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# Power and Public Utilities / Taking Back the Power: Will Chapter 10 Provide Relief from the Energy Crisis Looming over California?

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# Taking Back the Power: Will Chapter 10 Provide Relief From the Energy Crisis Looming Over California?

*E.J. Gladding*

## *Code Sections Affected*

Public Utilities Code §§ 3300, 3301, 3302, 3304, 3310, 3320, 3325, 3326, 3327, 3328, 3330, 3340, 3341, 3341.1, 3341.2, 3341.5, 3342, 3343, 3344, 3345, 3346, 3347, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3365, 3366, 3367, 3367.5, 3368, 3369, 3369.5, 3370, 3380.1, 3380.2, 3381, 3382, 3383, 3384 (new).  
SB 6X (Burton); 2001 STAT. Ch. 10.

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## I. INTRODUCTION

In 1996, California deregulated its energy industry, thereby placing the generation and sale of electric power in the hands of private parties.<sup>1</sup> By doing so,

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1. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 4 (Apr. 26, 2001).

the State sought to foster a competitive market for the purchase of electricity.<sup>2</sup> California's objective in opening its power industry to competition was to provide a benefit throughout the economy.<sup>3</sup> Ultimately, the State hoped that the resulting competition would cause power companies to lower the cost of electricity statewide.<sup>4</sup> Once completed, the deregulation of California's power industry was intended to place the State's energy market in the same class as other utilities,<sup>5</sup> with the desired result of lowering consumer costs.<sup>6</sup>

Unfortunately, deregulation did not go as planned. Instead, California found itself facing a severe shortage of power.<sup>7</sup> This lack of resources forced the State to purchase large amounts of electricity from other states, typically at grossly inflated rates.<sup>8</sup> Consequently, California endured "skyrocketing wholesale electricity prices, an electric system with suspect reliability, . . . and bondholders who have seen their investments plummet."<sup>9</sup>

In response to this energy crisis, the Legislature enacted Chapter 10,<sup>10</sup> which creates a public power authority responsible for providing the State with additional power to augment its dwindling supply.<sup>11</sup> Chapter 10 is intended to create a new agency whose duty is to build new power plants for California<sup>12</sup> in order to provide the state with a sufficient amount of power at reasonable rates.<sup>13</sup>

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2. See Elizabeth A. Nowicki, *Denial of Regulatory Assistance in Stranded Cost Recovery in a Deregulated Electricity Industry*, 32 LOY. L.A. L. REV. 431, 437 (1999) (expressing hope that "broader additional benefits will be reaped by deregulating the electricity generation market and opening the market to competition.").

3. *Id.*

4. See *id.* (citing New York as an example of another state that hoped to provide its citizens with electricity at lowered rates, as a result of deregulation).

5. See Colin Drukker, *Economic Consequences of Electricity Deregulation: A Case Study of San Diego Gas & Electric in a Deregulated Electricity Market*, 36 CAL. W. L. REV. 291, 292 (stating that "[d]eregulation is affecting many industries worldwide, such as telecommunications, airlines, trucking, and electricity.").

6. See Nowicki, *supra* note 2, at 437 (explaining that the objective of deregulating the power industry is to reduce energy prices).

7. See SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 4 (Apr. 26, 2001) (describing the "classic market failure" resulting from deregulation of the power industry and the accompanying energy shortage in California).

8. See Robert Salladay & Lynda Gledhill, *Energy Bill Approved by Senate; It Would Create Power Board That Could Build New Plants*, S.F. CHRON., Feb. 21, 2001, at A4 (observing that states such as Texas and North Carolina have been selling power to California at unreasonably high prices as a result of California's power shortage).

9. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 4 (Apr. 26, 2001).

10. See CAL. PUB. UTIL. CODE § 3300 (enacted by Chapter 10) (creating the California Consumer Power and Conservation Financing Authority Act, with the intent to create more available energy for California).

11. *Id.*

12. See *id.* § 3341.1(b) (enacted by Chapter 10) (allowing the Authority to "construct or improve" electricity generating facilities).

13. *Id.* § 3300 (enacted by Chapter 10).

Many feel that Chapter 10 is an effective method of lowering energy costs in California and will give the State the electricity it needs.<sup>14</sup> However, Chapter 10 raises suspicions as to whether it will be able to achieve the goals outlined by the Legislature.<sup>15</sup>

## II. EXISTING LAW

### A. *The Public Utilities Commission*

Currently, California law places the regulation of the State's electricity supply largely under the control of the California Public Utilities Commission (PUC).<sup>16</sup> The Legislature granted the PUC<sup>17</sup> power to impose regulations upon all state public utilities in any method needed, in a manner that is easiest for it under the circumstances.<sup>18</sup> Such public utilities are defined in the California Constitution as private entities, including corporations and individuals, that own or in any way operate plants and other systems pertaining to management of electricity and other public necessities.<sup>19</sup>

However, power companies owned and operated by public entities,<sup>20</sup> such as city or state governments, are not subject to the PUC's standards of regulation and are free to regulate their facilities as they see fit.<sup>21</sup> This deprives the State of the ability to regulate certain power generators.<sup>22</sup> Private entities, on the other hand, are subject to the PUC's regulations regarding operation of their facilities, including the rates they charge.<sup>23</sup> Under section 728 of the California Public

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14. See, e.g., Lynda Gledhill & Greg Lucas, *Bill to Let State Build Generators Gets an OK; New Power Authority Would Govern Plants*, S.F. CHRON., Apr. 27, 2001, at A21 (presenting the opinion of Assemblymember Robert Hertzberg, who believes that Chapter 10 will help California acquire the energy it requires and abate the energy crisis).

15. See *infra* Part IV.B (analyzing potential flaws in the construction of Chapter 10 and the possible accompanying consequences of its implementation).

16. See CAL. CONST. art. XII (governing the regulation of public utilities).

17. See *id.* § 1 (explaining that the PUC consists of five members appointed by the Governor and subject to the Senate's approval).

18. See CAL. PUB. UTIL. CODE § 701 (West 1975) (stating that the PUC has the authority to "supervise and regulate every public utility in the state and may do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction.").

19. See CAL. CONST. art. XII, § 3 (citing the following examples of entities under the control of the PUC: power-generating facilities, telephone transmission services, and public transportation systems).

20. See *Am. Microsystems, Inc. v. Santa Clara*, 137 Cal. App. 3d 1037, 1042-43, 187 Cal. Rptr. 550, 554 (1982) (limiting the definition of "public utility" for purposes of the PUC's regulatory power to encompass only facilities operated by private individuals and companies and not facilities operated by city, county, or state agencies).

21. See *id.* (holding that distributors of electricity owned by public entities are not subject to regulation by the Public Utilities Commission absent legislation to the contrary; therefore, they are not required to pass cost savings to their customers).

22. *Id.*

23. See CAL. PUB. UTIL. CODE § 728 (West 1975) (stating that the PUC, upon holding a hearing, shall determine rates that it considers fair if it finds that a privately owned power-generating facility has imposed

Utilities Code, if the PUC finds that the rates a public utility charges are unreasonably high,<sup>24</sup> the PUC may hold a hearing.<sup>25</sup> During these hearings, the PUC may determine a satisfactory rate to be charged to the public.<sup>26</sup>

In light of the above standards imposed by California law, the Legislature gave the PUC the authority to regulate public utilities, as specified in the California Constitution,<sup>27</sup> in any manner necessary.<sup>28</sup> This includes the power to set rates for just compensation in cases of property taken by using the State's power of eminent domain.<sup>29</sup> Compensation awarded to the prior owner is typically the value of the property taken plus the damages to the remainder, if any, minus any benefits conferred by the taking.<sup>30</sup> Current law applies to the PUC in eminent domain proceedings and does not affect its authority to exercise its power in such situations.<sup>31</sup> This allows the PUC to acquire the property necessary to perform its regulatory duties when no other means are available to do so, such as when a private company refuses to comply with rates imposed by the PUC, or when the land needed to build a new power plant is owned by a private citizen who is unwilling to sell it.<sup>32</sup>

### B. The Energy Commission

In addition to the authority and duties of the PUC, California also implemented the Warren-Alquist State Energy Resources and Development Act,<sup>33</sup> which creates and sets guidelines for the activities of the California Energy Resources Conservation and Development Commission (Energy Commission).<sup>34</sup> The purpose of the Energy Commission was to assist the State in providing the general public with an adequate supply of electricity, in an amount sufficient to

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rates that are not reasonable).

24. See S. Cal. Edison Co., No. 52336, 1971 Cal. PUC LEXIS 759, at \*56, 72 CPUC 282 (on file with *McGeorge Law Review*) (explaining that reasonable rates for public utilities are determined by weighing such factors as standard costs, rates charged by competing facilities, how the gained revenue is used, and overall advantage to consumers).

25. CAL. PUB. UTIL. CODE § 728.

26. See S. Cal. Edison Co., No. 52336, 1971 Cal. PUC LEXIS at \*56 (discussing factors used by the PUC to decide rates).

27. See CAL. CONST. art. XII, § 3 (stating that private entities in the business of operating electricity-generating facilities are "public utilities" subject to regulation by the PUC).

28. See CAL. PUB. UTIL. CODE § 701 (West 1975) (delegating legislative regulatory power to the PUC).

29. CAL. CONST. art. XII, § 5; see CAL. CIV. PROC. CODE §§ 1240.010, 1240.030 (West 1982) (dictating that eminent domain, the government's power to take the property of another, can be exercised when the property will be put to public use in instances of public necessity).

30. *Id.* § 1263.410 (West 1982).

31. *Id.* § 1230.060 (West 1982).

32. See *id.* §§ 1240.010, 1240.030 (West 1982) (allowing government agencies to take the property of private individuals when necessary to promote the welfare of the public).

33. See CAL. PUB. RES. CODE § 25000 (West 1996) (implementing the Warren-Alquist Energy Resources and Development Act).

34. *Id.* § 25000 et seq. (West 1996 & Supp. 2002).

satisfy the demands and needs of the public.<sup>35</sup> As such, the State declared that the level of energy produced was “consistent with the need for such energy for protection of public health and safety, for promotion of the general welfare, and for environmental quality protection.”<sup>36</sup>

The Energy Commission was authorized to secure this electricity in a number of ways, such as by conducting studies of current and future availability of and demand for electricity<sup>37</sup> and similar trends regarding fossil fuels.<sup>38</sup> However, the duty of the Energy Commission most relevant to public utilities is its certification jurisdiction.<sup>39</sup> This power gave the Energy Commission the authority to ensure that all electricity-producing facilities in California comply with its standards of production.<sup>40</sup> The result was that no electrical plants of any kind may be constructed or altered without first being certified by the Energy Commission<sup>41</sup> in a manner consistent with its standards.<sup>42</sup> All standards for the construction and operation of energy facilities are set by the Energy Commission, subject to changes suggested by the local, regional, and state governments.<sup>43</sup>

### III. CHAPTER 10

In an attempt to augment California’s waning power supply and to aid in the conservation of electricity,<sup>44</sup> the Legislature enacted Chapter 10, thereby creating

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35. *See id.* § 25001 (West 1996) (stating that:

[E]lectrical energy is essential to the health, safety and welfare of the people of this state . . . and that it is the responsibility of the government to ensure that a reliable supply of electrical energy is maintained at a level consistent with the need for such energy for protection of public health and safety, for promotion of the general welfare, and for environmental quality protection.).

36. *Id.*

37. *See id.* § 25309 (West Supp. 2002) (requiring the Energy Commission to provide the Governor and the Legislature with a report concerning California’s energy requirements for the next twenty years, as well as availability of power for that period, based on the amount the state develops in that time).

38. *See id.* § 25310 (West Supp. 2002) (providing guidelines for the Energy Commission’s report to the Governor and the Legislature regarding long range estimates of fuel availability and need, as well as any changes in current procedure that the Commission may recommend).

39. *See* CAL. PUB. RES. CODE § 25500 (West 1996) (governing the Energy Commission’s regulatory power over electricity-generating facilities).

40. *See id.* (asserting that “no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facilities by the commission.”).

41. *See id.* (mandating that electricity-generating facilities can only be constructed or altered if the project is certified by the Energy Commission).

42. *See id.* § 25525 (West Supp. 2002) (setting certification standards for the Energy Commission by requiring it to consider such factors as the facility’s compliance with state or local laws, its environmental effect, advantages the facility confers on the public, and whether or not the facility is a reliable source of energy).

43. *See id.* § 25216.3 (West 1996) (stating that certification requirements regarding electrical plants are to be devised by the Commission, except that government agencies may propose changes to those standards in order to comply with new laws).

44. CAL. PUB. UTIL. CODE § 3300 (enacted by Chapter 10).

the California Consumer Power and Conservation Financing Authority Act (the Authority).<sup>45</sup> Chapter 10 creates an agency modeled after the New York Power Authority (NYPA),<sup>46</sup> which is authorized to construct electricity storage and generating facilities for the purpose of aiding the state of New York in obtaining its needed power supply.<sup>47</sup> The NYPA has constructed ten power generating plants that currently provide New York with one-fourth of its electric power, providing much-needed electricity to the state.<sup>48</sup> Chapter 10 purports to make a similar contribution to California's power crisis by providing additional power in an effort to alleviate the State's lack of electricity.<sup>49</sup>

#### A. Powers Vested In the Authority

To achieve the goals of Chapter 10,<sup>50</sup> the Legislature empowered the Authority to create its own regulations in the course of conducting its business<sup>51</sup> and to "do all things necessary and convenient" in the exercise of its authority.<sup>52</sup> This is similar to the power given to the PUC.<sup>53</sup> Specifically, Chapter 10 authorizes the Authority to purchase and improve existing generators, enter into contracts with independent parties to construct new generators, provide loans in conjunction with construction and improvement of generation facilities and conservation projects, acquire land for the purpose of constructing new facilities, and any other activity it deems necessary to aid in the construction or improvement of generation facilities and energy conservation projects.<sup>54</sup> These powers are combined with the Energy Commission's authority to certify new facilities, requiring certification of any site purchased or otherwise acquired by the activities of the Authority.<sup>55</sup>

However, purchases and loans are not the only methods the Authority has at its disposal to construct new power plants.<sup>56</sup> Chapter 10 also empowers the

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45. *Id.* § 3320 (enacted by Chapter 10).

46. *See* SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 5 (Apr. 26, 2001) (commenting that Chapter 10 was modeled after the NYPA in an attempt to emulate that Authority's success in expanding energy generation, which helps to provide auxiliary power for such public agencies as hospitals and police stations).

47. N.Y. PUB. AUTH. LAW § 1005 (McKinney 1994 & Supp. 2002).

48. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 5-6 (Apr. 26, 2001).

49. *See id.* at 5 (describing the agencies' responsibilities and powers).

50. *See infra* Part IV.A (explaining the Legislature's motive for drafting Chapter 10).

51. CAL. PUB. UTIL. CODE § 3340(f) (enacted by Chapter 10).

52. *Id.* § 701 (West 1975).

53. *See id.* (giving the PUC the power to regulate public utilities, so that it may perform its duties as efficiently as possible).

54. *Id.* §§ 3340-3341.2 (enacted by Chapter 10).

55. *See* CAL. PUB. RES. CODE § 25500 (West 1996) (authorizing the Energy Commission to require certification of construction or alteration of any electrical facilities in the state before any building or modification takes place).

56. *See* CAL. PUB. UTIL. CODE § 3341 (enacted by Chapter 10) (outlining the powers of the Authority).

Authority to exercise eminent domain to acquire suitable land for new facilities.<sup>57</sup> Although the Authority may not exercise eminent domain over the land of the State without its consent,<sup>58</sup> this empowerment nevertheless acts as an expansion of the eminent domain power available to the PUC.<sup>59</sup> Although the PUC only has the power to regulate public utilities owned by private entities,<sup>60</sup> Chapter 10 grants additional power to the Authority, allowing it to “construct or improve any enterprise,” public or private, thus making it possible to regulate all generation facilities in the State.<sup>61</sup>

### B. Administration of the Authority

A board of directors, similar to that governing the PUC, administers the Authority.<sup>62</sup> The Authority’s board of directors consists of five members, including the State Treasurer and four other individuals selected by the Governor.<sup>63</sup> The members of this board, who will initially serve progressively smaller terms and thereafter serve for four years,<sup>64</sup> will hold meetings and vote on all issues pertinent to the activities of the Authority, with a supporting vote of three members being required for any issue to receive the support of the Authority.<sup>65</sup> The board’s meetings will be open to the public<sup>66</sup> and are a matter of public record.<sup>67</sup>

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57. *Id.* §§ 3340(d), 3341.1(a) (enacted by Chapter 10).

58. *See id.* § 3341.1(b) (enacted by Chapter 10) (allowing the Authority to obtain property in order to build or augment power facilities “[b]y gift, lease, purchase, eminent domain, or otherwise, . . . except that no property of a state public body may be acquired without its consent.”).

59. *See CAL. CONST.* art. XII, § 5 (granting the PUC the ability to set rates of just compensation for the property it takes through its power of eminent domain).

60. *See id.* § 3 (defining “public utilities” under the jurisdiction of the Public Utilities Commission as systems, including power facilities, owned or operated by private corporations or individuals).

61. *See CAL. PUB. UTIL. CODE* § 3341.1(b) (enacted by Chapter 10) (allowing the Authority to build and modify generation facilities and obtain the property necessary to do so via eminent domain, financial transactions, or through other methods, although such acquisitions are subject to the State’s consent in the case of property owned by public entities).

62. *See CAL. CONST.* art. XII, § 1 (explaining the composition and mechanics of the board of directors governing the PUC).

63. *See CAL. PUB. UTIL. CODE* § 3325(a) (enacted by Chapter 10) (articulating that such appointees must be extremely experienced in energy-related fields, such as electricity generation, natural gas, energy conservation, and electricity rates).

64. *See id.* § 3325(b) (enacted by Chapter 10) (explaining that four members of the board, in addition to the State Treasurer, will be appointed to progressively shorter terms, with the first member appointed serving a four-year term, the second serving a three-year term, the third serving a two-year term, and the fourth serving a one-year term).

65. *See id.* § 3325(c) (enacted by Chapter 10) (requiring a “quorum” of three board members before the Authority may act upon any issue before it).

66. *Id.* § 3327 (enacted by Chapter 10).

67. *Id.* § 3328 (enacted by Chapter 10).



C. Programs Created by Chapter 10

In keeping with Chapter 10's objective to provide the State with a supply of affordable power consistent with its needs,<sup>68</sup> all projects regarding generation of power initiated or financed by the Authority shall provide the citizens of California with the power generated by such projects at a cost equal to the price of the electricity that the projects produce.<sup>69</sup> In the event that power is generated in excess of the State's requirements, any superfluous power may be sold to foreign entities, provided it is sold at rates that are "just and reasonable."<sup>70</sup> In determining the State's needs for power generation, the Authority will consider information compiled by the Energy Commission regarding studies of energy trends and immediate and future needs pursuant to the Public Resources Code,<sup>71</sup> as well as information provided by independent collaborators.<sup>72</sup>

Additionally, the Authority is empowered to issue loans to independent parties.<sup>73</sup> These loans are intended to facilitate the purchase and development of equipment designed to provide efficient and renewable energy.<sup>74</sup> This power is consistent with Chapter 10's purpose to provide for energy conservation.<sup>75</sup> Such a program is an attempt to create affordable energy and alleviate the State's shortage of power.<sup>76</sup> Under this plan, all appliances purchased with one of these loans must be certified, under the standards of the Energy Commission,<sup>77</sup> that the work has been completed to install the equipment.<sup>78</sup>

The Authority also requires the PUC to compile a report regarding current and future trends of California's natural gas supply, in order to assist in obtaining an adequate supply of natural gas for energy production, pursuant to current and

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68. See *id.* § 3310(d) (enacted by Chapter 10) (stating Chapter 10's goal: to acquire an energy supply for California that meets the State's requirements).

69. CAL. PUB. UTIL. CODE § 3351(a) (enacted by Chapter 10).

70. *Id.*

71. See CAL. PUB. RES. CODE § 25309 (West Supp. 2002) (outlining technical guidelines for assessing future energy trends and public power requirements).

72. See CAL. PUB. UTIL. CODE § 3350 (enacted by Chapter 10) (allowing the Authority to use studies conducted by the Energy Commission and Independent System Operators regarding the energy supply and the necessity of new power plant construction).

73. *Id.* § 3365 (enacted by Chapter 10).

74. See *id.* (authorizing the Authority to loan up to one billion dollars to implement programs dedicated to conservation and renewable energy sources, such as "consumer appliances and home improvements with electric and gas energy efficiency or renewable energy characteristics.").

75. See *id.* § 3310(b) (enacted by Chapter 10) (demonstrating the Legislature's desire to create efficiency programs that will allow for renewable energy sources and the reduction of public power shortages).

76. See SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 6 (Apr. 26, 2001) (stating that a public power agency may alleviate the State's need for power and provide more cost-efficient electricity to consumers).

77. See *supra* note 42 and accompanying text (outlining the certification standards of the Energy Commission).

78. See CAL. PUB. UTIL. CODE § 3367 (enacted by Chapter 10) (requiring certification of all equipment when its installation is complete).

future requirements of the State.<sup>79</sup> This report shall be prepared from information obtained by the Energy Commission's assessment and studies of energy trends, requirements and current availability of natural gas.<sup>80</sup> The report shall be submitted to the Authority no later than ninety days after Chapter 10's enactment.<sup>81</sup>

Finally, Chapter 10 requires the Authority to collaborate with the Energy Commission and any independent parties involved in an effort to create an Energy Resource Investment Plan, to be returned to the Governor and the Legislature 180 days after the enactment of Chapter 10.<sup>82</sup> In certifying this plan, the Authority must consider factors such as current electricity supply, sufficiency of storage facilities, and environmental quality, in order to determine how much electricity and natural gas will be needed by the State in the next ten years.<sup>83</sup> The plan must devise a strategy for reducing demand and determine what investments would allow the Authority to attain that goal.<sup>84</sup>

#### D. Funding and Bonds

In order to pay for an enormous new entity such as the Authority, Chapter 10 created the California Consumer Power and Conservation Financing Authority Fund (the Fund), which is housed in the State Treasury.<sup>85</sup> The Fund is designed for the Authority to spend as it deems necessary to achieving its purposes.<sup>86</sup> This Fund is continuously available for expenditure on anything reasonably consistent with the exercise of its powers under Chapter 10.<sup>87</sup>

Additionally, Chapter 10 authorizes the Authority to grant bonds to any power facility operator, in order to provide programs and construction endeavors.<sup>88</sup> These bonds may be issued in any amount, up to five billion dollars,<sup>89</sup> except in the case of renewable energy and conservation projects, which

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79. *Id.* § 3368 (enacted by Chapter 10).

80. *See* CAL. PUB. RES. CODE § 25310 (West Supp. 2002) (authorizing the Energy Commission to conduct studies regarding California's natural gas supply).

81. CAL. PUB. UTIL. CODE § 3368(a) (enacted by Chapter 10).

82. *Id.* § 3369(a) (enacted by Chapter 10).

83. *See id.* § 3369(b) (enacted by Chapter 10) (mandating that the Authority balance the costs of various fuel sources in implementing the Plan, including an assessment of the most effective strategy for reducing public demand for energy and observing market stability of different fuel types).

84. *See id.* §§ 3369(c), (f) (enacted by Chapter 10) (allowing the Authority to suggest how to allocate its finances to implement its plan and to invest its funding wherever required to ensure the plan's success).

85. *Id.* § 3370 (enacted by Chapter 10).

86. *Id.* § 3370(a) (enacted by Chapter 10).

87. *See* CAL. PUB. UTIL. CODE §§ 3370(a)-(c) (enacted by Chapter 10) (implementing a continuous fund for use by the Authority for any needed expenses incurred over the course of its activities).

88. *See id.* § 3370(e) (enacted by Chapter 10) (stating that the Authority may expend its finances in the form of bonds payable from the Authority Fund).

89. *Id.* § 3380.1 (enacted by Chapter 10).

are limited to one billion dollars.<sup>90</sup> Therefore, the bonds issued are not considered loans but are paid from the Fund.<sup>91</sup> No state or local governments are obligated to repay the bonds, and the Authority gives full faith and credit to their payment.<sup>92</sup>

Chapter 10 will terminate on January 1, 2007.<sup>93</sup> The Authority may not finance any projects after the aforementioned date, absent specific Legislative permission.<sup>94</sup> However, one question remains: will the Authority succeed in solving California's energy crisis by that time?

#### IV. ANALYSIS OF THE NEW LAW

Like most new laws, Chapter 10 has its supporters<sup>95</sup> and its opponents.<sup>96</sup> The Legislature designed the Authority, by its own admission, to establish programs that will ultimately provide a sufficient amount of power to the citizens of California.<sup>97</sup> Thus, those in favor of the Authority argue that Chapter 10 is an effective method of satisfying the public's demand for power.<sup>98</sup> Indeed, in an atmosphere of electricity deregulation, where California's energy supply is dwindling,<sup>99</sup> additional power must be generated within the State to prevent other states from selling their power to California at unreasonably high rates.<sup>100</sup>

However, the creation of the Authority may not be the ideal solution. Critics of Chapter 10 argue that a power authority, operated by the State, contradicts the

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90. See *id.* § 3365 (enacted by Chapter 10) (limiting bond funding to one billion dollars for energy conservation projects such as consumer and home appliances with energy efficiency characteristics).

91. See CAL. PUB. UTIL. CODE § 3383 (enacted by Chapter 10) (emphasizing that the state is not responsible for repayment of any bonds issued by the Authority, as such bonds are to be taken directly from the Fund).

92. See *id.* (providing that payment of any bonds issued is the sole responsibility of the Authority and that the Authority therefore pledges to do so).

93. See *id.* § 3384 (enacted by Chapter 10) (requiring the Authority to achieve its objectives within five years of the date Chapter 10 becomes effective).

94. See *id.* (allowing additional programs to be approved after the Authority's termination date by enacting statutes to that effect).

95. See, e.g., Gledhill & Lucas, *supra* note 14, at A21 (paraphrasing Assemblymember Robert Hertzberg, who argues that the Authority's ability to fund new generators that produce cost-based electricity will help the state regain control over its power needs).

96. See *id.* (illustrating the State Republicans' virtually unanimous view that the creation of the Authority will hinder California's ability to produce more power generators).

97. See *id.* § 3310(b) (enacted by Chapter 10) (outlining Chapter 10's intention to fund activities that will help mitigate California's energy shortage).

98. See James Flanigan, *State Looks to Public Power as Solution to Energy Crisis*, L.A. TIMES, Apr. 8, 2001, at C1 (stating the observation of S. David Freeman, general manager of the Los Angeles Department of Water and Power, that state-operated power is the sole solution to building affordable power generators).

99. See ASSEMBLY COMMITTEE ON ENERGY COSTS AND AVAILABILITY, COMMITTEE ANALYSIS OF SB 6X, at 2 (Mar. 8, 2001) (observing that privatization of California's energy industry has caused problems in the form of low energy supplies and rising energy prices).

100. See Salladay & Gledhill, *supra* note 8, at A4 (explaining that states such as Texas and North Carolina are selling power to California at extremely high rates, which dramatically increases profits on such transactions and forces California to pay unreasonable amounts of money for the power it needs).

purpose of deregulation because it limits competition and leads California one step closer to the socialization of its government.<sup>101</sup> Moreover, given the energy crisis in which the State is presently immersed, Chapter 10 might simply be a “knee-jerk” reaction to the energy crisis,<sup>102</sup> and, as such, may have been enacted simply to present the citizens of California with a short-term solution that ultimately will not solve the energy problem.<sup>103</sup> Such arguments raise serious questions about the viability of Chapter 10 and lead one to inquire as to whether the new Authority will do more harm than good.<sup>104</sup>

#### A. *The Authority’s Purpose*

Chapter 10’s central focus is the creation and operation of electricity generators.<sup>105</sup> Such activity is ostensibly intended to provide additional energy to the people of California at rates that are reasonable and affordable.<sup>106</sup>

In addition to overseeing the construction of additional power plants, the Authority will also finance programs conducted by the PUC<sup>107</sup> and the Energy Commission<sup>108</sup> in an attempt to provide relief from the energy shortage.<sup>109</sup> The Authority is also meant to finance the improvement of old, obsolete, and generally inferior power generators in an attempt to augment their effectiveness.<sup>110</sup> According to the drafters of Chapter 10, the ultimate objective of these activities is to obtain a sufficient amount of energy to supply California

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101. See Bill Ainsworth, *Republicans Fiddle While Californians Burn*, SAN DIEGO UNION-TRIB., May 27, 2001, at A3 (restating the common argument that creation of power is “socialist,” which contradicts the capitalist ideals upon which the American economy is based).

102. See Bennett Roth, *Limits on Lifestyle; City Moves to Curb Undesirable Behavior*, HOUS. CHRON., May 3, 1992, at A1 (citing criticism of laws reflexively enacted in response to social problems and stating that such laws are simply short-term solutions that ultimately will not solve the problems they address).

103. See *id.* (describing how many laws enacted in response to a crisis are “Band-Aids” that do not provide a viable solution to the problem).

104. See Richard Nemeč, *The Power and the Irony; State Energy Mess Teems With Absurdity*, DAILY NEWS OF L.A., May 20, 2001, at V1 (questioning the effectiveness of a state-run power authority, implying that such an entity poses many risks and may cause severe harm to the economy).

105. See CAL. PUB. UTIL. CODE § 3310(a) (enacted by Chapter 10) (articulating that the Authority is intended to “[e]stablish, finance, purchase, lease, own, operate, acquire, or construct” electricity-generating plants through any means necessary, such as through independent action of the Authority, through contractual agreements with other entities, or through financing of others’ projects to bring more power plants into being).

106. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 5 (Apr. 26, 2001).

107. See CAL. PUB. UTIL. CODE § 701 (West 1975) (authorizing regulation of public utilities by the PUC).

108. See CAL. PUB. RES. CODE § 25309 (West Supp. 2002) (outlining the Energy Commission’s duties of conducting studies in order to determine energy trends and availability).

109. See CAL. PUB. UTIL. CODE §§ 3310(b), 3368 (enacted by Chapter 10) (citing examples of such activity to include working in conjunction with the Energy Commission’s duties regarding energy demand and conservation, financing the PUC’s regulation of privately owned public utilities, and providing funding for energy and fossil fuel storage).

110. *Id.* § 3310(e) (enacted by Chapter 10).

within five years of Chapter 10's enactment.<sup>111</sup>

Of course, in spite of such noble goals, the Legislature's decision to implement Chapter 10 has not been unanimously approved.<sup>112</sup> Consequently, the question remains as to whether the Authority is a solution to California's energy crisis.<sup>113</sup>

### B. Chapter 10: Is Public Power the Answer?

Despite Chapter 10's enactment, it nevertheless endures heavy criticism.<sup>114</sup> Opposition to the Authority comes largely from supporters of competition among public utilities.<sup>115</sup> Such critics of Chapter 10 feel that the establishment of a state-operated power authority undermines the competitive intentions behind deregulation of power companies<sup>116</sup> and will achieve nothing in the end but raised taxes to pay for the Authority.<sup>117</sup>

Considering such possible conceptual flaws, the Authority may not even accomplish its goal of affording additional power to California at lower prices.<sup>118</sup> Times of crisis, such as California's energy problem, can cause legislatures to pass laws rather hastily, purely in the interest of pleasing their constituents.<sup>119</sup> The resulting laws are typically nothing more than short-term solutions to problems that require far-sighted strategies.<sup>120</sup> Thus, it is yet to be determined whether Chapter 10 will truly remedy California's power deficiency or if it is rather a

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111. *Id.* § 3310(d) (enacted by Chapter 10).

112. *See* Ainsworth, *supra* note 101, at A3 (reporting that Republicans in the Legislature criticize the implementation of the Authority as being socialistic and an additional unwanted governmental control of business).

113. *See* Nemec, *supra* note 104, at V1 (posing the question of whether California's financial problems regarding the energy crisis can be solved by the imposition of a state-run public power authority and indicating that the Authority could cause severe financial harm to the State).

114. *See* Gledhill & Lucas, *supra* note 14, at A21 (illustrating the State Republicans' view that creation of the Authority will hinder California's ability to produce more power generators).

115. *See* Ainsworth, *supra* note 101, at A3 (describing the common Republican objection to the Authority as contrary to capitalist ideals); *see also* Salladay and Gledhill, *supra* note 8, at A4 (presenting the objection of Senator Bill Morrow, who stated that "[w]ith the passage of [Chapter 10], . . . deregulation in the state of California is officially dead.>").

116. *See id.* at A3 (citing Republicans' opposition to Chapter 10: that the Authority will infuse socialist principles into California's public utility market).

117. *See* Mitchell Landsberg, Nicholas Riccardi, & Christine Hanley, *The California Energy Crisis; Problem Has Many Answers, None Easy*, L.A. TIMES, Jan. 20, 2001, at A1 (restating energy analyst Donato Eassey's concern that, if the Authority's funds are depleted, the government may be forced to raise taxes to compensate for the deficiency).

118. *See* Nemec, *supra* note 104, at V1 (expressing doubt as to whether the Authority will solve California's energy crisis without harming its economy).

119. *See* Ann-Marie White, *A New Trend in Gun Control: Criminal Liability for the Negligent Storage of Firearms*, 30 HOUS. L. REV. 1389, 1416 (1993) (expressing the argument that legislation passed in response to public outcry is often deficient).

120. *See id.* (observing that laws passed to please the public are often "piecemeal," and, as such, may not provide long-term relief from the problems they purport to solve).

mere reflexive action by the Legislature, enacted to pacify voters.

### 1. Chapter 10 and Deregulation

Many see Chapter 10 as an effective solution to the energy crisis which will provide California with power facilities necessary to feed its hunger for electricity.<sup>121</sup> Indeed, the Authority does provide a means of constructing many new power plants in the State,<sup>122</sup> and it also presents the possibility of conserving energy to alleviate the shortage.<sup>123</sup> Therefore, Chapter 10 appears, on its face, to be a viable solution to California's energy problem, and it may provide the State with a sufficient amount of energy to meet its needs in due time.<sup>124</sup>

However, the Authority is not universally approved throughout the State, and opponents of Chapter 10 strongly disagree with the arguments in its favor.<sup>125</sup> Specifically, the Authority's critics suggest that statewide operation of power facilities is a direct contradiction of the very idea behind deregulation of electric power.<sup>126</sup> Deregulation was intended to put power sales into the hands of private industry and foster competition among energy providers thereby decreasing rates.<sup>127</sup> Therefore, Chapter 10's opponents maintain that creating a state-operated power authority will destroy competition.<sup>128</sup> Such adversaries consider this concept of public power to be "socialist"<sup>129</sup> and fear that its implementation will achieve nothing but higher taxes for the citizens of California, who will consequently end up paying more money regardless of whether or not power rates are lowered.<sup>130</sup>

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121. See, e.g., Salladay & Gledhill, *supra* note 8, at A4 (restating the argument that a public power authority would create a source of emergency power and provide California with relief from the energy crisis).

122. See CAL. PUB. UTIL. CODE § 3341.1(b) (enacted by Chapter 10) (giving the Authority the power to build new electrical facilities for the purpose of generating additional electricity for California).

123. See *id.* § 3365 (enacted by Chapter 10) (providing incentives for existing power generation facilities to enact programs regarding energy and fuel conservation).

124. See ASSEMBLY COMMITTEE ON ENERGY COSTS AND AVAILABILITY, COMMITTEE ANALYSIS OF SB 6X, at 3 (Mar. 8, 2001) (conceding that the Authority could alleviate some of the high costs of power rates and save the State money).

125. See Salladay & Gledhill, *supra* note 8, at A4 (expressing a common disdain for the concept of public power as making one more concession to "big government").

126. See Ainsworth, *supra* note 101, at A3 (observing that opponents of public power argue that the concept runs contrary to a capitalist system, thereby hindering competition).

127. See Flanigan, *supra* note 98, at C1 (stating that the goal of electricity deregulation is "lower rates and better service").

128. See Salladay & Gledhill, *supra* note 8, at A4 (quoting Senator Bill Morrow, who feels that implementing the Authority will decimate the idea of deregulation).

129. See Ainsworth, *supra* note 101, at A3 (quoting Assemblymember Dave Cox, who argues that creating a state-operated power authority is a form of socialism and that "socialism has failed throughout the rest of the world.>").

130. See Landsberg, et al., *supra* note 117, at A1 (expressing energy analyst Donato Eassey's argument that public power is likely to cause the State to raise taxes in order to pay for the funds which the Authority needs to operate).

The opposition's arguments are not without merit. The Fund, after all, is located in the State Treasury,<sup>131</sup> which is funded largely by personal income taxes.<sup>132</sup> As such, all taxes not returned as refunds are transferred into the Treasury,<sup>133</sup> which funds the Authority.<sup>134</sup> Therefore, regardless of whether the Authority lowers power costs, it is ultimately California's residents who pay for the Authority.<sup>135</sup>

Moreover, although Chapter 10 pledges the Authority's "full faith and credit" for all loans and bonds issued for the projects it funds,<sup>136</sup> this pledge ultimately may not mean a great deal for California. In particular, Chapter 10 provides that the Authority will be responsible for repaying the loans and bonds<sup>137</sup> but, at the same time, it requires that such loans and bonds will only be paid from the Fund.<sup>138</sup> So where will the money come from? If the State is not responsible for repaying the debt<sup>139</sup> and the Authority is only obligated to pay it back from the same fund from which it issued the bonds in the first place,<sup>140</sup> it is likely that taxes will have to be raised to make-up the difference.<sup>141</sup>

Therefore, even if Chapter 10 manages to provide Californians with power at a lower cost,<sup>142</sup> the taxes required to pay for the Authority will come directly from those living in the State.<sup>143</sup> Thus, Chapter 10 is quite likely to substitute one high cost for a different one, and the citizens of California will have to pay for the problem either way.<sup>144</sup>

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131. See CAL. PUB. UTIL. CODE § 3370(a) (enacted by Chapter 10) (creating the California Consumer Power and Conservation Financing Authority Fund within the California State Treasury).

132. See CAL. REV. & TAX. CODE § 19601 (West 1994) (providing that all personal income taxes paid by citizens of California will be transferred to the State Treasury, pending refunds to be awarded).

133. See *id.* § 19603 (West 1994) (requiring that all taxes, not subject to refunds, be redeposited in the funds of the State Treasury).

134. CAL. PUB. UTIL. CODE § 3370(a) (enacted by Chapter 10).

135. See Landsberg, et al., *supra* note 117, at A1 (observing that many have concerns that California will not have the money to operate the Authority, and, therefore, taxpayers will have to pay the cost of its existence).

136. See CAL. PUB. UTIL. CODE § 3383 (enacted by Chapter 10) (absolving the state and all other agencies from any responsibility for repaying loans and bonds issued by the Authority).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. See Landsberg, et al., *supra* note 117, at A1 (raising the concern that the Authority may not have enough money to compensate for loans and bonds issued from the Fund, which would mean that taxes would be raised to pay for projects authorized by the Authority). The stated purpose of this section is to "provid[e] electricity at just and reasonable rates." *Id.*

142. See CAL. PUB. UTIL. CODE § 3310 (enacted by Chapter 10) (outlining the Authority's objectives: build new power plants, finance conservation programs, and conduct other activities intended to alleviate California's pressing need for additional power).

143. See CAL. REV. & TAX. CODE § 19601 (West 1994) (placing revenue gained from Californians' income taxes directly into the State Treasury).

144. See Landsberg, et al., *supra* note 117, at A1 (addressing the risk that the Authority's lack of funds may force California citizens to pay additional taxes to provide the revenue necessary to operate the Authority's

2. The “Band-Aid” Problem: Is Chapter 10 Merely a Temporary Solution?

Chapter 10’s opponents present legitimate objections to its enactment.<sup>145</sup> The Authority is funded by the State Treasury,<sup>146</sup> and, therefore, it is realistic for its critics to be concerned that the government will raise taxes to pay for it.<sup>147</sup> After all, if taxes are raised to fund the Authority, the citizens of California may be required to pay just as much for their energy requirements even if Chapter 10 succeeds in lowering power costs.<sup>148</sup> As a result, the overall effectiveness of Chapter 10 is rendered noticeably suspect.<sup>149</sup> A conceptual flaw of this magnitude raises an important question: if establishing the Authority is not a practical solution to the energy crisis, why was Chapter 10 enacted at all?

The answer likely lies within the priorities of the Legislature. Simply put, when society is presented with a crisis, a public outcry often ensues, demanding that the government provide a solution to the problem.<sup>150</sup> When faced with these situations, legislatures sometimes respond to mounting pressure from their constituents by hastily passing laws that seem to solve the problems at hand, with the primary intention of appeasing the public.<sup>151</sup> Unfortunately, the laws thus created are often mere “Band-Aids,” which ostensibly present a “quick fix” for the problem without providing a permanent solution.<sup>152</sup>

Chapter 10 is no exception to the “Band-Aid” phenomenon. The Authority may, in fact, succeed in building more power plants for California and thus lower power costs by providing more energy to the State.<sup>153</sup> However, the fact that Chapter 10’s funding comes directly from taxes paid by California’s citizens<sup>154</sup> indicates a strong possibility that the State’s costs will escalate, even if the

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programs).

145. See *supra* Part IV.B.1 (concluding that Chapter 10’s critics raise valid arguments that implementation of the Authority is likely to cause the government to raise taxes in order to provide funding for the program).

146. CAL. PUB. UTIL. CODE § 3370(a) (enacted by Chapter 10).

147. Landsberg, et al., *supra* note 117, at A1.

148. See *id.* (observing that the government may be required to raise taxes in order to maintain funding for the Authority).

149. See *supra* Part IV.B.1 (perceiving fundamental economic flaws in the construction of Chapter 10).

150. See Roth, *supra* note 102, at A1 (describing “public clamor” for the government to implement a solution to the rising problem of violent criminal activity).

151. See *id.* (indicating that the Houston City Council enacted anti-crime ordinances with the sole intention of satisfying the public’s desire for the government to lessen criminal activity in the city).

152. See White, *supra* note 119, at 1416 (criticizing laws enacted in response to public demand as carrying the potential to become “piecemeal legislation targeted at highly visible short-term solutions with no underlying coherency”).

153. See SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 6 (Apr. 26, 2001) (observing that the Authority’s power to construct new facilities for electricity generation may provide for lowered energy costs and thus reduce the State’s pressing need for power).

154. See CAL. PUB. UTIL. CODE § 3370(a) (enacted by Chapter 10) (providing that the Authority shall be funded by the State Treasury); see also CAL. REV. & TAX. CODE § 19603 (West 1994) (providing funding for the State Treasury from personal income tax revenues).



Authority manages to lower power rates.<sup>155</sup> This glaring flaw in Chapter 10's structure indicates that it was not analyzed fully before it was enacted.<sup>156</sup> Therefore, Chapter 10 will likely not be a permanent solution to the energy crisis because the additional taxes required to pay for the Authority are likely to counteract any reduction in electricity rates that the new law may achieve.<sup>157</sup>

Thus, the Authority's propensity toward building power plants is probably a mere temporary answer to California's power problem which will not provide a substantial long-term solution.<sup>158</sup> As such, it is quite probable that, in enacting Chapter 10, the Legislature sought only an immediate solution for the energy crisis in the interest of pacifying the voters.<sup>159</sup> Sadly, the steps the Legislature has taken to appease the public will probably not be enough to abate California's pressing need for additional energy.<sup>160</sup> While the provisions of Chapter 10 may appease the public for a time, it likely cannot provide the far-reaching remedy required to provide California with a way out of its power emergency.<sup>161</sup>

## V. CONCLUSION

It is likely that the Legislature did not consider all of Chapter 10's potential ramifications before enacting it.<sup>162</sup> Chapter 10 appears to be simply a "Band-Aid" law,<sup>163</sup> which is likely to accomplish nothing more than higher taxes for the State<sup>164</sup> as it attempts to reduce California's costs by lowering power rates charged by public utilities.<sup>165</sup> The resulting cost shifting may not provide

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155. See Landsberg, et al., *supra* note 117, at A1 (arguing that a public power authority may require the government to raise taxes to provide its funding).

156. See White, *supra* note 119, at 1416 (stating that laws passed as a result of "public opinion" will often contain flaws due to their inherently short-sighted nature).

157. See Landsberg, et al., *supra* note 117, at A1 (citing objections to the risk of raised taxes posed by creating a state-operated power authority).

158. See *supra* Part IV.B.1 (commenting that Chapter 10 may not lower California's power costs, as it is likely to simply replace high electricity rates with a tax increase to fund the Authority).

159. See White, *supra* note 119, at 1416 (illustrating the inferior nature of hastily-passed legislation); see also *supra* note 156 and accompanying text (demonstrating the Legislature's failure to take into account all of Chapter 10's possible consequences before enacting the Bill).

160. See White, *supra* note 119, at 1416 (discussing the fact that legislation enacted in response to the public's demands is often insufficient to remedy the problems it addresses).

161. See Roth, *supra* note 102, at A1 (arguing that "Band-Aid" legislation does not effectively remedy the problems it purports to resolve).

162. See *supra* Part IV.B.2 (establishing Chapter 10 as a "knee-jerk" reaction to public opinion that probably will not provide a permanent solution to the energy crisis).

163. See White, *supra* note 119, at 1416 (showing that legislation enacted simply to pacify the public is not likely to solve any long-term problems); see also *supra* note 156 and accompanying text (demonstrating the "quick fix" nature of Chapter 10 and its resultant inefficiency).

164. See *supra* Part IV.B.1 (showing the probability that the government will be required to raise taxes in order to provide funding for Chapter 10).

165. See SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 6X, at 5 (Apr. 26, 2001) (describing the Authority's goal of providing the State with a sufficient energy supply at lower prices).

California with the reduced debt it requires to increase its power supply.<sup>166</sup> Therefore, there is little doubt that the Legislature created the Authority under pressure from its constituents as a short-term solution to the State's energy crisis.<sup>167</sup>

A "quick fix" of this nature is not what California needs to solve its energy crisis.<sup>168</sup> "Band-Aid" solutions will not rectify a problem of the magnitude which the State currently faces.<sup>169</sup> The Legislature's apparent concern with appearing productive is understandable, but if California is ever going to see the end of the energy crisis, the laws enacted to combat it need to be analyzed more thoroughly than Chapter 10.<sup>170</sup> If the Legislature does not begin to put more thought into its proposed solutions to this problem, it will be impossible to determine how long the energy crisis is going to last.

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166. See *supra* Part IV.B.1 (expressing the need for action against the energy crisis that provides a solution, rather than lowering costs in one area and raising them in another).

167. See White, *supra* note 119, at 1416 (stating that impractical laws are often the result of legislation passed in response to public demand).

168. *Id.*

169. See *id.* (observing that public opinion may not be an effective gauge for solving social problems because the Legislature tends to enact laws in response to public opinion which do not provide viable solutions to the crisis).

170. See *supra* Part IV.B.2 (arguing that the Legislature did not consider all of Chapter 10's potential consequences before enacting the Bill).