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 151 (3d ed. 2008); Benjamin D. Cramer, *Eminent Domain for Private Development—An Irrational Basis for the Erosion of Property Rights*, 55 CASE W. RES. L. REV. 409, 419 (2004); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1481 (2008) (Government and private land assemblers have an incentive to overuse eminent domain when landowners are politically ineffective).

[4] 545 U.S. 469 (2005).

[5] Sanderfur, *supra* note 1, at 711; Jennie C. Nolon, *Kelo's Wake: In Search of a Proportional Benefit*, 24 PACE ENVTL. L. REV. 271, 278-279 (2007); Michael Allan Wolf, *Hysteria versus History: Public Use in the Public Eye*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 15, 16-22 (Robin Paul Malloy ed., 2008) (detailing the media and public backlash against *Kelo*); CARLA T. MAIN, BULLDOZED: "KELO," EMINENT DOMAIN, AND THE AMERICAN LUST FOR LAND 171-178 (2007) (providing a colorful account of the post-*Kelo* backlash).

[6] *E.g.*, DON CORACE, GOVERNMENT PIRATES: THE ASSAULT ON PRIVATE PROPERTY RIGHTS—AND HOW WE CAN FIGHT IT 1 (2008); ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM 155-168 (2008); MAIN, *supra* note 5 (novelizing the case); Eddie D. Vassallo, Jr., *Land Use and Condemnation*, *in* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 3-1, 3-34 (2008) (citing *Kelo* as another example of the erosion of property owner rights); Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse about Private Property*, 34 FORDHAM URB. L.J. 613 (2007); Cohen, *supra* note 2; Garnett, *supra* note 2; Sanderfur, *supra* note 1.

[7] ELY *supra* note 3, at 158 (over 40 states have enacted law to restrict economic development eminent domain, with 5 states passing state constitutional amendments to the effect); MAIN, *supra* note 5, at 178-83 (describing the political reaction); Wolf, *supra* note 5, at 23-24; Baron, *supra* note 6, at 630-31; Garnett, *supra* note 2, at 149; James J. Kelly, Jr., *"We Shall Not be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 926 (2006); Sanderfur, *supra* note 1, at 712.

[8] Cohen, *supra* note 2, at 536-40; Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 926 (2007); Garnett, *supra* note 2, at 104; Heller & Hills, *supra* note 3, at 1475-76.

[9] Cohen, *supra* note 2, at 536.

[10] EAGLE, *supra* note 1, at 189-90; Kelly, *supra* note 7, at 940.

[11] YIFAT HOLZMAN-GAZIT, LAND EXPROPRIATION IN ISRAEL: LAW, CULTURE, AND SOCIETY 19 (2007); Cohen, *supra* note 2, at 541-42; Eagle, *supra* note 8, at 926; Christopher Serkin, *Big Differences for*

regulatory burdens excessively despite the presence of socially cheaper alternatives that may cost more to the government.[12]

Given the scholarly discourse that focuses on restricting the scope of eminent domain to prevent rent-seeking by private parties and ensuring proper compensation to promote government efficiency, one would naturally shudder at the thought of a regime expressly allowing eminent domain in order to transfer property to private parties coupled with below-market compensation. If such a regime exists, it surely has to be saddled with widespread rent-seeking and inefficiency.

Such a regime does exist in Singapore. Not only is protection of private property rights absent from Singapore's Constitution,[13] the government has wide eminent domain power[14] which is coupled with legally stipulated below-market compensation.[15] There is also no regulatory takings doctrine protecting owners from non-physical invasion of property.[16] Yet despite this blatant lack of private property protection from government takings, Singapore has not suffered from the predicted widespread rent-seeking and inefficiency. Rent-seeking is a form of corruption.[17] Echoing the rent-seeking problem of broad eminent domain powers, preliminary empirical evidence suggests that the quality of national property rights arrangements may be an important institutional determinant of national corruption levels.[18] Indeed, the "evil associated with use of the power of eminent domain for private benefit is the possibility of corruption that

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Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. REV. 1624, 1634 (2006); Heller & Hills, *supra* note 3, at 1481.

[12] EAGLE, *supra* note 1, at 187-88; Chenglin Liu, *The Chinese Takings Law from a Comparative Perspective*, 26 WASH. U. J.L. & POL'Y 301, 303 (2008) ("Substantial costs effectively force the government to search for other alternative means to complete its projects").

[13] *See* Sing. Const. (1999) (noting in particular the conspicuous absence of property rights protection under "Part IV Fundamental Liberties"); s*ee infra* Part II.

[14] *See* Land Acquisition Act, c. 152, § 5(1)(a)-(c) (1985) (amended 2007) (Sing.) (providing in part that land may be acquired if it is needed 1) for any public purpose, 2) by any person for any work which in the opinion of the Minister is of public benefit, public utility or in the public interest or 3) for any residential, commercial or industrial purposes; moreover, section 5(3) of the Land Acquisition Act stipulates that notification for eminent domain shall be conclusive evidence that the purpose requirement has been satisfied); *infra* Part II.A.

[15] Compensation is calculated as the value of the property on either the date of notification of preliminary inquiry (if the actual acquisition declaration is within 6 months of this date), the actual date of acquisition declaration, or certain previously legislative stipulated date, *whichever is lowest*. Land Acquisition Act, c. 152, § 33(1)(i)-(iii) (1985) (amended 2005) (Sing.).

[16] *Infra* Part II.C.

[17] Howard Dick, *Why Law Reform Fails – Indonesia's Anti-Corruption Reforms*, *in* LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 42, 46 (Tim Lindsey ed., 2007).

[18] Sonja Opper, *Inefficient Property Rights and Corruption – The Case of Accounting Fraud in China*, *in* THE NEW INSTITUTIONAL ECONOMICS OF CORRUPTION 198, 198, 203 (Johann Graf Lambsdorff et al. eds., 2005).

inevitably follows."[19] Yet Singapore is one of the least corrupt nations in the world and has a much lower corruption rating than the United States.[20] Singapore has also done well in various international studies measuring government efficiency and effectiveness.[21] While these studies inevitably have their own limitations and are far from conclusive,[22] the consistent high scores by Singapore do strongly suggest that the traditional discourse on the perils of weak property rights vis-à-vis government takings is not telling the whole story.

This paper utilizes the givings perspective[23] to argue that the focus on private property protection in tackling rent-seeking and inefficiency is both misplaced and incomplete. There are major deficiencies in merely focusing on the takings aspect. Restricting a government's eminent domain does little to curtail rent-seeking since there is still plenty of rent to be sought due to dishing out of benefits and wealth by the government.[24] Inefficiency will not be avoided even if all the social costs are internalized through adequate compensation.[25] Governments may still fail to undertake costly but socially beneficial projects due to the inability to pay for the projects without internalization of social benefits. As the givings jurisprudence dictates, ensuring that the government extracts a fair charge from the recipients of the government's benefits would be more effective in tackling the root of the rent-seeking and inefficiency problem.

Indeed, what Singapore lacks in private property protection is compensated by a rigorous zeal in charging for government benefits that

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[19] EAGLE, *supra* note 1, at 154.

[20] In a worldwide survey of 163 countries, Singapore comes in 5th with a score of 9.4 (scores range from 10 being highly transparent and 0 being highly corrupt), the U.S. comes in 20th with a score of 7.3. TRANSPARENCY INTERNATIONAL, ANNUAL REPORT 21 (Amber Poroznuk ed., 2006).

[21] *See infra* Part III.B.2. These are mainly studies of national governance. Singapore is usually among the top nations in areas such as "government effectiveness", "regulatory quality" and "government efficiency." Singapore has also typically outranked the U.S. in these areas.

[22] *See infra* Part III.B.3. The main limitations are indeterminate correlation (whether the broad-based corruption rating correlate to corruption and rent-seeking from government's eminent domain action) and presence of other contributing factors that may mask the deficiency in takings law.

[23] The flipside of takings jurisprudence, the givings jurisprudence focuses on the *giving* aspect of the equation and advocate that the beneficiary of a government's actions should pay for the benefits received. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001). For other applications of the givings jurisprudence see Lindsay Warren Bowen Jr., *Givings and the Next Copyright Deferment*, 77 FORDHAM L. REV. 809 (2008); Jianlin Chen, *China's Ding Zi Hu, the United States's Kelo, and Singapore's En-bloc Process: A New Model for Economic Development Eminent Domain from a Givings Perspective*, 28 J. LAND USE & ENVTL. L. 107 (2008); Wallace Wen-Yeu Wang & Jian-Lin Chen, *Bargaining for Compensation in the Shadow of Regulatory Giving: The Case of Stock Trading Rights Reform in China*, 20 COLUM. J. ASIAN L. 298 (2006).

[24] *Infra* Part IV.A.1.

[25] Daryl J. Levinson, *Making Government Pay: Market, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 350 (2000)*; see infra* Part IV.A.2.

either minimize the amount of rent available in traditional hot-beds of corruption (e.g. land-use zoning, regulatory permits, etc.) or internalize social benefits in projects which would otherwise be too costly for the government to undertake. The case study of Singapore's application of givings reveals that this is not only effective in curtailing rent-seeking and promoting efficiency but also produces other important benefits like a healthier government budget and an equitable tax regime.[26] The key normative implication is that an equal, if not greater, emphasis has to be placed on the givings aspect of the equation, whether in dealing with the problems of rent-seeking and inefficiency or promoting better governance and fiscal policies.

Yet the Singapore regime is far from perfect. In particular, the lack of legal restraints and enforcement mechanisms renders the givings policies and practices vulnerable to any changes in political conditions. This paper proposes a framework for implementing givings reforms that tackles this deficiency together with other pertinent issues like evaluation and public purpose. As countries all around the world embark on government givings in the form of massive economic stimulus spending budgets,[27] this framework provides a timely analytical structure in ensuring that stimulus plans are not marred by inefficiency and rent-seeking.

It is important to clarify that this paper is not suggesting that property rights protection from government takings is not important or should be neglected. There are many arguments related to the other benefits of property rights, such as the protection of liberty, political stability, and economic prosperity,[28] or even the rule of law.[29] These are neither the

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[26] *Infra* part VI.

[27] David M. Herszenhorn, *A Smaller, Faster Stimulus Plan, but Still with a Lot of Money*, N.Y. TIMES, Feb. 14, 2009, at A14 (reporting a $787 billion stimulus budget for the U.S.); Zakir Hussain, *Budget a "Decisive" one for Tough Times*, STRAITS TIMES (Sing.), Jan. 28, 2009 (noting that the Singapore stimulus budget is 8% of the GDP. The U.S. stimulus budget is about 6% and Germany's is about 1% while Taiwan's is about 4% over 4 years).

[28] Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1988). *See also* TERRY L. ANDERSON & LAURA E. HUGGINS, PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM & PROSPERITY 29 (2003) ("When clearly specified property rights exist in the context of rule of law, resources are better cared for, economic prosperity is more likely, and freedom prevails."); Dick, *supra* note 17, at 43 ("Without clear specification of property rights and the means to protect those rights against arbitrary seizure or encroachment by the state or associated interests, as also by opportunistic private interests, business faces high risks and high uncertainty and will be reluctant to invest."); FRANK J. POPPER, THE POLITICS OF LAND-USE REFORM 9 (1981) ("Ownership of land implies power, security, independence, fertility, and, above all, wealth."); POLLY J. PRICE, PROPERTY RIGHTS: RIGHTS AND LIBERTIES UNDER THE LAW 3-4 (2003) (Property as the "guardian of every other right"); Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 152 (1987) ("Ill-defined property rights lead to legislative intrigue, political favoritism, and massive uncertainty, all of which tend to reduce the levels of both liberty and utility.").

subject of this paper nor are they arguments with which the author necessarily disagrees. However, if discouraging rent-seeking and inefficiency are the chief concerns driving the takings discourse, then this paper argues that looking at the giving aspect is necessary for a more complete and effective approach to the problem.

Part II examines the lack of property rights protection from government takings in Singapore. This part explores the various aspects of government takings in Singapore, including the wide scope of eminent domain, the low quantum of compensation, the lack of regulatory takings doctrine and the en-bloc process that allows private developers to compulsorily acquire property directly from owners not wishing to sell their property. Part III discusses the conventional takings discourse which envisages the serious problems of rent-seeking and inefficiency arising from such weak property rights protection. This literature review is then contrasted with the various international surveys and empirical studies that strongly suggest Singapore has not suffered from the predicted rent-seeking and inefficiency.

Part IV critically examines the deficiencies of the conventional takings discourse. In particular, asserting that even the most stringent takings laws cannot adequately deal with the problems of rent-seeking and inefficiency. The key idea is that equal emphasis has to be placed on the givings aspect of the equation and ensuring that beneficiaries of government actions are properly charged for the benefits received.

With this theoretical framework, Part V looks at how Singapore imposes charges on the beneficiaries of government actions for all three types of givings: physical, regulatory and derivative.[30] Two examples are provided for each type of givings to illustrate the manner in which charges are imposed. Important examples include stringent procedures in the disposal of government assets and allocation of government contracts;[31] development charges which are calculated based on the increase in land

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[29] Curtis J. Milhaupt, Response, *Property Rights in Firms*, 84 VA. L. REV. 1145, 1170 (1998); J. Peter Byrne, *What We Talk about when We Talk about Property Rights – A Response to Carol Rose's Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 1049, 1058 (1996) ("Respect for property rights by both individuals and officials reflects the rule of law, and that, indeed, is the guardian of every other right").

[30] A physical giving is a direct transfer of wealth and/or property by the government to the private individual. A regulatory giving is where the value of the private individual's property has been enhanced by a government regulation affecting that property. A derivative giving occurs when the value of the private individual's property is increased by government actions nor directly affecting the property. Bell & Parchomovsky, *supra* note 23, at 551. *See also*, *infra* Part V.

[31] *Infra* Part V.A.1.

value arising from the development permit;[32] a special tax imposed on hotels that are situated along the designated route of the Formula One ("F1") street race on account of the huge benefits to the hotels from the increased demand in rooms,[33] among others. Where applicable, a comparison with the U.S. and other nations' doctrines is made to highlight the givings rationale driving Singapore laws and policies.

Based on these examples, Part VI analyzes the merits of Singapore's charging of government givings. The case study of Singapore not only confirms the benefits of social efficiency and reduced rent-seeking but also injects a new insight into how transactional cost implications reinforce the curtailing effect of charging givings on rent-seeking. In addition, Singapore's application of its eminent domain powers illustrates how a regime that charges givings can produce other important benefits not envisaged by the current givings jurisprudence. These include a healthier government budget and a more equitable form of taxation.

Part VII critiques the Singapore givings regime. The deficiencies of the Singapore regime, the lack of legal restraints and enforcement mechanisms are addressed along with other import issues such as the proposed framework for implementing givings reform. Part VIII concludes with comments on the unfolding stimulus budgets.

II. Limited Property Rights Protection in Singapore

Measuring the level of property rights protection usually includes the possibility of private property being expropriated by the government: the greater the chances of government expropriation of property, the lower the level of property rights protection.[34] The core constitutional protections for property focus on restricting governments from taking private property without compensation.[35] Indeed, the biggest threat to private property rights is often the state itself.[36]

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[32] *Infra* Part V.B.1.

[33] *Infra* Part V.C.2.

[34] PRICE, *supra* note 28, at 4 ("It is useful to compare constitutional protection of private property in the United States with the experience of some other nations... [where there have been] several instances of government appropriation and redistribution of private property without compensation to the owners."); Kevin E. Davis, *What Can the Rule of Law Variable Tell Us about Rule of Law Reforms*, 26 MICH. J. INT'L L. 141, 152 (2004).

[35] Andrzej Rapaczynski, *Can Constitutions Protect Private Property Against Governmental Predation?*, *in* THE EGLAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS 197, 210 (Enrico Colmbatto ed., 2004).

[36] Andrezj Rapaczynski, *The Roles of the State and the Market in Establish Property Rights*, 10 J. ECON. PERSP. 87, 92 n. 2 (1996). S*ee also* CORACE, *supra* note 6, at 1-6.

Singapore does not have private property rights enumerated in its Constitution.[37] The pre-1965 Federal Constitution that applied to Singapore included Article 13(1), which enshrined the constitutional right to property and the payment of fair compensation for property acquisition. However, the clause was deliberately left out when Singapore drafted its own Constitution after gaining independence in 1965.[38] This in itself is not entirely unusual since there are advanced democracies like Canada, India and New Zealand that do not have a property clause in their written constitutions or bills of rights.[39] However, such rejection of constitutional property rights is usually premised on grounds that individual property rights are undemocratic or that they entrench wealth inequality.[40] This is very different from Singapore where the clause was excluded to expressly avoid litigation on the adequacy of compensation.[41]

Indeed, the presence of the now rejected Article 13(1) had thwarted a previous attempt in the early sixties to pass a similarly worded predecessor of the Land Acquisition Act.[42] The Land Acquisition Act[43] has been the governing law on eminent domain in Singapore since 1965. It provides for a scope of eminent domain and amount of compensation that would appear outrageous for U.S. observers who have already heavily chastised the *Kelo* decision.[44] The lack of constitutional protection in Singapore has also curtailed the development of a regulatory takings doctrine and facilitated a private taking scheme known as the en-bloc process.

A. Wide Scope of Land Acquisition

The government's power in eminent domain is very broad. Land may be acquired if it is needed: 1) for any public purpose, 2) by any person for

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[37] *See* Sing. Const. (1999) (noting in particular the conspicuous absence of property rights protection under "Part IV Fundamental Liberties").

[38] N KHUBLALL, COMPULSORY LAND ACQUISITION SINGAPORE AND MALAYSIA 20 (2d ed. 1994); William J. M. Ricquier, *Compulsory Purchase in Singapore*, *in* TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 263, 268 (Tsuyoshi Kotaka & David L. Callies eds., 2002); Kevin YL Tan, *Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection*, 20 SING. L.R. 239, 258 (1999).

[39] GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 23 (2006).

[40] In Canada's case, the reasons for rejecting a constitutional property clause are the democratic rationale and federalism. *Id.* at 30-35, 47. For India, the rationales are more titled towards wealth redistribution and an underlying political struggle between the legislature and an activist judiciary. *Id.* at 49-57.

[41] KHUBLALL, *supra* note 38, at 20; Chenglin Liu, *supra* note 12, at 337-38.

[42] KHUBLALL, *supra* note 38, at 10-11.

[43] Discussion in notes, *supra* note 14.

[44] *See* discussion in notes, *supra* note 6.

any work which, in the opinion of the Minister, is of public benefit, public utility or in the public interest, or 3) for any residential, commercial or industrial purposes.[45] Under these broad definitions (especially the third factor), the government can acquire land from its owners for resale to a private developer. Because private development is beneficial to the community, such acquisitions may not be held up by obstructive owners.[46] There are numerous examples where land was acquired for private development.[47]

Moreover, the notification for eminent domain is conclusive evidence that the purpose requirement has been satisfied.[48] Given the extreme scarcity of land in Singapore and the public benefits gained from takings, courts are highly deferential to government authorities. Nonetheless, the courts "must – and will – step in" when there is bad faith, notwithstanding the clear language of section 5(3).[49] The courts have suggested that if the land had been acquired for resale without more (e.g. without a development plan), government action is likely to constitute bad faith.[50] However, there has been no reported case to date that has successfully challenged the government on this ground.[51] Indeed, the court has observed that the legislature intended "public purpose" to be very broad and that it "might conceivably include the acquisition of land for resale to private developers."[52]

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[45] Land Acquisition Act, c.152, §5(1)(i)-(iii) (1985) (Sing.).

[46] T.T.B. Koh & William S.W. Lim, *Planning Law and Processes in Singapore*, 11 MALAYA L. REV. 315, 333-34 (1969).

[47] Basco Enter. Pte. Ltd. v. Soh Siong Wai, 1989-1 Sing. L. Rep. (Sing. C.A.) (building was acquired with façade preserved while interior is sold via open public tender for retail outlets); Joanne Lee, *Dawson Estate to Make Way for Redevelopment*, STRAITS TIMES (Sing.), Mar. 5, 1999, at 45; Ann Williams, *Tiong Bahru Flats First in Redevelopment Scheme*, STRAITS TIMES (Sing.), Aug. 23, 1995, at 1; Chew Xiang, *Temple's Acquisition Appeal Dismissed*, BUSINESS TIMES (Sing.), Feb. 26, 2008 (a temple was acquired in conjunction with the construction of a mass transit line and set to be resold for high-density residential development).

[48] Land Acquisition Act, c.152, §5(3) (1985) (Sing).

[49] Teng Fuh Holdings v. Collector of Land Revenue, 2006-3 Sing. L. Rep. 507, 523-24 (Sing. High Ct.).

[50] *Id.* at 526; Ng Boo Tan v. Collector of Land Revenue, 2002-4 Sing. L. Rep. 495, 513 (Sing. C.A.).

[51] Based on the author's searches using LEXIS NEXIS and Lawnet (Sing.). *See also* Chenglin Liu, *supra* note 12, at 338-40. Liu's view on the "unchallengeable nature of public purpose doctrine in Singaporean Law" is probably overstated, especially in light of later cases like *Ng Boo Tan*, 2002-4 Sing. L. Rep. at 513, which reaffirmed the court's power of judicial review. Nonetheless, the author agrees that it is extremely difficult to succeed on this ground in Singapore.

[52] *Teng Fuh Holdings*, 2006-3 Sing. L. Rep. at 531.

B. The Quantum of Compensation

To make matters worse, the compensation under the Singapore takings regime appears grossly insufficient. Prior to the most recent 2007 amendments, market value was clearly not awarded.[53] Compensation was calculated as the value of the property on either the date of notification of preliminary inquiry,[54] the actual date of acquisition declaration, or a legislatively stipulated date, *whichever is lowest.*[55] The legislatively stipulated date has been revised periodically,[56] but there were often substantial shortfalls, especially during property booms.[57]

This clause can cause substantial hardship. In a litigated case where a building was acquired in 1985, the compensation awarded was based on the market value of the legislatively stipulated date of 1973.[58] The award amount of S$260,000 was far less than the 1985 market value of S$670,000.[59] Indeed, given the general trend of increasing property prices in land scarce and densely populated Singapore,[60] compensation is likely to be based on the lower value assessed at a prior date.

Moreover, the value of property is determined by the price that a bona fide purchaser might reasonably be expected to pay for the land on the basis of either its existing use or the purpose designated by post-acquisition zoning, again whichever is the lower figure.[61] Potential value from any possible more intensive use of the land is also not taken into account.[62] This is even harsher than the U.S. takings law that merely precludes including the

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[53] Land Acquisition (Amendment) Bill, Bill [5/2007] (2007) (Sing.), *available at* http://www.parliament.gov.sg/Publications/070005.pdf. Land Acquisition (Amendment) Bill, 2007, Parliament No. 11 *Hansard (Sing.)* 11 Apr. 2007, Col 500 (testimony Deputy Prime Minister and Minster for Law, Prof. S Jayakumar) (as acknowledged by legislature).

[54] This is a notice indicating the land is likely to be acquired. It grants the government the right to survey the land for the purpose of determining whether acquisition is, indeed, required. For this date to be taken into account, the actual date of acquisition declaration has to be within six months. *See* Land Acquisition Act, c. 152, §3 (1985) (Sing.).

[55] Land Acquisition Act, c. 152, §33(1)(a)(i)-(iii) (1985) (Sing.).

[56] Ricquier, *supra* note 38, at 272-273 (The act was amended in 1973, 1986, 1992, 1995); Ann Williams, *Big Drop in Land Acquired by Govt in Last Decade*, STRAITS TIMES (Sing.), Oct. 9, 1995, at 48.

[57] Ricquier, *supra* note 38, at 272-73.

[58] Collector of Land Revenue v. Ang Thian Soo, 1990-1 Sing. L. Rep. 11, 13, 19 (Sing. C.A.).

[59] *Id.*

[60] Land area of only 704 square kilometers with a population density of 6369 people per square kilometer. SINGAPORE DEPARTMENT OF STATISTICS, YEARBOOK OF STATISTICS SINGAPORE 2007 9 (2007) [hereinafter 2007 YEARBOOK OF STATISTICS SINGAPORE].

[61] Land Acquisition Act, c. 152, §33(5)(e) (1985) (Sing.).

[62] *Id.* §33(5)(e).

potential rise in land value from development in the compensation amount.[63] In Singapore, the property owner may actually be penalized with less compensation simply because the acquired land is down-zoned for the purpose of acquisition (e.g. to build a park that has less commercial value than the original residential zoning). Indeed, a property owner whose property was compulsorily acquired in 1998 was not compensated for the decrease in value caused by the scheme leading to the acquisition.[64] This is notwithstanding the fact that the depreciation of value arose from the announcement of a proposed road cutting through the acquired property.[65] The court specifically held that "no elements of any loss of value caused by the process of acquisition need to be artificially compensated for."[66]

Furthermore, there is a deduction in the increase in value of the property owner's remaining land by virtue of the use to which the acquired land will be put.[67] In a land acquisition exercise for the construction of a mass transit station, the government acquired a small plot of land originally used as a car park on private residential property. A nominal S$1 was paid as compensation since the gains in the property value from the eventual construction of the mass transit station (estimated by industry sources to be some $18,000,000) are much more than the value of the 220 square meters of land acquired.[68]

In addition, value of land increased by virtue of provision of public utilities and facilities over the past seven years will be discounted.[69] Private improvement within the past two years will also be disregarded unless it is shown to be made in good faith and not in contemplation of land acquisition proceedings.[70] The possible saving grace is that compensation can take into account relocation costs[71] and any damage to the property as a result of the acquisition.[72]

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[63] Cohen, *supra* note 2, at 539; Heller & Hills, *supra* note 3, at 1477 ("The Supreme Court has held that landowners do not deserve to receive a windfall from the beneficial activities of government simply because their land stands in the path of progress").

[64] *Ng Boo Tan*, 2002-4 Sing. L. Rep. at 495.

[65] *Id*. at 499.

[66] *Id*. at 514. For a critique of the case, *see generally* Tan Sook Yee, *Is There any Pointe?*, 2003 SING. J. LEGAL STUD. 262 (2003).

[67] Land Acquisition Act, c. 152, §33(1)(b) (1985) (Sing.).

[68] Mary Ann Mendis, *More Payment if Property Values Hit*, STRAITS TIMES (Sing.), July 2, 2003 (220 square meters amounts to 0.6 percent of the total residential property area).

[69] Land Acquisition Act, c. 152, §33(5)(c) (1985) (Sing.) (broadly defining that the development need not be commenced by the government, "development in the neighborhood by the provision of roads, drains, electricity, water, gas or sewerage or social, educational or recreational facilities within 7 years").

[70] *Id.* §33(5)(a).

[71] *Id.* §33(1)(e).

[72] *Id.* §33(1)(d).

C. No Regulatory Takings

The regulatory takings doctrine in the U.S.[73] provides some relief for property owner whose property is negatively affected by government regulations. As clarified by the U.S. Supreme Court in *Lingle v. Chevron*,[74] two relatively narrow categories of regulatory actions will generally be deemed per se takings for Fifth Amendment purposes, namely permanent physical invasion, however minor, and complete deprivation of all economically beneficial use of property.[75] Outside these two categories, the courts will adopt the approach in *Penn Central Transp. Co. v. New York City*,[76] and look into several factors, primarily focusing on "the economic impact of the regulation of the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[77] This doctrine has been criticized by scholars for not adequately protecting property owners from the real threat of government regulations.[78] Furthermore, expropriation of foreign investors' property by the state often manifests through government regulatory actions and seldom as direct expropriation.[79]

Yet, the property owners in Singapore are deprived of even this limited form of protection. It is not surprising that courts do not extend protection from non-physical invasions of property, since there is no constitutional protection of private property.[80] There have been no reported cases in Singapore where compensation is mandated for diminution of property value by regulation.[81]

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[73] For a historical account of the development of the regulatory takings doctrine in the U.S. from the property rights movement see ALFRED M. OLIVETTI, JR. & JEFF WORSHAM, THIS LAND IS YOUR LAND, THIS LAND IS MY LAND (Eric Rise ed., 2003). *See generally* EAGLE, *supra* note 1.

[74] 544 U.S. 528 (2005).

[75] *Id*. at 528.

[76] 438 U.S. 104 (1978).

[77] *Id*. at 124.

[78] EAGLE, *supra* note 1, at 716-17 (though there is a recent resurgence in property rights protection in the regulatory taking arena); ELY, *supra* note 3, at 165 ("individuals face significant handicaps in pursuing regulatory takings claims").

[79] KAJ HOBER, INVESTMENT ARBITRATION IN EASTERN EUROPE: IN SEARCH OF A DEFINITION OF EXPROPRIATION 221 (2007) (looking at investment disputes involving Eastern European states).

[80] The Fifth Amendment which the rich US jurisprudence of regulatory takings was founded upon is not particularly explicit on the matter. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation."); *see* discussion in notes, *supra* note 13.

[81] TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 4 (Tsuyoshi Kotaka & David L. Callies eds., 2002) (in a survey of Asian Pacific nations, only Japan and Korea had theories akin to "regulatory takings"). Searches by the author have also failed to uncover any cases.

D. En-Bloc Process

The lack of constitutional protection for private property rights has been used by legislators to justify a novel scheme involving granting eminent domain powers to private developers, otherwise known as the en-bloc process.[82] Under the en-bloc process, private developers purchasing a strata-title development (i.e., a flat or condominium) may compel owners who objected to the sale to transfer the property if a certain percentage of the majority[83] of owners in the strata-title development has agreed to the sale. The legislative rationale was to facilitate the realization of the land's full development potential and to allow rejuvenation of urban development.[84] During legislative discussions, there were concerns about property rights,[85] minority owners not being adequately compensated (e.g., subjective value and relocation costs),[86] and the fact that property owners were compelled to sell their property for economic purposes instead of traditional public interests like infrastructure construction.[87] However, the public interest element in en-bloc sale, namely the need for redevelopment in land-scarce Singapore, was ultimately compelling enough to override these concerns.[88]

Notwithstanding the necessity and merits of this arrangement,[89] the grant of eminent domain powers to private developers in such direct manner certainly makes *Kelo* look like an angel.[90]

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[82] Land Titles (Strata) (Amendment) Bill, 1998, Parliament No. 9 *Hansard (Sing.)* 31 July 1998, Col 623 (testimony of Mr. Shriniwas Rai). *See generally* Jianlin Chen, *supra* note 23, at 132-42.

[83] Either eighty percent or ninety percent majority depending on the age of the property. Land Titles (Strata) Act, Cap. 158, §84A(1) (1999) (Sing.).

[84] Land Titles (Strata) (Amendment) Bill, 1998, *supra* note 82, at Col 601 (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

[85] *E.g.*, Land Titles (Strata) (Amendment) Bill, 1998, *supra* note 82, at Col 60 (testimony of Associate Professor Chin Tet Yung); *id.* at Col 626 (testimony of Mr. Simon S.C.SC Tay).

[86] *E.g.*, Land Titles (Strata) (Amendment) Bill, 1998, *supra* note 82, at Col 609 (testimony of Associate Professor Chin Tet Yung); *id.* at Col 617 (testimony of Mr. Zulkifli Bin Baharudin); *id*. at Col 626 (testimony of Mr. Simon S.C.SC Tay); *id*. at Cols 615-16 (testimony of Mr. Chuang Shaw Peng).

[87] Land Titles (Strata) (Amendment) Bill, 1998, *supra* note 82, at Col 608 (testimony of Associate Professor Chin Tet Yung); Land Titles (Strata) (Amendment) Bill, (as reported from Select Committee), 1999, Parliament No. 9, Sess. No. 1, Vol. No. 70, Sitting No. 12, Col 1336 (1999) (Sing.) (testimony of Mr. Simon Tay).

[88] Land Titles (Strata) (Amendment) Bill, 1998, *supra* note 82, at Col 632 (testimony of Minister of State for Law, Associate Professor Ho Peng Kee). *See* Jianlin Chen, *supra* note 23, at 133-34.

[89] *See* Jianlin Chen, *supra* note 23, at 142-50. Arguments include the superior economic judgment of private developers compared to legislators, better internalization of cost and reduction of rent-seeking, better compensation for owners of acquired property, an efficient hybrid property-liability rule under economic analysis and a more structured and transparent process. *See also* Heller & Hills, *supra* note 3 (proposing a land assembly districts mechanism which is similar to the en-bloc process where private developers can compulsory acquire the property upon the approval of a majority of the property owner).

III. The Singapore Paradox: Where is the Rent-Seeking and Inefficiency?

A. Deficiencies of the Singapore Regime under Conventional Takings Discourse

The above account highlights the precarious nature of property rights in Singapore vis-à-vis government takings. In particular, the wide scope of eminent domain powers and clear undercompensation is decisively frowned upon by conventional takings discourse. Academics commonly focus on the problems of rent-seeking and inefficiency when criticizing such wide eminent domain powers and undercompensation.

1. Rent-seeking and Corruption

The broad eminent domain powers and deference to legislature by the Singapore courts theoretically provide ample room for rent-seeking and corruption. The wide scope of the Singapore eminent domain powers presents a real possibility of misuse in favor of certain individuals without at the same time conferring any public benefit.[91] As Justice O'Connor stated in her dissenting opinion in *Kelo*, these individuals are "likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."[92]

According to public choice theory, a mobilized, well-connected minority can exert more political influence than a numerically superior but unorganized or apathetic majority.[93] Public choice theory challenges the notion that persons working for administrative agencies are able to actively and single-mindedly pursue the public interest without being affected by their own self-interest.[94] Rent seeking in the political process provides an incentive for legislative bodies to seek favor from organized interest groups in order to raise money and gain votes, unfortunately at the expense of

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[90] *Kelo* suggests a test for clarifying the differences between valid public uses and private takings. David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After Kelo v. City of New London*, 24 UCLA J. ENVTL. L. & POL'Y. 195, 234 (2006).

[91] KHUBLALL, *supra* note 38, at 42.

[92] 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting). *See also* Kochan, *supra* note 2, at 52 (beneficiaries of a relaxed public use standard are often powerful and wealthy special interests capable of exercising significant influence on the government).

[93] Serkin, *supra* note 11, at 1637; EAGLE, *supra* note 1, at 22.

[94] John A. Rogovin & Rodger D. Citron, *Lessons from the Nextwave Saga: The Federal Communications Commission, the Courts and the Use of Market Forms to Perform Public Functions*, 57 ADMIN. L. REV. 687, 695 (2005); Richard E. Wagner, *User Fees and Earmarked Taxes in Constitutional Perspective*, *in* CHARGING FOR GOVERNMENT: USER CHARGES AND EARMARKED TAXES IN PRINCIPLE AND PRACTICE 179-88 (Richard E. Wagner ed., 1991).

individual homeowners and other politically weak groups.[95] The relaxed scope of public use in the U.S. has resulted in frequent abuses of eminent domain to benefit private parties.[96] There are even instances where municipal governments seem to favor a particular competitor.[97] The redistributive nature of such rent-seeking behavior is not only immoral but is also unproductive and inefficient.[98]

The wide scope of eminent domain "encourages the wealthy and powerful to arrogate that power to themselves."[99] Indeed, one of the "evil[s] associated with use of the power of eminent domain for private benefit is the possibility of corruption that inevitably follows."[100] Stronger property rights are also often hailed as the solution for corruption. There are economists and officials who expect and hope that strengthening constitutional protections of private property (i.e. tightening of the use and/or increasing compensation) will lead to a decline in government abuses.[101] The libertarians treat *Kelo* as evidence of the perils of "faction and rent-seeking that only a strong system of property rights can effectively resist."[102] Nobel Prize laureate Gary Becker argues that "the authority to seize property by eminent domain opens the door to inefficient projects born of corruption and enabled by abusive exercise of government powers."[103] Some commentators conclude that "the absence of secure property rights is the cause of corruption, and the creation of private property rights would be the cure for corruption."[104] The broad takings powers in Singapore, including the absence of regulatory takings doctrine, are certainly conducive for exploitation and rent-seeking for private benefits.

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[95] *See* all in *supra* note 3.

[96] *See* all in *supra* note 1.

[97] EAGLE, *supra* note 1, at 171-74 (favoring Costco Wholesale Corporation over 99 Cents Only Store); Cramer, *supra* note 3, at 416-17 (favoring BMW dealership over Mitsubishi dealership); Falls, *supra* note 1, at 364 (favoring BMW dealership over Mitsubishi dealership); *id.* at 365 (favoring Costco Wholesale Corporation over 99 Cents Only Store).

[98] Kochan, *supra* note 2, at 83; Eagle, *supra* note 8, at 928.

[99] Patricia E. Salkin et al., *The Friends of the Court: The Role of Amicus Curiae in Kelo v. City of New London*, *in* EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 165, 170 (Dwight H. Merriam & Marry Massaron Ross eds., 2006) (quoting the *amicus curiae* of the Better Government Association in the *Kelo* case).

[100] EAGLE, *supra* note 1, at 154.

[101] Rapaczynski, *supra* note 35, at 215.

[102] Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1423 (2006) (citing Richard A. Epstein, *Kelo: An American Original: of Grubby Particulars and Grand Principles*, 8 GREEN BAG 2d. 335, 357 (2005)).

[103] *Id.* at 1415.

[104] Gerald P. O'Driscoll & Lee Hoskins, *Property Rights: The Key to Economic Development*, 482 CATO INSTITUTE, Aug. 7, 2003, a*vailable at* http://www.cato.org/pub_cat_display.php?pub_cat=2&page=2, File No. 482.

2. Undercompensation and Inefficiency

Undercompensation is often cited as an important consideration in the eminent domain process.[105] "Compensation is a key restraint . . . as it requires government to think about the costs and benefits of a project and to allocate resources to the undertaking."[106] Undercompensation will cause inefficiency where the full costs of the takings are not internalized.[107] Government will be induced to acquire land or impose excessive regulatory burdens despite the presence of socially cheaper alternatives because those alternatives may cost the government more.[108] Economists caution that extensive use of eminent domain leads to inefficient government projects.[109] This is borne out in Israel where the law provides for far-reaching powers of expropriation without compensation.[110] This ability to acquire land for free has indeed resulted in inefficient eminent domain. A recent study found that local governments acquired land to construct redundant schools when existing schools were suffering from poor maintenance.[111]

While the provision of "just compensation" is sometimes used to justify takings,[112] U.S. courts have not pretended that fair market value will compensate for all the losses suffered as a consequence of a taking.[113] Even if fair market value is given, there is still undercompensation because relocation expenses, goodwill associated with a business's location, and the cost of replacing the condemned property, are not factored in the fair market value.[114] There may be surpluses from an owner's singular appreciation from his property, some being so idiosyncratic as to be intelligible while others may be reflective of unique needs (e.g., wheelchair-bound owners

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[105] *See* Eagle, *supra* note 8.

[106] Robin Paul Malloy & James Charles Smith, *Private Property, Community Development, and Eminent Domain*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 1, 8 (Robin Paul Malloy ed., 2008).

[107] Cohen, *supra* note 2, at 541-42; Serkin, *supra* note 11, at 1634; Eagle, *supra* note 8, at 926; HOLZMAN-GAZIT, *supra* note 11, at 19; Heller & Hills, *supra* note 3, at 1481.

[108] EAGLE, *supra* note 1, at 188 n.1102; Chenglin Liu, *supra* note 12, at 303 ("Substantial costs effectively force the government to search for other alternative means to complete its projects . . . .").

[109] Bell & Parchomovsky, *supra* note 102, at 1425.

[110] Up to forty percent of a plot may be taken without compensation. The land maybe taken without compensation for the purpose of sports facilities and buildings intended for educational, cultural, religious or health services, among other public uses. *E.g.* HOLZMAN-GAZIT, *supra* note 11, at 19-21.

[111] *Id.* at 31-32.

[112] Cohen, *supra* note 2, at 536.

[113] Kelly, *supra* note 7, at 940; EAGLE, *supra* note 1, at 189-90; Godsil & Simunovich, *supra* note 1, at 137-39.

[114] Garnett, *supra* note 2, at 106; Cohen, *supra* note 2, at 538.

with easy accessible homes).[115] Sentimental attachment to property may result in the subjective value of the property being higher than the fair market value.[116] There is also the uncompensated "dignitary harms" where the property owners feel unsettled and vulnerable in the eminent process.[117]

Given the undercompensation problem that exists even with fair market value compensation, the undercompensation problem can only be much more severe under the Singapore regime, which expressly provides compensation lower than market value. Indeed, a commenter in a comparative study of takings law in China, the U.S., and Singapore, opines that there would be prevalent abuse of eminent domain powers in Singapore given this severe undercompensation. [118]

B. No Wide Spread Rent-seeking or Inefficiency in Singapore

Given the government's wide eminent domain powers coupled with severe undercompensation, one would expect Singapore to be riddled with widespread rent-seeking and inefficiency. The broad scope appears to provide fertile grounds for interest groups to maneuver the government into takings for their own benefits while the lower than market value compensation exacerbates the government's failure to internalize social costs. Yet various studies and surveys suggest that Singapore has not suffered from the predicted perils of rent-seeking and inefficiencies.

1. Rent-seeking: Surveys on Corruption

Corruption has three main forms: rent-seeking, leaks and levies.[119] Echoing the rent-seeking problem of wide eminent domain powers as identified by conventional takings discourse, preliminary empirical evidence suggests that the quality of national property rights arrangements may be an important institutional determinant of national corruption levels.[120] Efficient property rights arrangements constrain the scope of corruption by, among other factors, drawing a well-defined line of state and bureaucrats'

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[115] Kelly, *supra* note 7, at 952; Heller & Hills, *supra* note 3, at 1475 (these also include the discussing the subjective value of "social capital" arising from connection to local community, and business and, or eccentric property renovation to suit individual's taste).

[116] Garnett, *supra* note 2, at 107; Eagle, *supra* note 8, at 926.

[117] Garnett, *supra* note 2, at 109.

[118] Chenglin Liu, *supra* note 12, at 346.

[119] Dick, *supra* note 17, at 46. Leaks refer to the (mis) appropriation of public funds for personal gains, while levies involve petty corruption practice such as the unauthorized imposition of charges/taxes by officers. *Id*. at 47.

[120] Opper, *supra* note 18, at 198, 203.

authority.[121] Indeed, avoidance of corruption is regarded as a limiting principle of the takings clauses.[122] Some commentators concluded that "the absence of secure property rights is the cause of corruption, and the creation of strong private property rights would be the cure for corruption."[123] Singapore's regime of wide eminent domain powers, undercompensation, no regulatory takings, and direct granting of eminent domain powers to private parties, seems ripe for corrupt government officials to exploit benefits for themselves and for favored individuals or groups.

However, Singapore is one of the world's least corrupt nations. In a worldwide survey of 163 countries by the international non-profit organization Transparency International, Singapore came in fifth with a score of 9.4 (scores range from ten being highly clean and zero being highly corrupt) while the U.S. came in twentieth with a score of 7.3.[124] In the World Bank-sponsored Worldwide Governance Indicators Project, which looks at 212 countries for a period of ten years, Singapore's score for the "Control of Corruption" indicator was 2.20 in 2007 (three being the highest and minus three being the lowest) and was outranked by only eight other countries. The U.S. had a score of 1.44 and was outranked by seventeen other countries.[125]

2. Inefficiency: Surveys on National Governance

Singapore also did well in the "Government Effectiveness" and "Regulatory Quality" indicators. Singapore's score of 2.41 for "Government Effectiveness" was the top score in the study, with the U.S. scoring 1.62 at seventeenth place.[126] For the "Regulatory Quality" indicator, Singapore scored 1.87 and was just behind Hong Kong's and Luxembourg's top score of 1.89. The U.S.'s score of 1.45 ranked it fifteenth.[127] In addition, Singapore has consistently done well in various global rankings on

[121] *Id.* at 201.
[122] Eagle, *supra* note 8, at 927.
[123] O'Driscoll & Hoskins, *supra* note 104, at 12.
[124] TRANSPARENCY INTERNATIONAL, *supra* note 20, at 325-30. When Transparency International first started the corruption perceptions index in 1998, Singapore was ranked seventh out of eighty-five countries with a score of 9.1. The United States was ranked seventeenth, with a score of 7.5. TRANSPARENCY INTERNATIONAL, ANNUAL REPORT 13 (Susan Côté-Freeman & Jeremy Pope eds., 1999).
[125] In 1996, Singapore's score was 2.24, while the U.S.' score was 1.75. Daniel Kaufmann et al., *Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007* 94-96 (World Bank, Working Paper No. 4654, 2008).
[126] *Id.* at 85-87. In 1996, Singapore's score was 2.31 while U.S.' score was 2.15.
[127] *Id.* at 88-90. In 1996, Singapore's score was 1.66 while the U.S.' score was 1.26.

economic development and competitiveness.[128] Singapore is not only one of the world most competitive economies according to the World Competitiveness Yearbook by Swiss business school International Institute for Management Development ("IMD"), but it also ranks among the top countries in terms of the government efficiency criterion.[129] Other local studies[130] and overseas studies,[131] have also echoed the efficiency and effective governance of the Singaporean governance institution.

3. Limitations of these Studies

It is important to note the inadequacies and inconclusiveness of these various studies and surveys. Studies of corruption have been criticized on several grounds, including: "corruption cannot be measured"; "subjective data reflect vague and generic perceptions of corruption rather than specific objectives realities"; and "subjective data are too unreliable for use in measuring corruption."[132] Even defenders of these surveys acknowledge elements of subjectivity and uncertainty in these surveys.[133]

In particular, the above-mentioned corruption rating by Transparency International and the other surveys is based on the perception of corruption across the board and may not necessarily correlate with the abuses in eminent domain and other government takings.[134] Further, many other factors may affect the level of corruption and government abuses in a country, such as political structure, judiciary independence, access to information, enforcement of criminal law against corruption, and poverty.[135] In the same vein, surveys and studies in relation to government efficiency

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[128] Michelle Tay, *S'pore Continues to do Well in Global Rankings*, STRAITS TIMES (Sing.), June 16, 2008 (discussing the various surveys).

[129] Anna Teo, *S'pore's the Second Most Competitive Economy*, BUSINESS TIMES (Sing.), May 15, 2008 (Singapore was ranked top in terms of government efficiency for both 2008 and 2007). For earlier top ranking in government efficiency, *see* Anna Teo, *S'pore's Regains 2nd Spot in IMD Competitive Rankings*, BUSINESS TIMES (Sing.), May 5, 2004; Narendra Aggarwal, *S'pore No. 2 Again for Competitiveness*, STRAITS TIMES (Sing.), Apr. 25, 2001, at 4 (top for five years prior to 2001).

[130] Anna Teo, *HK is Tops in New Competitiveness Study*, BUSINESS TIMES (Sing.), Aug. 19, 2007.

[131] Chuang Peck Ming, *S'pore Pips US to be 1st in Competitiveness*, BUSINESS TIMES (Sing.), May 30, 1996, at 1 (Study by Geneva-based World Economic Forum ranked Singapore first for "government." The "government" factor refers to openness of government, efficiency of bureaucracy and burden of tax system). *See also* Chuang Peck Ming, *Bouquets for Singapore, with a few Brickbats*, BUSINESS TIMES (Sing.), Sep. 7, 1994, at 17.

[132] *See* Daniel Kaufmann et al., *Measuring Corruption: Myths and Realities*, *in* GLOBAL CORRUPTION REPORT 2007 318-21 (Diana Rodriguez & Linda Ehrichs eds., 2007).

[133] *Id.* at 319-20.

[134] TRANSPARENCY INTERNATIONAL, *supra* note 20.

[135] *See* Cobus de Swardt, *Lessons Learned from Anti-corruption Campaigns around the World*, *in* GLOBAL CORRUPTION REPORT 2006 119 (Jana Kotalik & Diana Rodriguez eds., 2006).

suffer from these same problems of indeterminate correlation and the presence of other contributing factors.

4. Conclusion

Notwithstanding these limitations, various studies on corruption and national governance have failed to live up to the predictions of conventional takings discourse. In relation to the surveys of corruption, it is worth noting that in other developing countries such as China, corruption related to land is deemed the most problematic.[136] Singapore's government has in fact aggressively acquired land with the aid of the Land Acquisition Act.[137] The lack of a regulatory takings doctrine also opens up vast opportunities for rent-seeking and corruption in areas other than land acquisition. Similarly, one cannot easily dismiss the significant negative impact on regulatory quality or government efficiency arising from regulations that impose excessive social costs under no constraints of a regulatory takings doctrine.

At the very least, the consistency and strength of Singapore's performance strongly suggest that the conventional discourse on the perils of wide eminent domain power and weak property rights is not telling the whole story. As discussed in the next part, there are serious theoretical deficiencies with the conventional discourse.

IV. Explaining the Singapore Paradox (I): Givings In Theory

Conventional takings discourse emphasizes the need for restricting government taking powers and ensuring adequate compensation to combat the twin vices of rent-seeking and inefficiency. However, even the most restrictive eminent domain powers and comprehensive compensation scheme would not eliminate rent-seeking and inefficiencies since the root of problems lies in government allocation of benefits.

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[136] Jianlin Chen, *supra* note 23, at 118-19 (discussing the severe corruption in China's land acquisition process and government's recognition of the problem).

[137] Ricquier, *supra* note 38, at 266 (percentage of state land increase from forty-nine percent in 1969 to approximately sixty-five percent in 1975 alone). However, the amount of the land acquired by the government has dropped significantly in recent times, where the land acquired from 1985 to 1994, only one-tenth of that acquired from 1966 to 1984. *See* Williams, *supra* note 56. Nonetheless, the government is still not shy of acquiring land for broad policy purposes, such as recouping public investment and preventing windfall gain, even in comparatively recent times; *infra* Part V.C.1.c.

A. The Deficiencies of Conventional Takings Discourse

1. Rent-seeking: Still have Rent Available for Seeking

Given the widespread concerns about the danger of rent-seeking by interest groups—especially under the availability of wide eminent domain power—it is surprising that little takings literature is directed at this problem, which is arguably the root of eminent domain abuses. Reform proposals for eminent domain abuses have included payment of cash premiums to deter governments from overusing condemnation against owners who suffer incompensable losses,[138] restrictions on eminent domain against subsequent transfer/acquisition by private parties,[139] greater judicial control on "public use,"[140] and even banning of eminent domain for economic development all together.[141]

However, increasing the cost and/or difficulty of the exercise of eminent domain merely decreases the attractiveness of eminent domain as a tool for rent-seeking. Neither option eliminates the incentive for abuse when the benefit sufficiently outweighs the increased cost or does anything to deter rent-seeking behavior.[142] The emphasis on restricting eminent domain will simply divert government abuses and rent-seeking to other mechanisms.[143] While the public outcries after *Kelo* have restricted the use of eminent domain for private benefit through legislative amendments in Iowa, tax increment financing for infrastructure projects that benefit private developers remains permissible.[144] This not only leaves open room for rent-seeking but it also diverts taxpayers' money from other government recipients, especially school districts that rely significantly on property tax revenues.[145]

Moreover, the risk of abuses and other political vices such as corruption and favoritism from unfettered takings applies equally, if not

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[138] Kelly, *supra* note 7, at 941; Heller & Hills, *supra* note 3, at 1483-84.

[139] Cohen, *supra* note 2, at 560; Sanderfur, *supra* note 1, at 757 (enacting 2006 eminent domain restriction in South Dakota), 766 (2006 proposal by Louisiana for eminent domain restrictions).

[140] Heller & Hills, *supra* note 3, at 1485.

[141] Cohen, *supra* note 2, at 499.

[142] Jianlin Chen, *supra* note 23, at 127.

[143] *See* Bell & Parchomovsky, *supra* note 102, at 1449.

[144] George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 92-93 (2008). Tax increment financing occurs when a local government ear-marks future increases in property tax to finance infrastructure, which often can result in significant benefits to private development. *Id*. at 87-96.

[145] *Id*. at 83.

more, to unfettered givings.[146] This is because "givings may produce winners without identifiable losers, making it an attractive policy tool."[147] A clever government can easily distribute benefits to favored constituents to the exclusion of citizens who are not part of the government coalition or influential interest groups while raising revenue from all citizens.[148] The benefits are allocated to a small concentrated group while the costs, many of which are hidden, are spread out at minimal levels to numerous people.[149] It is rational to be ignorant of all the costs resulting from government actions given the high information costs, especially relative to the limited incentive arising out of this information (i.e. the minimal probability of affecting the government's policy and the limited aversion of cost in the even of success).[150] On the other hand, beneficiaries of a government policy are typically a small discrete group that receives a concentrated benefit and has disproportionately strong incentives to acquire information on these policies and attempt to influence them.[151]

The vast expansion of the federal government's regulatory power since the turn of the twentieth century has opened up unprecedented opportunities for rent-seeking by business, labor and other interests.[152] The government's regulatory power provides an unusually fertile source of rent.[153] Politicians use corruption or the legitimate alternative of campaign contribution to capitalize on these rent-seeking efforts.[154] "The legislative process rewards legislators who use political means to favor highly motivated interest groups at the expense of fragmented, diverse and possibly unknown interests."[155] "Politicians are faced with strong market force incentives to enact laws that serve private rather than public interests."[156] "Much legislation frankly seeks to achieve a wider distribution of wealth by

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[146] Bell & Parchomovsky, *supra* note 23, at 574.

[147] *Id*. at 574-75.

[148] Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 289 (1990).

[149] ROBIN PAUL MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT 41 (1991).

[150] Dwight R. Lee, *Government Regulation and Property Rights*, *in* THE EGLAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS 310, 315 (Enrico Colmbatto ed., Edward Elgar 2004).

[151] *Id*.; *see* Kelly, *supra* note 7, at 34-37 ("the concentrated benefit problem").

[152] Bradley A. Smith, *Hamilton at Wits End: The Lost Discipline of the Spending Clause vs. the False Discipline of Campaign Finance Reform*, 4 CHAP. L. REV. 117, 128 (2001).

[153] EAGLE, *supra* note 1, at 25; ANDERSON & HUGGINS, *supra* note 28, at 76 ("To make matters worse, the billions of dollars are continually put up for grabs, in each legislative session, adding to the rent-seeking cost and making property rights all the less secure.").

[154] ANDERSON & HUGGINS, *supra* note 28, at 53.

[155] MALLOY, *supra* note 149, at 40.

[156] Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905, 910 (1999) (quoting Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986)).

divesting owners of their right to use property to its maximum advantage and by altering contractual arrangements."[157]

"Higher government spending increases opportunities for private rent-seeking from the government," resulting in "a cause and effect relationship by which the growth rate of government spending accounts for more than eighty percent or more of the growth rate in campaign spending."[158] These large campaign contributions arguably lead to quid pro quo corruption whereby legislative votes are exchanged for campaign contributions.[159] There is growing evidence that such campaign contributions do have an effect on political decision-making.[160] Economically and normatively, there is no difference between a legal campaign contribution to politicians to procure a favorable government regulation and an illegal bribe to politicians to procure the same favorable government regulation. The politicians in both cases are corrupt because, rather than acting in a supposedly neutral manner for the interest of the public, the politicians modify their behaviors and allocate benefits to the rent-seekers due to the benefits the rent-seekers provided to the politicians.[161]

These risks are borne out in practice. A study of Indianapolis's government property development activities reveals that the activities were highly advantageous to certain developers.[162] In addition, "although public funds were used to subsidize and promote a wide range of projects in Indianapolis, many of the benefactors of these undertakings turn out to have been on the planning, management, or oversight boards of the City Committee and the public entities acting with the authority over the projects."[163] In Malaysia, after the government was forced to reveal the beneficiaries of major government economic programs, the list of beneficiaries released was populated with royalties, senior civil servants, politically connected individuals and family members of leaders.[164] The need for transparency only arose during periods of economic turmoil, which

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[157] ELY, *supra* note 3, at 174.

[158] Smith, *supra* note 152, at 133 (citing John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger*, 43 J.L. & ECON. 359, 383 (2000)).

[159] *Id.* at 133. However, there is little systematic evidence to suggest that campaign contributions are the source of significant quid pro quo corruption. *See, e.g.*, *id*. at 135.

[160] Bruce L. Benson & Fred S. McChesney, *Corruption, in* THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS 328, 336 (Enrico Colombatto ed., 2004) (citation omitted).

[161] *Id.*

[162] MALLOY, *supra* note 149, at 104.

[163] *Id.* at 109.

[164] Brendan Pereira, *Has it Helped the Masses or Just an Elite Few?*, STRAITS TIMES (Sing.), July 19, 1998, at 45.

resulted in insufficient goodies to go around.[165] The recent "pay-to-play" corruption scandal involving former Illinois governor Rod Blagojevich[166] only serves to highlight the fact that corruption and rent-seeking arises primarily out of the ability to give, not take.

2. Inefficiency: Still no Full Internalization

As discussed above,[167] conventional takings discourse focuses on adequately compensating government takings victims to ensure cost-internalization on government decision-making.[168] However, as governments respond to political rather than market incentives, focusing on making government pay does not necessarily mean social costs will be incorporated into its calculus.[169] When confronted with the additional outlay of compensation, governments may simply shift the additional costs to either the broad tax base or to deficit spending in order to incur correspondingly low political costs.[170] Indeed, Daryl Levinson, through public choice models, dispels the common myth on the justification of just compensation and concludes that cost remedies (requiring government to pay) do not necessarily result in either internalization of cost or effective deterrence.[171]

Moreover, while takings literature assumes that government does not internalize social costs and thus has to be forced to pay money from the treasury, it ignores the social benefits of the equation or any requirement for the government to internalize the social benefits. The literature assumes rather optimistically that governments apply a more altruistic function in the giving aspect as opposed to the taking aspect.[172] This is ironic given that public choice theory has challenged the notion that administrative agencies' personnel can actively and single-mindedly pursue the public interest without being affected by their own self-interest.[173] The same logic of inefficiency for takings should apply when property or property rights are

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[165] *Id*.

[166] *Auctioning Illinois*, CHI. TRIB., Dec. 14, 2008, §2, at 3.

[167] *See supra* Part III.A.2.

[168] *See also* Levinson, *supra* note 25, at 348-49.

[169] *Id*. at 347; Rapaczynski, *supra* note 35, at 216.

[170] Rapaczynski, *supra* note 35, at 216-17. The costs, which can include higher taxes or an even less efficient economy, are so spread out over the entire population that it is rational for an individual to be ignorant or indifferent about them given the cost of information and the limited impact of an individual. *See also* Lee, *supra* note 150, at 315.

[171] Levinson, *supra* note 25, at 415 ("Depending on the model of the political process employed as an exchange mechanism between financial and political costs, and on numerous contextual variables, the deterrence effects of compensation on government behavior seem as likely to be perverse as beneficial.").

[172] *Id.* at 350.

[173] Rogovin & Citron, *supra* note 94, at 695; Wagner, *supra* note 94, at 188.

transferred to private hands.[174] Inefficiency is not averted even if all the social costs are fully internalized through compensation of takings victims[175] since the social benefits are often not internalized.[176] Just like undercompensation will cause inefficiency where the full costs of the takings are not internalized,[177] unaccounted givings will result in positive externalities that would create fiscal illusion if not internalized.[178] Inefficiency still results when socially efficient projects are not undertaken because it is too costly for the government. Opportunity cost also exacerbates inefficiency when the allocation of a government benefit is based on political influence rather than actual efficiency.[179]

B. Conclusion: Need for Emphasis on the Givings Aspect

In conclusion, focusing only on the takings aspect of the equation will neither ensure efficiency nor constrain rent-seeking. Rent-seeking is not (or maybe "cannot be" would be better) tackled at its source because the allocation of government benefits provides many opportunities/incentives for rent-seeking. Rent-seeking is not tackled at its source as the allocation of government benefits still provides ample opportunities for rent-seeking. Inefficiency remains very much alive since social benefits of government actions are still not internalized. A complete picture requires equal focusing on the givings aspect. Givings jurisprudence is the flipside of takings jurisprudence. While takings jurisprudence focuses on identifying those diminutions of property caused by the government actions that must be compensated, givings jurisprudence seeks to determine under what circumstances beneficiaries of government actions must be charged for received benefits.[180] This is not only essential in combating rent-seeking and inefficiency but also provides other important benefits.

By imposing appropriate charges on government benefits, rent-seeking activities are significantly curtailed since the government recoups

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[174] JOHN BRIGHAM, PROPERTY AND THE POLITICS OF ENTITLEMENT 140 (1990).

[175] Moreover, even under current U.S. takings doctrine, a substantial part of the social costs associated with takings remained uncompensated. These are derivative takings where property values are diminished because of government actions on a neighboring or nearby property. Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 290-92 (2001).

[176] Levinson, *supra* note 25, at 350.

[177] *See* discussion *supra* Part III.B.2.

[178] Bell & Parchomovsky, *supra* note 23, at 554; Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 23, at 330.

[179] By allocating benefits to those with the greatest political influence rather than those with the highest economic valuation, the benefits are not used for the most efficient purposes. MALLOY, *supra* note 149, at 116.

[180] Bell & Parchomovsky, *supra* note 23, at 554.

the "rent" through the charges. For example, private developers will have little incentive to lobby the local government to exercise eminent domain for subsequent transfer to themselves if they are made to pay competitive market value for the acquired land. This will be far more effective in preventing the rent-seeking abuses by private developers than any restrictions on eminent domain.[181] Unlike in the U.S. where the private developers obtained land on the cheap, English public authorities "are prevented from using cheap land assembly as a bargaining chip in negotiations with private businesses over decisions to locate (or relocate)."[182] This possibly explains why eminent domain for the benefit of private developers does not generate such public outrage and controversies in the United Kingdom ("U.K."). While not part of typical takings discourse, this requirement that the local government must obtain the highest price for the land would in itself prevent dubious and controversial eminent domain cases such as *Poletown Neighborhood v. City of Detroit*[183] and *99 Cents Stores v. Lancaster Redevelopment Agency*[184] without any reference to the public use requirement.[185] Indeed, "[s]adly for special interest groups, user fees tend to maintain competition and generate no rents for [these groups]."[186] Similarly, the ability to recoup benefits arising out of government actions will enhance the government's financial capabilities in undertaking such benefits-generating activities.

In addition, government givings or takings are likely to be accompanied by some other corresponding takings or givings.[187] Having used eminent domain to take private property from private owners in the name of economic development, it is common for the government to transfer that plot of land to private developers.[188] Zoning can also be seen as a

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[181] Jianlin Chen, *supra* note 23, at 125-27. *See* discussion *infra* Part V.

[182] Tom Allen, *Controls over the Use and Abuse of Eminent Domain in England: A Comparative View*, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 75, 84 (Robin Paul Malloy ed., 2008).

[183] 304 N.W.2d 455 (Mich. 1981).

[184] 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

[185] Allen, *supra* note 182, at 89-90.

[186] Bruce Yandle, *User Charges, Rent Seeking and Public Choice*, *in* CHARGING FOR GOVERNMENT: USER CHARGES AND EARMARKED TAXES IN PRINCIPLE AND PRACTICE 34, 50 (Richard E. Wagner ed., 1991).

[187] Bell & Parchomovsky, *supra* note 23, at 565; Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 23, at 327-28; BRIGHAM, *supra* note 174, at 138-39 ("Disposal of public property, like the governmental taking that is its analog and often a corollary, is a function of the structure of expropriation law.").

[188] Kelly, *supra* note 7, at 37-38 (citing the following examples: the ninety nine year lease at one dollar per year in the case of *Kelo*; General Motors obtaining land for $8 million even though the cost of the project to the public was $200 million; in Cousins Island, Maine, lot was seized and given to developer for one dollar, in addition to $1 million in rebate); Callies, *supra* note 1, at 57 (citing example of developer

competition between property owners whose property value is negatively affected with property owners whose property value is positively affected.[189] The inextricable relationship between takings and givings dictates the importance of the giving jurisprudence in developing a coherent takings jurisprudence.[190]

Furthermore, both givings and takings affect relative wealth.[191] Current takings jurisprudence is only concerned with diminutions of absolute wealth.[192] However, changes in relative wealth should not be any less important than changes in absolute wealth. Both givings and takings affect the poverty gap, which should be an important social-economical consideration in any government action.[193] When a government expends substantial investment and efforts to engage in massive urban renewal and revitalization in a particular area, benefits to that particular area "come at the expense of equivalent or perhaps greater [benefit] that could have occurred elsewhere but for the intervention of political means."[194] Making a particular area a "comparatively richer and nicer place to live in" means other areas are made comparatively worse off.[195]

Finally, givings, like takings, raise great concerns of fairness. "It is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole."[196] It is clearly unfair for the government to discriminatorily allocate benefits on the basis of the recipient"s ability to exploit the political system.[197]

These merits are further elaborated in the next two parts where the various manners in which Singapore imposes charges on government beneficiaries will be examined and contrasted with U.S. practices which very often leave these benefits "uncharged."

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wanting to build a CVS "mega drugstore" and obtaining a 20-year lease of $100 annually after the borough council condemned 4 homes and 5 businesses in order to obtain the land); Allen, *supra* note 182, at 85 (citing examples where acquired land would be resold for $1).

[189] ANDERSON & HUGGINS, *supra* note 28, at 53.

[190] Bell & Parchomovsky, *supra* note 23, at 552.

[191] *Id*.

[192] *Id*.

[193] Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 23, at 328.

[194] MALLOY, *supra* note 149, at 115.

[195] *Id*.

[196] Bell & Parchomovsky, *supra* note 23, at 554 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[197] Bell & Parchomovsky, *supra* note 23, at 578.

V. Explaining the Singapore Paradox (II): Givings In Practice

While Singapore arguably fares very badly in the takings aspect given its wide powers of eminent domain and low compensation, this is mitigated by Singapore's emphasis on the givings aspects of the equation. This Part examines how Singapore charges for all three different types of givings: physical, regulatory, and derivative. Comparisons with the U.S. and other countries highlight Singapore's givings rationale.

A. Physical Givings

It is common sense that when government directly transfers property to a private individual, it should be transferred at a fair market value in the absence of compensatory or redistributive purpose. Yet occasions where private developers acquire land through eminent domain practically for free are unfortunately common.[198] The ability to decide the award of large lucrative government contracts also provides a rich avenue for rent-seeking and corruption, as illustrated by the recent Blagojevich scandal.[199] This scandal has prompted Illinois to ban firms from making political donations to elected official if the elected official is responsible for contracts that are awarded to the donating firms.[200] While this helps constrain corruption, another approach to the problem is simply to ensure that the government obtains the best value.

This section examines Singapore's emphasis on competitive bidding for the award of government contracts and the disposal of government's assets together with the en-bloc process. The en-bloc process is particularly interesting where there are no allegations of corruption or rent-seeking despite eminent domain powers being directly wielded by private developers.

1. Award of Contracts and Disposal of Assets

Proper procedures in public contracting are important for efficiency and maximizing returns to the public sector.[201] Several safeguards are built

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[198] *See* all in *supra* note 188.

[199] State contracts have been followed by substantial political contribution. *See, e.g.*, *Auctioning Illinois*, *supra* note 166; Richard Wronski & Jon Hilkevitch, *Tollway Deal was Rich with Possibilities*, CHI. TRIB., Dec. 11, 2008, at C6 ($1.8 billion tollway project was dangled to attract $500,000 campaign fund contribution).

[200] Rick Pearson & Ray Long, *A System Made of Money*, CHI. TRIB., Dec. 14, 2008, at C1.

[201] TRANSPARENCY INTERNATIONAL, NATIONAL INTEGRITY SYSTEMS: COUNTRY STUDY REPORT: SINGAPORE 28 (2006).

into Singapore's government procurement process to avoid corruption and ensure efficiency. First, technical specifications for the procurement/tender should not be restricted as to any particular supplier, trademark, design or patent.[202] More importantly, the government is not to seek or accept advice on these technical specifications from persons who are likely to have a commercial interest in the procurement in question.[203] Second, if selective procedures are used for the procurement, a sufficient number of applicable suppliers must be invited to ensure competition.[204] Third, the contract must be awarded to the lowest price or most advantageous tender that complied with the terms and conditions of tender and contract requirements.[205] Fourth, the contracting authority is to provide, upon request by the rejected tenderer, "pertinent information on the reasons why his tender was not selected, the characteristics and relative advantages of the tender selected, and the name of the successful tenderer."[206] Failure to comply with these safeguards will render the government contracting authority liable to compensate parties participating in the tender or procurement for the loss arising from the non-compliance.[207]

Other safeguards exist. All government tenders must be posted online or in other widely accessed public media.[208] Use of limited tender must be approved at a high level.[209] The Government Instruction Manuals require that "the allocation of public assets should be done in objective and fair manner" and maximizing of total returns.[210] These government contracts are subjected to audit by the Auditor-General.[211] The Auditor-General examines the books of government ministries and statutory boards every year, with

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[202] "[U]nless the goods or service to be procured cannot be described by reference to technical specifications which are sufficiently precise and intelligible to all suppliers, in which case the references shall be accompanied by the words 'or equivalent'." Government Procurement Regulations, Cap. 120, Section 6, § 5(3) (2004 Rev. Ed.) (Sing.).

[203] There is an additional ban on acting "in a manner which will have the effect of precluding competition." *Id*. § 5(4).

[204] However, this process must take place "without affecting efficiency in the procurement." *Id*. § 16(1).

[205] The tenderer must also be deemed to be fully capable of complying with the terms and conditions of the contract. *Id*. § 22(4). However, the contracting authority may decide not to award the contract if it opines that it is against the public interest. *Id.* § 22(3).

[206] *Id*. § 29. However, this information may be withheld if the provision of this information will prejudice public interest or impede fair competition. Government Procurement Regulations, Cap. 120, Section 6, § 30 (2004 Rev. Ed.) (Sing.).

[207] This right to compensation can only be brought in an administrative tribunal and not a judicial court. Government Procurement Act, Cap. 120, §7 (1998 Rev. Ed.) (Sing.).

[208] TRANSPARENCY INTERNATIONAL, *supra* note 201, at 29.

[209] *Id*.

[210] GOVERNMENT INSTRUCTION MANUALS: IM3G REVENUE CONTRACTING PROCEDURES #4 (Sing.).

[211] *Id*. at #11.

heavier emphasis on those with large procurement budgets.[212] Procurement irregularities and other non-compliance with government procurement procedures are a common focus in these audits.[213] Reflecting an inherent concern about the risk of inefficiency and corruption in the discretion of allocating resources, sale of government assets through direct private sale are frowned upon even if measures are taken to redress the deficiencies.[214] A report commissioned by Transparency International concluded that "Singapore government procurement is based on value for money through fair and open competition with no favoritism towards any supplier, whether big or small, local or foreign."[215]

This is a far cry from neighboring countries where government procurement is a rich source of excesses and possible corruptions.[216] Public contracting in the U.S. has also raised concerns.[217] The market for government contracts in the U.S. is easily worth trillions of dollars even before the recent massive government bailout, and it is unsurprisingly plagued by "lobbying and political corruption scandals" and "controversial payments to, and actions by, government contractors."[218] In addition, "newspapers and magazines have been filled with articles about awarding of noncompetitive contracts to politically connected companies."[219] Nonetheless, this is not primarily caused by the absence of formal laws since

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[212] Judith Tan, *Guardians of the Public Coffers*, STRAITS TIMES (Sing.), Aug 15, 2008.

[213] *E.g.*, Anna Teo, *Committee Calls for Review of Sentosa Land Sales*, BUSINESS TIMES (Sing.), May 26, 2007; Vince Chong, *Auditor-General Raps BCCS Again*, BUSINESS TIMES (Sing.), July 10, 2003; Salma Khalik, *Lapses Seen in Govt Agencies*, STRAITS TIMES (Sing.), June 15, 2000, at 27; Salma Khalik, *Auditor-General Report Cites Many Irregularities*, STRAITS TIMES (Sing.), Sep. 8, 1999, at 3; Dominic Nathan, *Airport Running Without Land Deed*, STRAITS TIMES (Sing.), July 17, 1998, at 51.

[214] Anna Teo, *supra* note 213; Vince Chong, *supra* note 213 (Despite the government appointing five property agents to sell the property, the Auditor-General opined that "[w]ithout an open tender or auction, the sale lacked transparency and there was no assurance that all interested buyers had been reached.").

[215] TRANSPARENCY INTERNATIONAL, *supra* note 201, at 28.

[216] In Malaysia: Pauline Ng, *KL Plans Index on Ministries' Accountability*, BUSINESS TIMES (Sing.), Sep. 15, 2007 (inflating cost of procurement supplies by up to 100 times); Pauline Ng, *A Budget for Spending More? Fine – if the Money's Well Spent*, BUSINESS TIMES (Sing.), Sep. 10, 2007 (examples include a 10-title set of technical books costing RM 417 being contracted at a cost of RM 10,700). In Thailand: Nirmal Ghosh, *Thailand's Super Fighter: Jaruvan Maintaka has Defied Attempts by the Powerful to Derail her Campaign against Corruption*, STRAITS TIMES (Sing.), Feb. 11, 2006 (for example, a road project was contracted with no bargaining with bidders and cost the state 1.6 billion baht more that it should have).

[217] TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 275-76 (Amber Poroznuk ed., 2006); Jennifer Jo Snider Smith, *Competition and Transparency: What works for Public Procurement Reform*, 38 PUB. CONT. L.J. 85, 88 (2008).

[218] Paula L. Hopper & Robert G. Hensley, Jr., *What Do You Mean I'm a Lobbyist?: New Government Contractor Restrictions and What They Will Mean for Banking Institutions*, 12 N.C. BANKING INST. 103, 103 (2008).

[219] Lani A. Perlman, *Guarding the Government's Coffers: The Need for Competition Requirements to Safeguard Federal Procurement*, 75 FORDHAM L. REV. 3187, 3189 (2007) (citation omitted).

the competitive and procedural measures adopted by Singapore are similar to the U.S. equivalent.[220] More importantly, the inevitable presence of exemptions in both jurisdictions[221] means the focus in this area is more on actual interpretation and implementation of the law rather than the underlying jurisprudence or legal framework per se.

Thus while the competitive and transparent nature of the Singaporean government's awarding of contract and disposal of government assets does contribute to efficiency and the lack of corruption, her laws and policies in this aspect are not entirely unusual or special on their own. As discussed in the remainder of this part, it is how this *maximum value for government* rationale is applicable to other areas where the allocation of benefits is less direct and obvious that the givings jurisprudence can be best appreciated.

2. En-bloc: Economic Development Eminent Domain Without Abuse

As discussed above,[222] the en-bloc process allows private developers to compulsorily acquire property from homeowners who objected to the sale if a certain percentage of the majority has agreed to the sale. The legislative amendment that granted this eminent domain power[223] to private developers was unapologetic to the underlying objectives of redevelopment of land and urban renewal,[224] which were duly acknowledged as differing from traditional public use.[225] Yet there is no public outcry of the government being "merely the conduit" [226] hijacked by private developers for private benefit. This is not surprising given that the private developers in the en-bloc process do not enjoy the obscene benefits commonly seen in U.S. economic development eminent domain cases.[227] Private developers typically have to fork out a high premium of between 60% to 100% above market value for the property *from their own pocket*.[228] Thus, while there

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[220] *See id*. at 3198-05.

[221] U.S: *Id*. at 3199-02. Singapore: *see* discussion *supra* Part V.A.1.

[222] *See* discussion, *supra* Part II.D.

[223] Jianlin Chen, *supra* note 23, at 141-42 (explaining that notwithstanding the appearance of a private collective sale, eminent domain powers is exercised during an en-bloc sale).

[224] Land Titles (Strata) (Amendment) Bill, 1998, *supra* note 82, at Col 614 (testimony of Mr. Chuang Shaw Peng).

[225] *Id.* at Col 608 (testimony of Assoc. Prof. Chin Tet Yung); Land Titles (Strata) (Amendment) Bill (As reported from Select Committee), 1999, *supra* note 87, at Col 1336 (Mr. Simon Tay).

[226] *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 482 (Mich. 1981) (Fitzgerald, J., dissenting).

[227] *See* discussion is notes, *supra* note 188.

[228] Kalpana Rashiwala, *Sing Holdings Inks Deal to Buy Hillcourt Apts for $361m*, BUSINESS TIMES (Sing.), Mar. 23, 2007 (60% premium); Uma Shankari, *Heiwa Court Sold for $11 Million; Elmira Heights also up for Collective Sale for $326m*, BUSINESS TIMES (Sing.), Feb. 22, 2007 (70% premium); Joyce Teo, *Anderson 18 Owners to Get $6.75m Each from Condo Sale*, STRAITS TIMES (Sing.), Mar. 6, 2007 (98.5%

are many criticisms of Singapore's en-bloc process,[229] none concern corruption or rent-seeking behavior by the private developers.

One might argue that the en-bloc law is a piece of legislation that is clearly beneficial to private developers and is likely to have been lobbied heavily by them. However, given the extreme wide scope eminent domain power coupled with the significant fiscal cost of eminent domain, it would be strange for private developers in Singapore to lobby for such a piece of legislation. They could have easily done what the private developers are doing in the United States, namely get the government to exercise eminent domain and then transfer the land cheaply to them. Even if private developers have indeed lobbied (or bribed) for this legislation,[230] the fact that they have to resort to this legislation, which requires them to obtain a super majority of owners' approval and paying above market compensation out of their own pocket, shows that they are unable to get much mileage out of economic development from eminent domain. Singapore's stringent procedures in asset disposal only strengthened the importance of proper charging for physical givings by the government.

B. Regulatory Givings

The constraining of physical givings is certainly important. With the local government constrained in providing financial incentives to attract private business,[231] private developers in the U.K. do not rely on eminent domain as a primary source of profit, helping negate the public impression

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premium); Tan Dawn Wei, *They Don't Even Own the Land They're Fighting Over*, STRAITS TIMES (Sing.), May 20, 2007 (offer $1.37 million when market price is $770,000); Carolyn Quek, *140-Unit Estate Sold But One Won't Move; Buyer City Developments Planning Legal Action Against 63-year-old Who is Uncontactable Now*, STRAITS TIMES (Sing.), June 4, 2007 (60% to 90% premium).

[229] *See, e.g.*, concerns about the lack of clarity, transparency, and safeguards in the current en-bloc process vis-à-vis possible abuse by certain owners: Land Titles (Strata) (Amendment) Bill, 2007, Parliament No. 11 *Hansard (Sing.)* 20 Sept. 2007 (testimony of Deputy Prime Minister and Minister for Law, Prof. S Jayakumar); pro-sale owners using common fund to further the en-bloc process for their own private gain: Tan Dawn Wei, *En Bloc Investors or Just Vultures?; Traders Who Sniff Out Old Units and Push Hard For Collective Sale Stir Up Mixed Emotions Among Residents* STRAITS TIMES (Sing.), May 27, 2007; historical values are lost as they are not factored into the negotiation between owners and private developers: Arthur Sim, *Place Older Buildings' Heritage Along with Commercial Value; Professional Body Urges Reviews to Aid Conservation*, BUSINESS TIMES (Sing.), May 5, 2007; social externalities like environment pollution arising out of the demolition and construction in the redevelopment process: *Storeys* [sic] *of Dust and Noise; Homes and Businesses Surrounded by En Bloc Constructions Bemoan the Physical Discomfort and Additional Costs They Bring*, STRAITS TIMES (Sing.), Sep. 2, 2007; increased anxiety caused to other property owners who want to see their residence as a home and not a mere commodity: Linda Lim, *Can Money Ease Loss of Memories?*, STRAITS TIMES (Sing.), June 21, 2007. *See generally* Jianlin Chen, *supra* note 23, at 138-40.

[230] There is no evidence of this happening.

[231] Allen, *supra* note 182, at 92-93.

that the power of eminent domain has been abused for the sake of private interests.[232] However, these U.K. constraints focus on the possible financial burden on the government and may still allow conferment of huge private benefits in the form of favorable planning or zoning decisions that impose no direct costs on the government.[233] This is a serious loophole for abuse since it is through planning permission where the value of the land can be dramatically enhanced.[234] From an economics perspective, there is no fundamental distinction between "property" and "regulation" because both can be equally valuable.[235] Indeed, the government's regulatory powers provide an unusually fertile source of rent.[236] The opportunistic behavior of benefiting particular group through beneficial legislation "is less painful to lawmakers than levying taxes to finance [beneficial] governmental programs."[237] Here, Singapore's charging of regulatory givings helps close this loophole.

1. Development Charge

a. How it is Charged

Development charges are imposed when written permissions for development of land beyond existing use are granted.[238] Development charges are payable when a developer applies to change the intensity or use of land to enhance its value.[239] The Ministry of National Development sets the rate in consultation with the Chief Valuer, who takes into account current market values.[240] As a general rule, higher premiums are levied for projects

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[232] *Id.* at 95-96.

[233] *Id.* at 90-92.

[234] *Id.* at 95 (£7000 per hectare mixed-use agricultural land versus £2.6 million per hectare of residential "bulk" land).

[235] EAGLE, *supra* note 1, at 332.

[236] *Id.* at 25; ANDERSON & HUGGINS, *supra* note 28, at 76.

[237] ELY, *supra* note 3, at 174.

[238] Planning (Amendment) Bill, 1964, Parliament No. 1 *Hansard (Sing.)* 2 Nov. 1964, Col 146 (testimony Minister for National Development, Lim Kim San); Ricquier, *supra* note 38, at 277 ("The development charge is the difference between the Development Baseline and the Development Ceiling."); These two terms are defined in sections 36 of the Planning Act (Cap. 232 (1998 Rev. Ed.) (Sing.)). Development Baseline basically means the value of the land based on the basic zoning permission, either under the original 1958 Master Plan or under a planning permission where development charges have been paid. Development Ceiling means the sum of the value of development of the land previously authorized to be attained and the value of the land to be authorized by the planning permission.

[239] Kalpana Rashiwala, *Prime Residential DC Seen Rising 20-35%; But Potential En Bloc Sellers Remain Upbeat Due to Positive Outlook*, BUSINESS TIMES (Sing.), Feb. 10, 2007.

[240] *Id.*

in prime areas.[241] It was initially designed to capture between 25% and 50% of the incremental value for the state when it was first implemented as a fixed rate in the 1960s.[242] However, the law was later amended to impose development charges based on a prescribed percentage of the appreciation in land value, initially set at 70%.[243] It is currently 70% for permission to develop land for any other purpose except business zone commercial use, which is 100%.[244]

For ease of administration,[245] a set of pre-determined and regularly revised tables stipulate the values for different geographical areas for prima facie calculation.[246] They closely mirror property values and vary according to land use and locations.[247] The current frequency of revision is every six months.[248] The system is transparent since the revision of development charges reflects movement in property and land prices.[249] The impact of the total development costs of the project is somewhat limited. When the rate was increased from 50% to 70% in 2007, the increase in total development costs was only a few percentage points.[250]

A property owner selling after securing planning permission to increase the plot ratio from 3.46 to 5.1 should be able to secure a higher value than $630 million if not for the fact that the new buyer would have to pay nearly $50 million of development charge before he can tap into the enhanced development potential from the planning permission.[251] Similarly, when the zoning of a land was changed from "warehouse and office" to

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[241] Abdul Hadhi, *Development Charges go Up; Developers May Have to Absorb Hike*, BUSINESS TIMES (Sing.), Sep. 1, 1995.

[242] Koh & Lim, *supra* note 46, at 332.

[243] Planning (Amendment) Bill, 1979, Parliament No. 4 *Hansard (Sing.)*, 11 Dec. 1979, Col 525 (1979) (testimony of Minister for National Development, Teh Cheang Wan).

[244] Planning (Development Charges) Rules, Cap. 232, Section 40, §10 (2007 Rev. Ed.) (Sing.).

[245] Planning (Amendment No. 2) Bill, 1989, Parliament No. 7 *Hansard (Sing.)* 4 Aug. 1989, Col 449 (1989) (testimony of Minister of National Development, S. Dhanabalan).

[246] Planning (Development Charges) Rules, *supra* note 244, §§ 3-5, First Schedule (Sing.). The value from the table may be challenged through administrative avenue. Planning Act, Cap. 232, § 39 (1998 Rev. Ed.) (Sing.)

[247] Joyce Teo, *Property Charge Hike May Cool En Bloc Fever*, STRAITS TIMES (Sing.), July 19, 2007.

[248] Fiona Chan, *Property Development Charges Barely Budge*, STRAITS TIMES (Sing.), Mar. 1, 2008.

[249] Ann Williams, *Land Bids "May Drop" as Govt Jacks up Development Charges*, STRAITS TIMES (Sing.), Sep. 1, 1995, at 48.

[250] Maria Almenoar, *Property Charge Hike Not Meant to Cool Collective Sale Fever*, STRAITS TIMES (Sing.), July 23, 2007 ("For these sites, the DC hike could add 6 per cent or more to the land cost"); Joyce Teo, *supra* note 247 ("with the change, it expects the land cost for acquiring Hillcourt Apartments to rise by about 1.2 per cent – from $1,444 per sq ft of potential gross floor area to $1,461"; "the rate revision will add a few percentage points to the total costs of some developments").

[251] Kalpana Rashiwala, *Royal Brothers in Talks to Buy Paragon By Sogo*, STRAITS TIMES (Sing.), Jan. 25, 1996, at 60.

prime residential development with increased plot ratio, the increase in land value would have to be tampered by the $1.75 million in development charges if the benefit of the zoning is to be realized.[252] However, the development charge is unlikely to deter property developers because the developers will not be able to enjoy the appreciation in the property value if they do not pay for the development charges.[253] As in other forms of taxes, whether the developers or buyers bear the charge depends on market forces.[254]

b. Legislative Rationale

The legislative rationale for the development charges focused on the benefits landowners will enjoy from government zoning and planning decisions.[255] From its initial enactment in 1964, the development charges were introduced "with a view to secure to the State the increases in value of land brought about by community development and not through the efforts of the landowner . . . ."[256] Development charges were imposed such that "landowners or other interested persons who will benefit from the grant of permission must pay to the State a part of this benefit in the form of a development charge."[257]

Concerns about the windfall landowners would receive by mere re-zoning continued to resonate in subsequent amendments of the relevant laws, with statements like "a windfall in land appreciation [will be conferred] on the land owners unless the Government is able eventually to tax part of the appreciation in the form of development charge,"[258] or

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[252] *Michelin to Sell Prime Site Near S'pore River*, STRAITS TIMES (Sing.), Jan. 18, 1995, at 39.

[253] Ann Williams, *Developers Expected to Absorb Bulk of Extra Costs*, STRAITS TIMES (Sing.), Sep. 3, 1994, at 48.

[254] *Id.*; LEUNG YEW KWONG, DEVELOPMENT LAND AND DEVELOPMENT CHARGE IN SINGAPORE 127 (1987); J. BARRY CULLINGWORTH, THE POLITICAL CULTURE OF PLANNING 79-80 (1993) (the more attractive or sought after the property is, the more likely consumers bear the charge; conversely, it is the land owner who bears the charge). In an empirical study in the U.S., it was found that a quarter of the development impact fees were borne by the original property owners, with the rest being borne by the new home purchasers. Developers on the other hand do not bear any of the charge in a competitive housing construction market. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 214 (2006).

[255] Planning (Amendment) Bill, 1964, *supra* note 238, at Col 146 (Minister for National Development, Lim Kim San).

[256] *Id.*

[257] *Id.*

[258] Planning (Amendment) Bill, 1982, Parliament No. 5 *Hansard (Sing.)*, 3 Mar. 1982, Col 449 (1982) (testimony of Minister for National Development, Teh Cheang Wan).

> [T]he Development Charge is . . . levied where the value of land is enhanced as a result of some actions of the State, whether this is the building up of infrastructure that would allow land to be used more intensively, or whether this is some change in planning parameters, or some change of policy regarding land use.[259]

In recent years, there has been an interesting shift in emphasis from this windfall rationale to focusing on the government's expenses in value enhancement (building of infrastructure) and the need to recoup for further public infrastructure.[260] Nonetheless, when the government increased the rate from 50% to 70% in 2007, the new rates were described as a "sharing of the gains and of the increase in value of the land as a result of Government's planning approval."[261]

One lawmaker opined that from a social-economic perspective, it is perfectly legitimate to require landowners to give back a portion of realizable gains to the State by way of development charge when they benefit from the positive externalities arising from government's planning actions. There was also recognition that given the land scarcity situation in Singapore where real estate has great value, zoning and development charges laws have strong and far-reaching implications on social wealth distribution.[262]

c. Difference and Merits

While the United States has a similar scheme known as monetary exactions, the legislative rationale is very different. In the United States, exactions and programs linking development rights with obligations to provide municipal improvements have become increasingly common.[263] Originally, development conditions were imposed for the provision of basic utilities on the site.[264] This was later expanded to include "off-site" utilities

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[259] Planning (Amendment) Bill, 2003, Parliament No. 10 *Hansard (Sing.)*, 11 Nov. 2003, Col 3491 (2003) (testimony of Minister for National Development, Mah Bow Tan).

[260] *Id.;* Almenoar, *supra* note 250.

[261] Almenoar, *supra* note 250.

[262] Planning (Amendment) Bill, 1982, *supra* note 258, (testimony of Dr. Amy Khor Lean Susan).

[263] EAGLE, *supra* note 1, at 441 ("grown to a 'full-blown land use fad'"); HOLZMAN-GAZIT, *supra* note 11, at 21; Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1731 (1988).

[264] CULLINGWORTH, *supra* note 254, at 76; Rosenberg, *supra* note 254, at 199; HOLZMAN-GAZIT, *supra* note 11, at 21.

such as sewerage, parks and roads.[265] A primary reason for this expansion was opposition from existing property owners against having to pay increased property taxes for the benefit of new property owners.[266] Indeed, the trend towards greater development charges in the United States, Canada and the United Kingdom stemmed from the inability of local governments to shoulder the increased financial burdens of such developments.[267]

The public discourse in the United States focuses on how to supply needed public improvements without increasing the general taxes, and it reflects the theme that growth "should pay its own way."[268] This is part of the general shift of civic culture to privatize development costs.[269] It is indeed interesting to note that the U.S. courts struggle with categorizing the monetary exaction as either police power regulation or as a form of taxation,[270] but fail to consider the possibility of treating it as a form of charging for the benefits arising from the development permit.

Thus, while the United States imposes some charges upon granting development rights and planning permissions, there is a fundamental doctrinal difference from Singapore, which emphasizes the windfall arising from such development permissions. The difference is crucial in light of the potential room for rent-seeking in this form of regulatory givings. Zoning increases the opportunities for rent-seeking by allocating the right to develop through the political process.[271] This is especially true because the development and business interests are well organized and have a long history of influencing state government, especially state legislatures.[272] Indeed, there have long been concerns that U.S. land use determinations are marked by questionable deal making and bias.[273] Developers may get around zoning regulations by obtaining a variance with the help of a bribe or campaign contribution to the underpaid local government officials.[274] For example, the ongoing Illinois corruption scandal includes allegations that a congressman obtained key zoning changes for projects whose developers

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[265] CULLINGWORTH, *supra* note 254, at 77; Rosenberg, *supra* note 254, at 200; HOLZMAN-GAZIT, *supra* note 11, at 21; EAGLE, *supra* note 1, at 441 (providing a list of the common types of exactions).

[266] CULLINGWORTH, *supra* note 254, at 77; Rosenberg, *supra* note 254, at 180.

[267] CULLINGWORTH, *supra* note 254, at 83.

[268] Rosenberg, *supra* note 254, at 180.

[269] *Id.* at 181; Brad Charles, *Calling for a New Analytical Framework for Monetary Development Exactions: the "Substantial Excess" Test*, 22 T.M. COOLEY L. REV. 1, 3 (2005).

[270] Rosenberg, *supra* note 254, at 218.

[271] Sterk, *supra* note 263, at 1744; Eagle, *supra* note 8, at 918.

[272] POPPER, *supra* note 28, at 93 (Many state legislators are themselves members of the development and business group. They also accounted for the bulk of the state's economic activities, tax revenue, and campaign contributions.).

[273] Eagle, *supra* note 8, at 928-29; EAGLE, *supra* note 1, at 333.

[274] POPPER, *supra* note 28, at 10.

were major political donors.[275] Ensuring a proper charge is imposed in these lucrative regulatory actions will certainly go a long way in reducing rent-seeking and corruption in this area.

Brad Charles considers it unfair when developers are forced to pay for development exactions when the development does not increase any additional burdens on the public infrastructure.[276] However, "[i]f the sudden windfall gain brought about by the stroke of a pen is not partially creamed off in the form of a development charge, it may lead to accusations of unfair treatment and enrichment."[277] It is also interesting to note that the Recommendation D3 of the 1976 United Nations Conference on Human Settlements, held in Vancouver, recommended that:

> [T]the unearned increment resulting from the rise in land values resulting from change in use of land, from public investment or decision, or due to general growth of the community must be subject to appropriate recapture by public bodies (the community) unless the situation calls for other additional measures such as new patterns of ownership, the general acquisition of land by public bodies.[278]

2. Other Regulatory Givings

There are other examples where the Singapore government imposed a charge pursuant to a beneficial regulatory action due to concerns of a potential windfall to the recipients. Two of these concerns are discussed below.[279]

a. Allocation of Spectrum Use

In selecting the mechanism for allocating the 3G telecommunication licenses, Singapore government decided to utilize the competitive auction model instead of a "beauty contest" mechanism where the regulatory authority made its decision based on the merits of the application of

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[275] Todd Lighty et al., *Gutierrez Cashes in with Donors*, CHI.. TRIB., Dec. 8, 2008, (discussing allegations of improper zoning decision involving Congressman Luis Gutierrez and Ald. Manuel Flores).

[276] Charles, *supra* note 269, at 3.

[277] LEUNG YEW KWONG, *supra* note 254, at 126.

[278] *Id.* at 124.

[279] Bell & Parchomovsky consider the government givings like the granting of broadcasting rights for telecommunication companies as physical giving: Bell & Parchomovsky, *supra* note 23, at 551. However, the author thinks that since the value and allocation of these benefits arose out of the government's regulatory power, it will be more appropriate to classify them as regulatory givings, at least for this paper.

telecommunication service providers.[280] One of the important rationales driving the Singapore government's decision was the prevention of "immediate windfall profit" under the "beauty contest" system.[281] The Minister stated that "the [g]overnment has a responsibility to obtain fair value for a scarce resource."[282]

In contrast, the U.S. Federal Communications Commission ("FCC") allocated spectrum use through "comparative hearings" prior to 1981.[283] Political peddling was an unsurprising feature of these hearings given the high value of licenses allocated.[284] This was replaced by a lottery where most of the licenses awarded by the lottery were resold.[285] However, there was still room for political influence since the entry of the lottery was subject to certain qualification determinations by the authorities.[286] Indeed, the legislative history of the federal licensing regime is characterized by legislators maximizing "political support by arbitrating a rent-seeking competition for valuable licenses . . . ."[287]

It was not until 1993 when the U.S. Congress finally authorized the FCC to auction licenses of the spectrum through competitive bidding.[288] In 1997, this method of licensing was further made mandatory for future licensing proceedings save for some limited exemptions.[289] The main rationale was to award the license to the highest valuer.[290] "[R]ecovery for the public of a portion of the value of the public spectrum resource made

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[280] Andrew Wee, *All 4 3G Licence* [sic] *Applicants Qualify*, BUSINESS TIMES (Sing.), Mar. 31, 2001, at 8; For discussion of the various policy issues behind the different regulatory scheme, *see generally* Thomas W. Hazlett & Matthew L. Spitzer, *Advanced Wireless Technologies and Public Policy*, 79 S. CAL. L. REV. 595 (2006); *see* Daniel Sineway, *What's Wrong with Wireless?: An Argument for a Liability Approach to Electromagnetic Spectrum Regulation*, 41 GA. L. REV. 671 (2007).

[281] 3G Telecommunication Licences[sic], 2001, Parliament No. 9 *Hansard (Sing.)* 12 Jan. 2001, Col 1296 (Minister for Communications and Information Technology, Yeo Cheow Tong) (Other reasons include allocating "the spectrum to the operators who value it most," and ensuring a "transparent and fair allocation mechanism.").

[282] *Id.* (the potential large sum obtained in similar auction in Europe is noted).

[283] Rogovin & Citron, *supra* note 94, at 692 ("agency evaluated each applicant's submission and made a determination as to which applicant would best serve the public interest"); Jerry Ellig, *Costs and Consequences of Federal Telecommunications Regulations*, 58 FED. COMM. L.J. 37, 77 (2006); Susan P. Crawford, *The Radio and the Internet*, 23 BERKELEY TECH. L.J. 933, 966 (2008).

[284] Crawford, *supra* note 283, at 966.

[285] *Id.*; Ellig, *supra* note 283, at 77; Rogovin & Citron, *supra* note 94, at 693 (speculation for spectrum licenses).

[286] Crawford, *supra* note 283, at 966.

[287] Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 912 (1997).

[288] Rogovin & Citron, *supra* note 94, at 693; Ellig, *supra* note 283, at 77; Crawford, *supra* note 283, at 966.

[289] Rogovin & Citron, *supra* note 94, at 693-94.

[290] *Id.* at 694.

available for commercial use" was also stated as an objective underlying the new auction mechanism.[291] However, it is worth noting a subtle but important distinction from the Singapore rationale. In the U.S., the "recovery for the public" rationale was driven more by budgetary pressure than an aversion to granting windfalls to private parties.[292] Given the long history of political rent-seeking in the licensing regime, it is reasonable to doubt whether competitive bidding, an arguably more efficient and fairer allocation mechanism,[293] would have been adopted without the budgetary pressure.

b. Certificate of Entitlement (COE)

Another form of regulatory bidding, the Certificate of Entitlement ("COE") is a vehicle quota system implemented in Singapore since 1990 as a means to control traffic congestion.[294] COE is a competitive tender system where potential car-owners bid for a limited number of car-ownership licenses.[295] The givings rationale is again well encapsulated in the statement "[i]t is the Government's responsibility to collect the market price for the COEs and to use the substantial revenue so collected for public projects which can benefit everyone."[296] Queuing and balloting were expressly rejected as a means of allocation due to the windfall profit for those who are quick to get in the queue or are merely lucky.[297] The revenue collected helped maintain the budget and reduced the need to raise taxes.[298] Indeed, the lowering of income tax rates was only made possible through the increases in indirect revenue levied on car ownership.[299] A legislator also noted that while transport policies relating to car ownership "seemingly uninvolved" the majority of the population who were not car owners, the

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[291] *Id*. at 693.

[292] Crawford, *supra* note 283, at 967, 973-74 (explaining the pressure to reduce the ever-mounting budget deficit in the context of the 700 MHz auction, with the most noteworthy being the anonymous statement by FCC staff members of the need to get top dollar from the spectrum auction because "the auction proceeds have already been allocated by Congress").

[293] Hazlett & Spitzer, *supra* note 280, at 597-99 (discussing the two alternative approaches of "property rights" and "open spectrum," and noting their superiority over the previous allocation system); Ellig, *supra* note 283, at 77 (calling the 1993 development a "major improvement").

[294] *Certificate of Entitlement*, 1994, Parliament No. 8 *Hansard (Sing.)* 1 Nov. 1994, Col 728-729 (testimony of Minister for Communications, Mah Bow Tan).

[295] *Id*. at Col 729 (Minister for Communications, Mah Bow Tan).

[296] *Id*. at Col 730 (Minister for Communications, Mah Bow Tan).

[297] *Id*. at Col 729 (Minister for Communications, Mah Bow Tan).

[298] *Id*. at Col 730 (Minister for Communications, Mah Bow Tan).

[299] *Select Committee Report on Land Transportation Policy*, 1990, Parliament No. 7 *Hansard (Sing.)*, 15 Jan. 1990, Col 934, 953 (1990) (testimony of Heng Chiang Meng).

policy could still be potentially detrimental to them.[300] The failure to recoup the windfall to car owners arising from the government regulatory actions would have resulted in less government revenue available for public projects.[301]

C. Derivative Givings

Derivative givings are also extremely important. A derivative giving occurs when property value is indirectly increased by a government action,[302] be it a physical action such as the building of public amenities near the property or a regulatory action such as those mandating a "greenbelt" in surrounding land.[303] The government actions are not directly targeted at the property or the property rights, but the value of the benefits received are not in any way less significant. Indeed, it is the subtlety of this sort of givings that makes it particularly vulnerable to rent-seeking behavior. It is also in this aspect where we can best appreciate Singapore's policy of imposing a fair charge for government givings.

1. Discounting During Land Acquisition

Part II.B above discussed the below market value compensation payable under the Singapore eminent domain regime. However, beyond taking the lowest market value among certain stipulated dates, the compensation formula also effectively charges the owner of acquired property for benefits accruing from government's actions.

a. The Provisions of the Land Acquisition Act

First, section 33(5)(c) of the Land Acquisition Act excludes from compensation any increase in value of the acquired property over the past seven years by virtue of provision of public utilities and facilitates.[304] Second, section 33(1)(b) excludes increases in value of any other land owned by the same owner by virtue of the use that the acquired land will be put to.[305] The first provision recoups the enhancement of value produced by government investment in public amenities. These investments can constitute very substantial derivative givings especially in the early years

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[300] *Id.*
[301] *Id.*
[302] Bell & Parchomovsky, *supra* note 23, at 551.
[303] *Id.* at 551 (in particular the accompanying text in footnote 14).
[304] Land Acquisition Act, *supra* note 14, § 33(5)(c).
[305] *Id.* § 33(1)(b).

where the construction of public roads and other amenities produced a "phenomenal increase" in value for previously swampy and rural land.[306]

The second provision emphasizes the inextricable relationship between takings and givings where the same act of eminent domain can produce significant benefits to the owner whose property is acquired. Indeed, in a land acquisition exercise for the construction of a mass transit station, the government acquired a small plot of land originally used as a car park in a private residential property. A nominal S$1 was paid as compensation since the gains in value of the property from the eventual construction of the mass transit station (estimated by industry sources to be some $18 million) was much more than the value of the 220 square meters of land acquired.[307]

b. Legislative Rationale

Consistent with the rationale behind the development charges,[308] the Land Acquisition Act was designed to curb property speculation and windfalls.[309] These provisions reflected the broad legislative guidelines "that no private land owner should benefit from development which has taken place at public expense."[310] The rationale was to "save the Government from having to give land-owners windfall gains and increases in value as a result of public expenditure incurred in the area."[311] It would be irrational if the government had to pay compensation at a value which Government itself had helped to enhance through public investment and provision of public infrastructure.[312] Indeed, the policy that no private landowner should benefit from any of the governments' efforts in providing for infrastructural changes and improvements was reflected in the amendments to the various relevant legislations.[313] The Singapore courts have also echoed this unjustified windfall rationale in dealing with cases on

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[306] *Teng Fuh Holdings*, 2006-3 Sing. L. Rep. at 536-37 (*Jurong*, *Kallang* Basin, and *Kranji* cited in the parliamentary debate are well known to be swamp land with little commercial value, especially in the sixties and seventies).

[307] Mendis, *supra* note 68.

[308] *See supra* Part V.B.1.b.

[309] Wong Sher Maine & Cheong Suk-Wai, *Landing a Fair Deal; Owner Wins Fight Over Land That Govt Undervalued By $1.5M*, STRAITS TIMES (Sing.), Aug. 16, 2003.

[310] *Id*.; *Teng Fuh Holdings*, 2006-3 Sing. L. Rep. at 535.

[311] *Teng Fuh Holdings*, 2006-3 Sing. L. Rep. at 535.

[312] *Id*. at 536-37.

[313] Tan Sook Yee, *supra* note 66, at 264 (e.g. Planning Ordinance, Foreshores Ordinance and Land Acquisition Ordinance).

land acquisition.[314] The courts have recognized that "the prevention of economic windfalls is one of the key policies underlying the Act."[315]

c. The North-East Mass-Transit Line

This aversion to windfall gain by a private owner through government's public investment is well illustrated by the relatively recent example of the North-East mass-transit line. When building this new mass-transit line in the mid-1990s, land acquired by the government included not only the actual railway line but also land around the proposed stations.[316] The purpose was to enable comprehensive redevelopment of the surrounding area and to "ensure that windfall capital gains resulting from construction of the North-East line accrue to the State rather than to individual property owners."[317] Preventing windfalls was especially important because the increase in land value was due to the government's investment of S$5 billion of taxpayer money and thus should not go to individual landowners but should go to all the taxpayers.[318] Indeed, the need to recoup the profit from the increased land value arising from the substantial investment of taxpayers' money "is the reason why the Government needs to acquire the land for comprehensive redevelopment."[319] The discounting provisions allowed such recouping.

d. Difference and Merits

In the U.S, there is the "average reciprocity of advantage" doctrine, which has been used by U.S. courts to justify regulations that might have otherwise constituted takings but for the fact that the property owners obtained some benefits from the very same government actions.[320]

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[314] *Teng Fuh Holdings*, 2006-3 Sing. L. Rep. at 534 (Sing. High Ct.) (in deciding whether land, which was acquired 22 years ago but was licensed back to the original owner, should be returned to the land owner upon the land owner returning the original compensation for the acquired land, the courts rejected the claim, taking into account the fact that the land value had increased significantly from external factors and return of the land would result in an "unprecedented, and . . . unjustifiable windfall to the plaintiff").

[315] *Id.* at 534.

[316] World Class Land Transport System, 1996, Parliament No. 8 *Hansard (Sing.)* 19 Jan. 1996, Col 655 (1996) (Minister for Communication, Mah Bow Tan).

[317] *Id.*

[318] Budget, Ministry of Communications, 1996, Parliament No. 8 *Hansard (Sing.)* 21 Mar. 1996, Col 1862-1863 (testimony of Minister for Communication, Mah Bow Tan).

[319] *Id.*

[320] Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 301-02 (1990); EAGLE, *supra* note 1, at 797-01 (for an account of the development and application of this concept in courts).

However, the doctrine's scope is more limited and certainly does not operate to reduce the compensation payable in direct physical acquisition of land.[321] Interestingly, the U.S. has a benefit-offset principle similar to Singapore's Land Acquisition Act, section 33(1)(b).[322] Bell and Parchomovsky regard this as a more sophisticated version of the average reciprocity doctrine due to its ability to aggregate the total value of benefits and then offset it with the amount of taking compensation. In contrast, the reciprocity of average doctrine is a binary all-or-nothing approach.[323] Nevertheless, the U.S.'s benefit-offset principle suffers from the shortcoming that only the property owners of acquired property are being charged for the benefits.[324] This has prevented the continued reception of the principle.[325]

Singaporean scholars echo this deficiency as well.[326] Nonetheless, while Singapore's provisions do accord some unfairness in the relative aspect,[327] it is worth noting that the doctrine is more sophisticated than the U.S. principle, which only offsets the benefits from the government's acquisition actions. The Singapore provisions exclude from the value of land any increases due to provision of public utilities and facilitates over the past seven years. These are easily substantial physical and derivative givings that the U.S. principle failed to address.

2. Formula One (F1) Street Race

The land acquisition example is arguably a more passive form of charging givings since the "charge" is only imposed when the property or land is acquired. A more direct form of charging a derivative giving is the F1 special tax.

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[321] Bell & Parchomovsky, *supra* note 23, at 598.

[322] *Id*. at 597; Heller & Hills, *supra* note 3, at 1478. *But cf.* EAGLE, *supra* note 1, at 196-98 (suggesting that the doctrine is still alive, especially with the application by a North Carolina Supreme Court in a 1997).

[323] It is either there is rough reciprocity with no compensation, or no reciprocity and compensation based solely on the value of the takings with the giving aspect ignored. Bell & Parchomovsky, *supra* note 23, at 598.

[324] *Id.*

[325] *Id*. at 599; Heller & Hills, *supra* note 3, at 1478.

[326] KHUBLALL, *supra* note 38, at 233.

a. Background and Mechanics

Singapore held the first ever night race in the sixty-year history of Formula One ("F1") and was one of three street races in 2008.[328] Singapore secured a five-year deal with an option for a five-year extension.[329] The estimated annual cost of the Singapore F1 bid is S$150 million, with the Singapore government picking up 60% of the tab.[330] The spillover benefits to Singapore's economy (e.g., increased consumer or tourism spending) were very large; the government's estimate of S$100 million per year was conservative in light of the S$150 million and S$200 million estimates by market analysts such as Citigroup.[331] Other benefits included image promotion and free publicity to reach out to 500 million television viewers worldwide.[332] One of the biggest and most direct beneficiaries was the hotel industry, which filled rooms even with rates easily double-to-triple the usual room rates.[333] Given the street-race nature of the Singapore F1 races, the economical benefits to the hotels fortunate enough to be along the race route were even more enormous.

In response, the government imposed a special F1 tax on hotel room revenue during the five days of the F1 race, with the trackside hotels having to pay a 30% tax while non-trackside hotels paid 20%.[334] This was to defray the high cost of bringing the F1 to Singapore.[335] The estimated revenue from this special tax is between S$15 million to S$20 million a year.[336] The tax is levied because hotels in the area stand to gain significantly.[337] The government allowed the hotels to set the actual price of the room.[338] Notwithstanding this high tax, hotel rooms filled quickly at significantly higher than normal room rates.[339]

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[327] There is no unfairness to the takings victims in absolute terms, but only vis-à-vis surrounding property owners.

[328] Wilfred Yeo, *F1 Comes to Singapore*, STRAITS TIMES (Sing.), May 12, 2007.

[329] *Id.*

[330] *Id.*; Leonard Lim & Terrence Voon, *Govt Assures Taxpayers of F1 Race Boost*, STRAITS TIMES (Sing.), May 27, 2007.

[331] Lim & Voon, *supra* note 330.

[332] Yeo, *supra* note 328.

[333] Alvin Foo, *S'pore Can Well Do With the Buzz F1 Brings*, STRAITS TIMES (Sing.), Mar. 17, 2007; Leonard Lim, *STB Won't Regulate F1 Hotel Prices*, STRAITS TIMES (Sing.), May 23, 2007 (In Monaco, it is a triple-to-five-fold increase).

[334] Lim Wei Chean, *F1 Race: Up To 30% Levy On All Hotels*, STRAITS TIMES (Sing.), Aug. 14, 2007.

[335] *Id.*; Lim & Voon, *supra* note 330.

[336] Terrence Voon, *Good News for Economy*, STRAITS TIMES (Sing.), May 12, 2007.

[337] Yeo, *supra* note 328.

[338] Lim & Voon, *supra* note 330.

[339] Christopher Ong & Leonard Lim, *Hotel Rooms During F1 Race Period Going Fast*, STRAITS TIMES (Sing.), Jan. 19, 2008 (some hotels, even non-trackside ones, are already fully booked for the race nine months prior to the start of the race); Nisha Ramchandani, *F1 Weekend Brought Brisk Business to*

b. "Giving" Characteristics

The first interesting feature of this tax is that it justifiably discriminates between hotels that are trackside and hotels that are not. This is well attuned to givings jurisprudence where the amount of charge imposed should commensurate with the benefits. Second, the tax can be seen as an internalization of social benefits of a costly government project. The Singapore government was asked whether the economic benefits of hosting this event outweighed the cost.[340] An F1 race does not come cheap, with rights to hold the race costing up to US$40 million[341] and requiring substantial support from the local governments.[342] Yet the spillover benefits often outweighed the costs and direct benefits of these projects. In Australia, the Australian Grand Prix results in a net loss of A$5 million to A$21 million a year for the operator, but is still socially beneficial because it adds up to A$174.8 million to the country's coffers.[343] By capturing a significant aspect of the otherwise external social benefits arising out of the project, the tax improved the financial viability of the project vis-à-vis the government's financial perspective, ensuring this socially efficient project was not derailed because of government's budgetary constraints.[344]

VI. Merits of Singapore's Givings Charging Regime

The Singapore regime of actively charging for government benefits has provided a real-life application of the givings jurisprudence. This Singaporean case study has not only confirmed the benefits of social efficiency and less rent-seeking but also injects new insights into how transaction costs implications reinforce the curtailing effect of charging givings on rent-seeking. In addition, Singapore's application illustrates how a regime of charging givings can produce other additional benefits not

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Some Hotels: Average Room Rate Peaked at US$701, Occupancy Hit a High of 87.8%, BUSINESS TIMES (Sing.), Feb. 2, 2009. *But cf.* Lim Wei Chean, *F1 Hotels still have Lots of Room*, STRAITS TIMES (Sing.), June 20, 2008 (many hotels still have empty rooms 3 months prior to the race, and in turn lower their rates).

[340] *Hosting F1 will get Cheaper*, STRAITS TIMES (Sing.), May 25, 2008.

[341] *Racing to Pots and Pots of Gold*, STRAITS TIMES (Sing.), Jan. 28, 2007.

[342] *Id.* (The Australian government had to pump in A$41.8 million (S$50 million) to cover the losses of the Melborune Grand Prix, while huge capital investment of around US$150 million are injected in Malaysia and Bahrain for the necessary hardware); Carolyn Hong, *Malaysia Losing No Sleep Over S'pore's Formula One Bid*, STRAITS TIMES (Sing.), Apr. 7, 2007 (Malaysian government underwrites the relevant promoters fees).

[343] Foo, *supra* note 333; Lim & Voon, *supra* note 330.

[344] Christopher Tan, *F1 Bid: Hurdles Remain for 2008 Race*, STRAITS TIMES (Sing.), May 10, 2007 (From the beginning, the government reiterated it was "willing to support [the F1] venture up to a level commensurate with the broader benefits to the economy," i.e. "there is a limit to which the Government is willing to invest").

envisaged by the current givings jurisprudence. These include a healthier government fiscal budget and a more equitable taxation regime.

A. Social Efficiency

Singapore's application of the giving jurisprudence promotes efficiency by internalizing the social benefits and utilizing efficient resource allocation mechanisms. As discussed above,[345] inefficiency is the likely result if the government fails to fully internalize the positive and negative externalities of its policy and actions. Inefficiency is not averted even if all the social costs are fully internalized through compensation of takings victims since the social benefits are still not internalized.[346] The outcome is the government operating under a fiscal illusion, resulting in distorted government incentives.[347] This can also result in the failure to undertake socially beneficial projects.

The special F1 tax[348] is a clear example how the charging of a derivative giving allowed the Singaporean government to recover part of the substantial costs of a socially beneficial project. Without the ability to recover a significant part of the costs from the parties most directly benefiting from the project, the Singaporean government may not be able to undertake such a costly project that has very substantial spillover social benefits. Another example is the acquisition of the land for the North-East Line construction.[349] By being able to recoup the enhanced land value arising from the substantial investment of taxpayer money, the government has more fiscal incentives to make such socially beneficial investments in the future.

The emphasis on obtaining best value for the government when allocating valuable resources has also resulted in the adoption of allocation mechanisms that are more efficient. U.S. scholars have called for more competitive mechanisms in government procurement in light of scandals from discretionary allocation of contracts.[350] Open competitive tender is the norm in Singapore and selling government assets through direct private sale is frowned upon even if measures are taken to address the deficiencies.[351] The "responsibility" of the government to "obtain fair value for a scarce

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[345] *See supra* Part IV.A.2.
[346] Levinson, *supra* note 25, at 350.
[347] Bell & Parchomovsky, *supra* note 23, at 580-81.
[348] *See supra* Part V.C.2.
[349] *See supra* Part V.C.1.c.
[350] *E.g.*, Smith, *supra* note 217; Perlman, *supra* note 219.
[351] *See supra* Part V.A.1.

resource" and to "collect the market price" has also driven the use of competitive market bidding in allocating valuable regulatory license such as the 3G licenses and vehicle permits.[352] Pertinently, less efficient mechanisms like comparative hearings, queuing, and balloting were expressly rejected because of potential to grant of windfall profits to private parties under these mechanisms.[353]

B. Public Choice: Less Rent-seeking

There is a huge potential for rent-seeking in scenarios such as the F1 and the mass-transit construction. The mere stroke on the drawing board in designating the route of the street track and the stations for the mass-transit line will bring an indirect but very substantial benefit to the surrounding property owners. Given the obvious latitude and potential arbitrariness in such decisions (i.e., should the race route turn at this corner or the next corner? Should the station be here or 400 meter down the road?), the risks and incentives for improper influence are certainly severe. However, by imposing a fair charge which reduces the windfall (in the case of the F1) or removes the windfall (in the case of the North-East line), rent-seeking opportunities and the accompanying corruption are significantly curtailed. The same applies to zoning and regulatory permits, which have been a traditional hotbed of corruption.[354]

Indeed, if the value of these rights to the private parties is significantly reduced by the imposition of fair charges, the curtailing effect on rent-seeking behavior would be even more significant given the transaction costs inherent in rent-seeking. Corrupt transactions are essentially similar to other economically based interactions and are based on the exchange of specific bundles of property rights. These transactions face the same problems of transaction costs.[355] With the imposition of fair charges and the transaction costs of rent-seeking, there is a good chance that rent-seeking activities may be priced out. This is especially so given that costs have to be incurred to keep bribes and dubious campaign contributions secret.[356]

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[352] *See supra* Part V.B.2

[353] *See id*.

[354] *See supra* Part V.B.1.c. (discussion of corruption involving these regulatory permits)

[355] These include transaction initiation, contract competition, and safeguards against opportunistic behavior – although corrupt transactions are more particularly endangered by ex-post opportunism: Matthias Schramm & Markus Taube, *The Institutional Economics of Legal Institutions, Guanxi and Corruption in the PR China*, *in* FIGHTING CORRUPTION IN ASIA 271, 283 (John Kidd & Frank-Jürgen Richter ed., 2003).

[356] Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. ECON. 599, 612 (1993).

Moreover, the reality of administrative costs means that an emphasis on charging givings is more effective than compensating takings to reduce rent-seeking behavior. Administrative costs have to be incurred to determine the amount of compensation to be paid or the charge to be collected. There are also costs in payment of compensation and collection of charges. Hence, compensation is usually only paid out for larger takings while charges, if imposed, will usually be on substantial givings. This means that focusing on compensating takings is disproportionately detrimental to small owners since the value of acquired property may not outweigh the potentially hefty cost in seeking redress. This will result in many small takings and diminutions of property being uncompensated and un-redressed. On the other hand, influential interest groups and the rich or powerful benefit disproportionately under such regimes because of their ability to argue for higher compensation[357] or simply seek to block the takings altogether.[358]

The converse is true for givings. Small owners stand to gain in a regime which charges givings since the administrative costs would likely preclude charging of small benefits. Instead, recipients of big benefits will be disproportionately targeted for the charge. In this Singapore case study, the government beneficiaries being charged are generally the upper class of society who have significant wealth and resources, such as owners of downtown hotels (F1 tax), landed property owners (North-East Line),[359] car owners (COE) and telecommunication companies (spectrum right auction). If the charge is excessive or unfair, these are private parties who are able to either fight back or simply move away from Singapore. More importantly, these are the groups that are most likely and most well placed to rent-seek for potential benefits in the first place. Now having made to bear the costs of these projects, they would be more careful when lobbying for those projects and benefits.[360]

C. Healthier Fiscal Budget

Charging of government benefits allows the government to have a bigger budget. The Singapore government operates consistently under a

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[357] Bell & Parchomovsky, *supra* note 102, at 1424 (empirical studies of takings in Chicago showed that owners of expensive lots are compensated at above market value).

[358] Leslie Lopez, *Port Tycoon and S'pore Firm Tussle Over Land*, STRAITS TIMES (Sing.), June 13, 2006 (the property owner whose large tract of property was acquired fight back with his extensive business interests and political resources).

[359] Only 5% of Singapore households reside in landed property. The bulk of Singapore households (88%) reside in HDB flats (public housing). LEOW BEE GEOK, CENSUS OF POPULATION 2000 STATISTICAL RELEASE 5: HOUSEHOLDS AND HOUSING 35 (2007).

[360] Levmore, *supra* note 148, at 291.

budget surplus. The budget surplus for 2007 was S$6.4 billion.[361] In fact, prior to 2001, year after year of primary budget surpluses supplied by the government's revenue from taxes, fees, and charges were sufficient to support total public spending.[362] Budget surpluses averaged 2.4% of gross domestic product ("GDP") from 1996 to 2000.[363] Earlier, budget surpluses averaged about 6% of GDP from 1991 to 1995 and 2-3% in 1996 to 1997 without even including investment income, net lending, and net capital receipts (such as land sales).[364] Unlike in the U.S.,[365] the amount of government fees and charges collected are significant in comparison with revenue from general taxes and is one of the key components to these budget surpluses.[366]

Furthermore, the giving rationales and policies contribute to a healthy fiscal budget in other ways. First, government expenditure is conserved with stringent government procurement procedures driven by the compulsion for maximum value to the government.[367] Second, the overall government policy and practice of recouping any windfall gains to private parties accrued through government actions helps curtail rent-seeking activities in general. This not only further reduces government expenditures and activities aimed at benefiting interest groups but it also ensures a more efficient regulatory regime[368] that promotes general public welfare and enhances the tax bases of general taxes.

There are many benefits to having a healthy budget. For starters, the government is able to focus more on good governance than money. Faced with a dwindling budget, U.S. local governments have integrated land use planning and zoning efforts with municipal financial planning goals, which

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[361] Anna Teo, *$6.4B Budget Surplus Poser: Was GST Hike Needed Last Year?* BUSINESS TIMES (Sing.), Feb. 22, 2008.

[362] Anna Teo, *S'pore's Reserves Provide a Fiscal Buffer: Ministry*, BUSINESS TIMES (Sing.), Feb. 22, 2005; Hussain, *supra* note 27 (In the 43 years of independence, there were only 11 fiscal years with budget deficits).

[363] Teo, *supra* note 361.

[364] Anna Teo, *Over $ 1B Deficit Seen for FY 98*, BUSINESS TIMES (Sing.), Feb. 25, 1999; *see* SINGAPORE DEPARTMENT OF STATISTICS, YEARBOOK OF STATISTICS SINGAPORE 1997, at 7 (1998) [hereinafter 1997 YEARBOOK OF STATISTICS SINGAPORE].

[365] WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 2 (14th ed. 2006) ("Other" constitutes about 4% of the total federal revenue. The rest are "income taxes" [55%], "social insurance" [38%] and "excise taxes" [3%]); HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION 140-141 (2nd 2004).

[366] "Fees & Charges" typically constitute about 10% to 15% of the total government operating revenue. 2007 YEARBOOK OF STATISTICS SINGAPORE, *supra* note 60, at 207; 1997 YEARBOOK OF STATISTICS SINGAPORE, *supra* note 364, at 192. When compared to revenue from corporate and personal income tax, the ratio is about 1:4 (i.e., income tax revenue is 4 times more than fees and charges).

[367] *See supra* Part IV.A.1.

[368] *See supra* Part III.B.

has resulted in "regulate for revenue."[369] Similarly, "all Americans pay for the negative effect[s] on the value of the dollar and the national economy" as government deficit spending increases.[370] On the other hand, the consistent budgetary surpluses allow Singapore to build up a huge reserve.[371] This has enabled Singapore to distribute a massive economic stimulus program in response to the current economic recession. It is telling that while the Singapore's stimulus package is proportionally larger than stimulus packages in most other nations, it has been financed by simply withdrawing from the national reserve instead of incurring huge deficit spending and government debts commonly relied upon by many other countries, including the U.S.[372]

Moreover, empirical studies show that public spending is an important determinant of rights protection and enforcement.[373] The studies suggest that there is an association between a variety of rights indicators and government spending.[374] Property rights and equality before the law are also found to be stronger in countries with lower budget deficits.[375] A healthy budget allows Singapore to provide its civil servants with a wage premium above private sector salaries. Singapore pays its government officials and civil servants high salaries compared with equivalent salaries in the private sector.[376] In particular, ministers are benchmarked against top-earners from corporate executive officers ("CEOs") of listed companies and other professions.[377] This helps decrease corruption, as per the efficiency wage

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[369] Rosenberg, *supra* note 254, at 183; Charles, *supra* note 269, at 1-5; EAGLE, *supra* note 1, at 424 (also known as fiscal zoning, where land use policies is used by local government to increase tax collection or reduce likely expenditures).

[370] MALLOY, *supra* note 149, at 58; *see also* MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS 19 (2008) (The deficits are ultimately borne by future generations with accrued interest).

[371] The official foreign reserves is over $250 billion with that figure excluding investment and assets portfolios managed by the Government of Singapore Investment Corporation and Temasek Holdings. Anna Teo, *Economists Favour Firing Reserves Ammo*, BUSINESS TIMES (Sing.), Jan. 20, 2009. This is certainly a sizeable sum for a population of just over 4 million. 2007 YEARBOOK OF STATISTICS SINGAPORE, *supra* note 60, at 9.

[372] Sue-Ann Chia, *Budget Aim: Biggest Bang for the Buck*, STRAITS TIMES (Sing.), Feb. 6, 2009; Hussain, *supra* note 27 (The Singapore stimulus budget is 8% of the GDP., while the U.S. budget is approximately 6%, Germany approximately 1%, and Taiwan approximately 4% over 4 years).

[373] Luiz de Mello & Randa Sab, *Government Spending, Rights, and Civil Liberties*, 22 INT'L REV. L. & ECON. 257, 273 (2002).

[374] *Id.*

[375] *Id.* at 274.

[376] Sue-Ann Chia, *For Reality Check, Compare Their Pay With That of Bosses*, STRAITS TIMES (Sing.), Apr. 12, 2007; Lydia Lim, *Top Govt Salaries Far Behind Private Sector's*, STRAITS TIMES (Sing.), Mar. 23, 2007; *Govt Pay Boost for 65,000*, STRAITS TIMES (Sing.), Dec. 4, 1993, at 1.

[377] Chia, *supra* note 372; Lim, *supra* note 376.

theory.[378] Indeed, the high salaries of political leaders and public officials are credited with contributing to the lack of corruption in Singapore.[379] In contrast, Indonesia's very low government salaries encourage rent-seeking.[380] In the U.K., legislators receive token salaries and often end up taking jobs as paid lobbyists for companies and other commercial organizations.[381] U.S. Senators, Congressman, and senior officials often make up for their low public sector wages during term times by utilizing their contacts and public service for lobbying purposes.[382] Paying high salaries is certainly preferable to allowing rent-seeking and corruption as a supplementary compensation scheme for low government salaries.[383]

D. More Equitable Taxation Regime

It is telling that the healthy budget surplus, which the Singapore government enjoys, is obtained while having one of the world's lowest income and corporate tax rates, especially compared with the U.S. and European countries.[384] The Singapore tax rate is low: The maximum tax rate is 20% for income exceeding $320,000.[385] Since reform in 1994, 71% of individuals no longer pay income tax.[386] This is much less than the one-third figure in U.S.[387] In 2007, Singapore's corporate tax rate was reduced from 20% to 18%.[388] Prior to the reduction, Singapore's statutory corporate tax rate of 20% was the third lowest in the region and the eighteenth lowest worldwide.[389] To put those figures into perspective, the top marginal personal income tax and corporate tax rates in the U.S. are both 35%.[390]

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[378] Pranab Bardhan, *Corruption and Development: A Review of Issues*, XXXV J. ECON. LITERATURE 1320, 1339 (1997).

[379] TRANSPARENCY INTERNATIONAL, COUNTRY STUDY REP., *supra* note 201, at 12.

[380] Andrew White, Esq, *The Paradox of Corruption as Antithesis to Economic Development: Does Corruption Undermine Economic Development in Indonesia and China and Why are the Experiences Different in Each Country?*, 8 ASIAN-PAC. L. & POL'Y J. 1, 10 (2006).

[381] *Singapore Needs Own Model for Public Servants Pay*, STRAITS TIMES (Sing.), Nov. 1, 1995, at 17.

[382] *Id.*

[383] White, *supra* note 380, at 17.

[384] AULT & ARNOLD, *supra* note 365, at 162-64 (The maximum marginal rate of European nations is typically 40-50%).

[385] Income Tax Act, Cap. 134 (2004 Rev. Ed.) (Sing.), Second Schedule Part A.

[386] *Staying Ahead with Guts, Gumption and Enterprise*, STRAITS TIMES (Sing.), Mar. 2, 1995, at 6.

[387] KLEIN, *supra* note 365, at 1.

[388] Annual Budget Statement, 2008, Parliament No. 11 *Hansard (Sing.)* 15 Feb. 2008, Col 365 (testimony of Second Minister for Finance, Tharman Shanmugaratnam).

[389] *News of Corporate Tax Rate Cut Welcomed*, STRAITS TIMES (Sing.), Jan. 21, 2007.

[390] 26 U.S.C.A. §1, §1(i)(2), §11. *See* AULT & ARNOLD, *supra* note 365 at 139-140 (reduced from 39.6% to 35% in 2003). However, the tax rate is set to increase back to 39.6% in the near future: John D. Mckinnon & Tom Herman, *The Wealthy Lose Out as Many Others Gain*, WALL ST. J., Feb. 27, 2009, at A8; Laura D'Andrea Tyson, *In Defense of Obamanomics*, WALL ST. J., Mar. 9, 2009, at A19.

Tax is often viewed simply as a revenue-producing devise, but it is in fact one of the far-reaching powers of the government, which can impose real costs on private property rights.[391] Scholars have considered taxing as a form of eminent domain and have even argued that some tax laws are actually unconstitutional takings.[392] Broadly based taxes, like income tax and corporate tax, do not treat all taxpayers fairly, because they benefit some citizens at the expense of others.[393] Tax laws are subjected to intense lobbying pressures, which result in provisions catering to the lobbying interest groups at the expense of general taxpayers.[394] Indeed, a system that strongly protects individual property rights will not only require compensation when an individual's property is taken or burdened for the public good, but will also minimize the use of broadly based taxes.[395]

On the other hand, by ensuring that the government beneficiaries pay the appropriate charges, whether through the benefits-offsetting in land acquisition, development charges, COE, or the F1 special tax, the Singapore government has a more equitable form of taxation that is both progressive and minimizes the use of broadly based taxes. The Singapore government has acknowledged that government receipts from regulations, while collected for reasons other than revenue, have enabled the government to keep other taxes low.[396] The practice of the government is to charge realistic fees for government services so as to avoid the ever-increasing subsidies on public services.[397] This prevents the need for extraordinarily high taxes to compensate, as in many developed countries, and allows Singapore to keep total taxes, fees and other charges collected from its population at one of the lowest rates in the world.[398] Thus, the government need not draw as heavily on the broadly based taxes when undertaking socially beneficial projects like public infrastructure.[399]

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[391] Bell & Parchomovsky, *supra* note 102, at 1416.

[392] Bell & Parchomovsky, *supra* note 102, at 1432-33.

[393] Levmore, *supra* note 148, at 292; RONALD F. KING, MONEY, TIME & POLITICS: INVESTMENT TAX SUBSIDIES AND AMERICAN DEMOCRACY 34 (1993) ("Distributionally, opportunities for special tax reductions vary widely within each income class, therefore leading to grossly uneven treatment of roughly equally situated individuals.").

[394] STEVE FORBES, FLAT TAX REVOLUTION: USING A POSTCARD TO ABOLISH THE IRS 8-10 (2005); KING, *supra* note 393, at 34 ("The tax code is virtually littered with special benefits and preferences."); JOSHUA D. ROSENBERG & DOMINIC L. DAHER, THE LAW OF FEDERAL INCOME TAXATION 32 (2008); GRAETZ, *supra* note 370, at 10-11 (The intense lobbying effort is reflected in the frequent and numerous changes to the tax law over the past twenty years).

[395] Levmore, *supra* note 148, at 292.

[396] B.G. Lee, *High Savings Needed for Sustained Growth*, STRAITS TIMES (Sing.), Aug. 26, 1992, at 26.

[397] Alvin Foo, *Govt Fees Freeze Extended Till End of Year*, STRAITS TIMES (Sing.), Feb. 28, 2008.

[398] *Id.*

[399] Socially beneficial projects include the North East Line, the COE, and the F1 races.

VII. Moving Forward: Implementing Givings

Part VI vividly illustrates how the Singapore givings charging regime has not only helped promote efficiency and constrain rent-seeking, but has also enabled a healthy fiscal position coupled with equitable taxation. The question then is how to translate this givings jurisprudence into meaningful implementation and reform. The Singapore regime is far from perfect. In particular, the lack of legal restraints and enforcement mechanisms renders the givings practice and policies susceptible to the prevailing political climate. This part proposes a framework for givings reform that addresses this deficiency, together with other important issues.

A. Deficiencies of the Singapore Regime

The givings rationale resonates frequently in the Singapore government's decision making .[400] However, it is still only a policy to which the Singapore government voluntarily subscribes. If there is a change of the ruling party, or simply a policy reversal, a Pandora's box of vices and abuses may well be opened. Indeed, there have been subtle changes in government policies over the years. The government has somewhat decreased its emphasis on windfalls from development permits in justifying development charges.[401] The Land Acquisition Act has also been amended so that there is no longer a "charge" for derivative givings in the form of provisions for public utilities and facilities.[402] These changes are not per se undesirable,[403] but they do highlight the delicate nature of the givings policies in Singapore.

Closely related is the lack of enforcement mechanisms. Auditing by the Singapore government auditing body has proven rather effective[404] but nevertheless suffers from the inherent limitations of being public enforcement.[405] Moreover, the Auditor-General's powers are limited to reporting the findings and recommending follow-up. The Auditor-General

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[400] *See generally supra* Part V.

[401] *See supra* Part V.B.1.b.

[402] Land Acquisition Act, c. 152, §§ 33(5)(a), (c) (1985) (amended 2007) (Sing.).

[403] The reason for abolishing the discounting of the increase in value for public investment is because Singapore is now generally well developed and any increase in value is less drastic. Land Acquisition (Amendment) Bill, 2007, *supra* note 53, at Col 500 (Deputy Prime Minister and Minster for Law, Prof. S Jayakumar).

[404] *See supra* Part V.A.1.

[405] Public enforcement suffers from possible bureaucratic inefficiency and inadequate resources. They may be subjected to corruption and political pressure. *see* Guido Ferrarini & Paolo Giudici, *Financial Scandals and the Role of Private Enforcement: The Parmalat Case*, *in* AFTER ENRON–IMPROVING CORPORATE LAW AND MODERNIZING SECURITIES REGULATION IN EUROPE AND THE US 159, 195-96 (John Armour & Joseph A McCahery ed., 2006).

does not have legal power to pursue irregularities.[406] Except for the case of government tender, where rival bidders have the power and incentive to enforce any non-compliance of the government policies,[407] there are no external enforcement mechanisms for other givings. The givings policies and practices are essentially promulgated and enforced simply by the political will of the ruling party.[408]

This severe lack of checks and balances renders the givings practice extremely susceptible to the prevailing political climate. Any government policy is subjected to the influence and distortion of the various political actors. Interest groups have strong incentives and the leverage to distort, for their own benefit, government processes aimed at enhancing government efficiency.[409] In the U.S., the imposition and assessment of user fees (a form of charging for givings) are often determined by the political process instead of a genuine attempt on internalizing the costs and benefits.[410] Many of the charges that best reflected the benefits of economics efficiency ironically were the ones with the most political resistance.[411] Bureaucrats also have perverse incentives to oppose the imposition of user charges since doing so may result in a decrease in demand for the bureau service and consequently the bureau's budget.[412] Moreover, while user fees are a more attractive fiscal tool than new taxes from the perspective of vote-maximizing politicians, "more attractive still is the idea of a 'free lunch': providing voters with benefits in cases where the cost of those benefits is sufficiently small to hide elsewhere in the federal budget."[413] All this jousting by various political actors can seriously undermine effective implementation of givings reforms.

Indeed, the query then is how Singapore has managed to maintain its givings policies for over forty years since independence. This is likely due to the fact that "post-Independence Singapore has not experienced political turnover nor is this prospect reasonably foreseeable, given the ineffectual

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[406] Tan, *supra* note 212.

[407] *See supra* Part V.A.1.

[408] *E.g.*, by ensuring the government ministries take adequate actions in response to the audit report.

[409] Yandle, *supra* note 186, at 56.

[410] Gary M. Anderson, *The Fiscal Significance of User Charges and Earmarked Taxes*, *in* CHARGING FOR GOVERNMENT: USER CHARGES AND EARMARKED TAXES IN PRINCIPLE AND PRACTICE 13, 15 (Richard E. Wagner ed., 1991).

[411] *Id*. at 27-28 (Examples include entrance fee to the Statue of Liberty to cover maintenance at the Statue, entrance fees for all national parks and monuments, and user fees for public library).

[412] Dwight R. Lee, *The Political Economy of User Charges: Some Bureaucratic Implications*, *in* CHARGING FOR GOVERNMENT: USER CHARGES AND EARMARKED TAXES IN PRINCIPLE AND PRACTICE 60, 73 (Richard E. Wagner ed., 1991).

[413] Anderson, *supra* note 410, at 27.

parliamentary opposition, holding two of 84 elective seats."[414] While there are qualms as to whether this political dominance is entrenched through undemocratic and authoritarian measures,[415] the lack of immediate risk of political turnover does help facilitate greater discipline and more long-term perspective in relation to fiscal policies. The reasonable security of political tenure means the government has less incentive to overspend in the current term or engage in popular but fiscally damaging tax cuts.[416] Similarly, the government is more likely to engage in tax reforms that may be unpopular but essential to long-term fiscal health.[417] After all, the same government will face the full effects of its fiscal policies, whether it is a healthy surplus or a crushing deficit. This political dominance may also help curtail the rent-seeking activities of interest groups since the ruling party is much less dependent upon interest groups' campaign contributions and votes.

Nonetheless, the political will of the current government in itself is certainly not a reliable premise for implementing givings reform, especially since there are limited checks against any sudden reversal of the policy. Moreover, such political dominance is more the exception than the norm. Any givings reform must adequately address the issues of legal restraints and enforcement mechanisms.

B. Framework for Implementing Givings Reform

Actual reform on particular government practices and policies requires careful examination of socio-economic conditions and corresponding legal framework. These scenario-specific considerations include the administrative costs in benefits and charges collection, behavior modifications induced by the charges, the desirable magnitude of the charges, redistributive considerations, and relationships with existing takings law. It is impossible to articulate a concrete workable reform proposal without full analysis of these scenario-specific considerations from each

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[414] Thio Li-ann, *The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to Fit the Imperatives of 'Asian' Democracy*, 6 SING. J. INT'L & COMP. L. 181, 183 (2002). Since 1968, political opposition has never captured more than 10% of the total available parliamentary seats. *Id.* at 192.

[415] *See generally id*. (Discussing the various susceptible methods, including pro-ruling party electoral laws, controlling free speech, conflating party with state, suppressing opposition etc.). While these methods are not entirely illegitimate or unjustifiable, the author agrees that they do help maintain the ruling party's continued political dominance.

[416] *E.g.*, George W. Bush inherited a substantial budget surplus and initiated many tax cuts. GRAETZ, *supra* note 370, at 5. By the time he left office in 2009, there was a deficit of $1.2 trillion, which significantly limits the policy options for the next president. Jackie Calmes, *Obama Planning to Slash Deficit, Despite Stimulus*, N.Y. TIMES, Feb. 22, 2009, at A1.

[417] GRAETZ, *supra* note 370, at 17-33.

particular practice. This is beyond the scope of this paper. Nonetheless, this section proposes a framework for implementing givings reform that addresses the pertinent issues that are common and essential to any effective givings reform.

1. Legal Restrains and Enforcement Mechanisms

Proper legal constraints and enforcement mechanisms are necessary to ensure the benefits of givings reform materialize in practice. The U.K. provides a good example of the effectiveness of legal constraints in givings. The U.K. restrictions on bestowing of benefits to private parties by local government arose out of the anti-competition concerns.[418] These restrictions are enforced by competitors who are harmed by the bestowing of benefits to another competitor. While not motivated by givings jurisprudence or concerns for individual rights threatened by eminent domain, these restraints have sufficient legal bite and means of enforcement to help "control some of the excesses that have been so controversial in the United States."[419] However, givings scenarios, where there is an identifiable victim who suffered substantial detriment, is more the exception than the norm.[420] As alluded to above,[421] givings are especially susceptible to rent-seeking because the benefit is concentrated in the hands of a few while the cost is spread out thinly over a large number of people. Relying upon a party harmed by the giving to oppose the giving will render most givings undetected and unopposed in most scenarios.

Hence, any reform should impose legal restraints coupled with effective enforcement mechanisms. In addition to parties harmed by such givings, a possible solution to enforcement is to rely on non-profit organizations ("NPOs"). Striking down a government's action for unjustified givings is a public good since the benefits—mainly a reduction in corruption and reimbursement of public coffer—are enjoyed by all taxpayers. NPOs can be seen as a response to government and market failures in the supply of public goods.[422] The non-distribution constraint of NPOs may also make them a more trustworthy producer of public goods

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[418] Allen, *supra* note 184, at 90 (both competition between the various local governments and competition between states in the European common market).

[419] *Id.*

[420] Another possible example is the common economic development eminent domain where the benefits to the landowner come at the expense of private homeowners.

[421] *See supra* Part IV.A.1.

[422] Curtis J. Milhaupt, *Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT'L L. 169, 181 (2004).

than for-profit firms.[423] Another approach is to grant an incentive award to private parties who have successfully struck down an unjustified giving. This can energize private enforcement to complement public enforcement. Nonetheless, the incentive award must be carefully tailored to prevent over-enforcement and the consequential social costs.[424]

2. Evaluating the Quantum of the Charges

Should the charges be assessed based on the value of the benefits received or the cost to the government? In the context of user fees, economists opine that efficiency requires the fee to correspond with the marginal cost to the government in providing that benefit.[425] This will provide the proper incentive for optimal consumption of government benefits.[426] On the other hand, Singapore's givings regime tends to focus on the value of benefits to recipients in calculating the charge. The charges in development charges—including 3G licenses, COE and discounting in acquisition—are premised on the value of the government benefits.

Accessing the value of public benefits is difficult since much of it is subjective.[427] An accurate assessment of the benefits usually requires the existence of a competitive market. This can be done through competitive biddings of the benefits (e.g., 3G licenses or COE) or valuation using a comparative market (e.g., development charges, discounting during acquisition). Evaluation of benefits will be difficult and ambiguous in situations without such a market. For example, the benefits may be unique or may have only one potential recipient. The government may also enjoy a monopoly in the production of those benefits, as with regulatory permits.[428] Applying a charge in these types of monopolies may artificially drive up prices.[429] On the other hand, while the cost approach provides a direct and

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[423] *Id.* at 182.

[424] *See* Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 333-38 (2007) (generally discussing the possible vices of private enforcement). This can include weak cases, which impose litigation, judiciary and enforcement costs not internalized by the plaintiff.

[425] Anderson, *supra* note 410, at 15.

[426] *Id.* at 14-15; Yandle, *supra* note 186, at 34-35.

[427] RICHARD E. WAGNER, *Tax Norms, Fiscal Reality and the Democratic State*: *User Charges and Earmarked Taxes in Principle and Practice*, *in* CHARGING FOR GOVERNMENT: USER CHARGES AND EARMARKED TAXES IN PRINCIPLE AND PRACTICE 1, 5 (Richard E. Wagner ed., 1991). For a discussion as to the difficulties in public pricing, *see* RICHARD E. WAGNER, *Subjective Cost, Property Rights, and Public Spending*, *in* CHARGING FOR GOVERNMENT: USER CHARGES AND EARMARKED TAXES IN PRINCIPLE AND PRACTICE 75 (Richard E. Wagner ed., 1991).

[428] Anderson, *supra* note 410, at 17.

[429] *Id.* at 17 (this is further aggravated by the inefficiency of government).

more straight-forward evaluation mechanism, it is not applicable where the government incurs little or no costs, as with various lucrative regulatory permits.

However, every givings involves an allocation of government resources. The benefits approach promotes a more efficient allocation of resources. The benefits approach ensures that benefits are allocated based on their value to recipients. This ensures utilization of resources by those who value them the most. Moreover, there is much less room for rent-seeking, which can distort an otherwise efficient allocation of resources. By basing charges on the value of the benefits, rent is either significantly reduced[430] or eliminated.[431]

The efficiency and rent-seeking rationale is particularly pertinent for government benefits that cost the government very little, such as regulatory permits. Charging for these benefits on the minimal government costs will result in inefficient allocation mechanisms based on either queuing, balloting or government discretion. Resources are not given to those who valued them the most under queuing and balloting, while there are significant rent-seeking and administrative costs associated with government discretion. The costs approach also fails to guarantee efficient consumption of government services when there are negative externalities not reflected in the government's cost.

On balance, the benefits approach should be the primary basis for evaluating the amount of charges in most givings reforms. The costs approach may be useful in situations where the government costs are easily ascertainable but the benefits are difficult to access.

3. Requirement of Public Use or Public Purpose?

The more difficult issue is whether government givings must be subjected to a "public use" or a "public purpose" requirement, as in the case for takings. The notion that the government can bestow a benefit upon a private party without a corresponding public purpose seems untenable. Yet not all givings should be charged, even if a private party has clearly benefited. If the government has to impose a fair charge on every givings, the government will not be able to allocate resources for redistributive purposes.[432]

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[430] Where the charge is a proportion of the benefit, e.g. development charges.

[431] Where the charge is the market value of the benefit, e.g. 3G licenses, COE.

[432] R. Lisle Baker, *Using Special Assessments as a Tool for Smart Growth: Louisville's New Metro Government as a Potential Example*, 45 BRANDEIS L.J. 1, 11 (2006) ("If the benefit principle were to become dominant, the redistributive effects of general taxation would be undermined."); RICHARD E.

This paper proposes that there should be a requirement of "public purpose." "[O]btaining the maximum value for the government's benefits/resources/assets" will be sufficient evidence that this "public purpose" is satisfied. The efficiency in allocating and bolstering public coffers is clearly a legitimate government purpose. Beyond this, the government must show that granting of benefits serves some important public purpose, such as income distribution, special incentives, etc. It is acknowledged that like the "public use" doctrine in takings law, ambiguity and controversy in the interpretation of this requirement is inevitable. Nonetheless, this requirement will still go some way towards reducing rent-seeking by attracting more public attention on such givings, which can often go unnoticed.[433] Under a legally enforceable framework with effective enforcement mechanisms as identified above,[434] the "public purpose" requirement would force the government to justify bestowing benefits to private parties, promoting transparency and encouraging public scrutiny.

When formulating the givings jurisprudence, Bell and Parchomovsky omit the "public use" requirement in their analytical framework.[435] This is perhaps not surprising, since they are not big fans of the "public use" doctrine for takings.[436] Another reason is that their framework envisages the benefits to be only charged upon voluntarily acceptance by the beneficiaries, rendering it more as a contractual transaction.[437] Yet this voluntary/involuntary categorization can be more illusionary than real, especially when there are no practical alternatives to the government benefits.[438] Moreover, this contractual approach may encounter holdout problems.[439] For example, if, under the F1 street race tax, ten percent of the hotels objected to the tax and the F1 street race while the other 90% were willing to be subjected to the tax in exchange for the benefits of the F1 street race,[440] should the government proceed with the projects and the tax? Thus,

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WAGNER, *Subjective Cost, Property Rights, and Public Spending*, *in* CHARGING FOR GOVERNMENT: USER CHARGES AND EARMARKED TAXES IN PRINCIPLE AND PRACTICE 75 (Richard E. Wagner ed., 1991) (normative objection that user charges may be unfair to the low incomes segment of society).

[433] Sanderfur, *supra* note 1, at 771 ("pro-eminent domain groups invest extensively in obscuring their private benefit"). *See supra* Part IV.A.1.

[434] *See supra* Part VII.B.I.

[435] Bell & Parchomovsky, *supra* note 23, at 547.

[436] Bell & Parchomovsky, *supra* note 102.

[437] Bell & Parchomovsky, *supra* note 23, at 556.

[438] WAGNER, *Tax Norms*, *supra* note 427, at 7.

[439] Holdout typically occurs when unanimous consent is required for a collective action, such as property or contractual transaction. A holdout occurs when a single objection is capable to prevent the transaction for going through.

[440] The Singapore government did consult local hoteliers before imposing this tax and the "feedback has been positive." Voon, *supra* note 336.

the more effective approach is to incorporate the "public use"/"public purpose" discourse with givings as with takings, but noting that unlike takings, where there has to be public use *and* just compensation, a fair charge is possibly sufficient for givings. This allows redistributive welfare consideration to legitimately enter the legal discourse while acknowledging the inevitable compulsion in some instances of givings.

VIII. Conclusion

Conventional discourses on the perils of weak property rights vis-à-vis government takings have failed to provide an adequate account and response to the rent-seeking and inefficiency problems of government actions. This case study of Singapore from a givings perspective has demonstrated the importance of imposing a fair charge on the various kinds of givings in curbing rent-seeking and inefficiency. It is also worth noting the additional benefits of Singapore's healthy fiscal budget and more equitable taxation. While not discounting the importance of property rights protection, this paper provides a timely reminder to conventional U.S. scholarship that the givings aspects of the equation cannot be ignored.

The proposed framework on implementing givings reform is particularly important and timely as some of the largest ever givings unfold through various massive government economic stimulus programs.[441] The Obama administration has signaled the political will to cut waste and ensure that taxpayer money is well spent.[442] But given the huge potential for rent-seeking,[443] the legal restraints and effective enforcement mechanisms articulated in the proposed framework is pertinent to ensure the contracts under the various spending programs[444] are efficiently and competitively allocated. Other than the rival bidders which are harmed by dubious awards of contract, the laws could possibly allow citizen watch groups to enforce non-compliance with procurement procedures *and* the principle that the government is getting the maximum value. Indeed, given this gargantuan expenditure of taxpayer money in stimulus packages, the last thing needed is for rent-seeking and inefficiency to mar this grandest of government givings.

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[441] Herszenhorn, *supra* note 27; Hussain, *supra* note 27.

[442] Janet Hook & Peter Nicholas, *Pledge has Deficit of Believers*, CHI. TRIB., Feb. 26, 2009, C6.

[443] *Id.* ("there are signs that Democrats and Republicans in Congress will not have much appetite for restraint, including his call to ban 'earmarks' for things he considers pork"); see *supra* Part V.A.1

[444] *See Spending Plans and Major New Programs by Department*, WALL ST. J., Feb. 27, 2009, at A6 (a concise table explaining the various spending programs).