# NOTRE DAME LAW REVIEW ONLINE

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CONTENTS

## CASE COMMENT

The Factual Reality of *Koontz v. St. Johns* ..... *Eric Dean Hageman*

## RECENT CASE

*Bond v. United States* .....*Dean M. Nickles*

## ESSAYS

An App for That: Local Governments and
the Rise of the Sharing Economy ..... *Andrew T. Bond*

A Hypothetical Engagement:
GATT Article XX(a) and Indonesia's
*Fatwa* Against Trade in Endangered Species..... *Lisa M. Meissner*

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CASE COMMENT

# THE FACTUAL REALITY OF *KOONTZ V. ST. JOHNS*

*Eric Dean Hageman**

## INTRODUCTION

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation."[1] On its face, this language provides private actors monetary relief for government seizures of their property. For twenty-seven years, the Supreme Court has interpreted the clause more expansively, such that it protects property owners seeking land-use permits.[2] In particular, the Court has interpreted the clause to limit the type[3] and amount[4] of property a government can demand in exchange for a land-use permit. This protection is considered an application of the unconstitutional conditions doctrine to the field of regulatory takings.[5] The unconstitutional conditions doctrine provides that a government may not deny a private actor a public benefit in order to incentivize the relinquishment of a constitutional right.[6] Thus, as a general matter, it acts

* Candidate for Juris Doctor, Notre Dame Law School, 2016; Bachelor of Architecture, University of Notre Dame, 2013. I thank Professor Nicole Stelle Garnett for her patient instruction in property and land-use law, as well as for her input in this Comment's drafting. I also thank my co-editors of the *Notre Dame Law Review* for their revisions. All errors are my own.

1 U.S. CONST. amend. V. The Supreme Court incorporated this provision against state and local governments. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 255–57 (1897).

2 *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

3 *See id.*

4 *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

5 *See* Molly Cohen & Rachel Proctor May, Comment, *Revolutionary or Routine?* Koontz v. St. Johns River Water Management District, 38 HARV. ENVTL. L. REV. 245, 249 (2014).

6 *See* Elrod v. Burns, 427 U.S. 347, 361 (1976) (plurality opinion) ("The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly."); Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental

to vindicate private actors' constitutional rights by preventing governments from coercing them to give up those rights.[7] In vindicating the Fifth Amendment right to just compensation, the Supreme Court protects private actors more than the doctrine would otherwise. In particular, the Court requires that a condition to a land-use permit must bear an "essential nexus" to "the end advanced as the justification for" the condition[8] and be "rough[ly] proportional[]" to the "impact of the proposed development."[9]

In *Koontz v. St. Johns River Water Management District*,[10] the Court extended the unconstitutional conditions doctrine's protections even further in two respects. First, the Court held that a government's conditions for land-use permits are subject to *Nollan*'s and *Dolan*'s nexus and proportionality tests "even when the government *denies* the permit."[11] Second, the Court subjected such conditions to the same tests when a government demands money instead of real property rights.[12] The Court remanded the case to the Florida Supreme Court for the resolution of an issue of state statutory law.[13]

Writing for four Members of the Court, Justice Kagan dissented.[14] She objected to the second half of the Court's holding, asserting that the extension of *Nollan* and *Dolan* to monetary conditions "r[an] roughshod over" the Court's precedents and "threaten[ed] to subject a vast array of land-use regulations . . . to heightened constitutional scrutiny."[15] She also asserted that the government actor, St. Johns River Water Management District (the District), "never demanded *anything* . . . in exchange for a permit" and that as such, the *Nollan*/*Dolan* tests should not apply.[16] Finally, she observed that "no taking occurred in this case because [petitioner] Koontz never acceded to a demand . . . and so no property

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benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .").

7 *See* Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 986 (7th Cir. 2012) ("Understood at its most basic level, the [unconstitutional conditions] doctrine aims to prevent the government from achieving indirectly what the Constitution prevents it from achieving directly.").

8 *Nollan*, 483 U.S. at 837.

9 Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

10 133 S. Ct. 2586 (2013).

11 *Id.* at 2603 (emphasis added).

12 *Id.*

13 *Id.* A Florida statute provided for damages to parties subjected to "an unreasonable exercise of the state's police power constituting a taking without just compensation." *Id.* at 2593 (quoting FLA. STAT. § 373.617(2) (2014)). The Court remanded the case despite the fact that no taking occurred (since the government denied the plaintiff's permit). *Id.*

14 *Id.* (Kagan, J., dissenting).

15 *Id.* at 2603–04.

16 *Id.* at 2604.

changed hands."[17] From that fact, she concluded that "Koontz therefore [could not] claim just compensation under the Fifth Amendment" and that the Court should have dismissed the case for that reason.[18]

The Court's opinion in *Koontz* has elicited many negative reactions in academia,[19] most of which focus on the expansion of *Nollan* and *Dolan* to monetary exactions.[20] Criticisms run the gamut: some scholars argue that the Court was wrong to ignore the environmental impact of land developments,[21] while others suggest the Court gave the same consideration too much credence.[22] These criticisms are likely premature and necessarily speculative, since the Court decided the case less than two years ago.

Scholars have scrutinized this case's factual and procedural history less closely, and those elements may justify the Court's holding. Two often-overlooked facts are particularly important. First, the government's demand was unusually exploitative—the District offered no sufficient justification for the exaction, and it was large in comparison to the

17 *Id.*

18 *Id.* Koontz "brought his claim pursuant to a state law cause of action," *id.* at 2597 (majority opinion), and as such, the Court remanded the case to Florida's courts to decide whether his cause of action could survive despite the fact that no actual taking occurred. *Id.* at 2597, 2603.

19 *See, e.g.*, Cohen & Proctor, *supra* note 5, at 253 (noting that the *Koontz* Court failed to realize the breadth of the decision's impact); Richard A. Epstein, *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 HARV. J.L. & PUB. POL'Y 23, 36–37 (2014) ("[*Koontz*] invent[ed] a very large notion of 'harm,' and then announc[ed] that some duty of environmental mitigation shall be imposed upon all landowners who have the temerity to want to build on their own land without creating a nuisance to anybody. The performance on every side of this particular argument was lamentably incompetent in terms of the way in which it was organized." (footnote omitted)); Israel Piedra, Comment, *Confusing Regulatory Takings with Regulatory Exactions: The Supreme Court Gets Lost in the Swamp of* Koontz, 41 B.C. ENVTL. AFF. L. REV. 555, 555 (2014) ("[I]t was unwise for the Court to apply [*Nollan*'s and *Dolan*'s restrictions] to monetary exactions."); Kristin N. Ward, Comment, *The Post-*Koontz *Landscape:* Koontz*'s Shortcomings and How to Move Forward*, 64 EMORY L.J. 129, 129 (2014) (noting that the Court was "unsympathetic to environmental protection at the local level" and "suspicious of local government's ability to make reasoned land-use decisions without extorting unfair value from property owners").

20 *See, e.g.*, Cohen & Proctor, *supra* note 5, at 257 (suggesting *Koontz*'s impact will depend on an aspect of the expansion to monetary conditions); Piedra, *supra* note 19, at 562 (describing the expansion of *Nollan* and *Dolan* to monetary conditions as "unwise").

21 *See, e.g.*, Ward, *supra* note 19, at 147 ("[T]he [*Koontz*] Court makes incorrect and unsupported assertions about environmental policy . . . ."); *id.* (pointing out the Court's description of "local governments as extortionate over-regulators.").

22 *See, e.g.*, Epstein, *supra* note 19, at 37 ("[T]he danger in [*Koontz*] . . . lies in the ad hoc view that the government somehow owns an environmental easement over all property, which it will waive only if private individuals engage in acts of environmental mitigation.").

development's value.[23] Second, on remand, the Florida courts read the statute under which Koontz brought his claim to allow for monetary damages,[24] despite the plain language of the statute and the dissent's assertion that it could not be read to authorize the damages.[25] These two facts, respectively, suggest that the Court's fear of evading *Nollan* and *Dolan* was reasonable, and that the Court's decision to remand the case to Florida courts was prudent. Thus, this Comment will argue that the behind-the-scenes reality of the conflict in *Koontz* justifies the Court's decision.

This Comment proceeds on the premise that the *facts* of particular cases should inform the way courts shape constitutional law. That proposition is up for debate, but it is not one this Comment addresses. Even the most skeptical of readers will find value in knowing more about the real-world impact of Supreme Court jurisprudence.

## I. HISTORY

In 1972, Coy Koontz, Sr.,[26] purchased over fifteen acres of undeveloped land near the intersection of two highways outside Orlando.[27] Koontz's neighbors developed the surrounding land intensely, which caused his property to be "significantly altered from its original state."[28] Before or in the midst of that development, the Florida Department of Transportation condemned some of Koontz's property in order to widen one of the intersecting highways, thus reducing Koontz's property to 14.9 acres.[29] A 100-foot-wide power line easement divided the remaining property into two portions: approximately 3.7 acres sat north of the easement, with the balance of the property south of it.[30] The northern

23 *See infra* Part IV.

24 St. Johns River Water Mgmt. Dist. v. Koontz (*Koontz V*), No. 5D06-1116, 2014 WL 1703942, at *2 (Fla. Dist. Ct. App. Apr. 30, 2014) (Griffin, J., dissenting) (noting a "$376,000 award of compensation to Koontz for the District's 'temporary taking'").

25 St. Johns River Water Mgmt. Dist. v. Koontz, 133 S. Ct. 2586, 2604 (2013) (Kagan, J., dissenting); *see also infra* Part IV.

26 Coy Koontz, Sr., passed away while this case was being litigated. His son, Coy Koontz, Jr., represented his estate for the remainder of the litigation. *Koontz*, 133 S. Ct. at 2591 & n.1 (majority opinion). Like the Court, *id.*, this Comment will not distinguish between the two men.

27 St. Johns River Water Mgmt. Dist. v. Koontz (*Koontz II*), 861 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring).

28 *Id.*

29 *Id.*

30 *Id.*; *see also id.* at 1272 (portraying a diagram of the property).

section "drain[ed] well; the most significant standing water form[ed] in ruts in an unpaved road used to access the power lines."[31]

Over the following years, two Florida statutes impacted the property. In the same year that Koontz bought it, Florida passed the Water Resources Act, "which divided the State into five water management districts and authorized each district to regulate 'construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state.'"[32] The Act required landowners interested in developments that fell within the districts' jurisdiction to obtain a Management and Storage of Surface Water (MSSW) permit, and granted the districts wide discretion to issue or deny those permits.[33] Twelve years later, Florida enacted the Warren S. Henderson Wetlands Protection Act, which required a landowner to obtain a Wetlands Resource Management (WRM) permit to "dredge or fill in, on, or over surface waters."[34] Pursuant to the Act, the St. Johns River Water Management District adopted a policy of "requir[ing] that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."[35]

In 1994, Koontz decided to develop the northern section of the property.[36] To do this, he needed to dredge 3.25 acres of wetlands,[37] so he applied to the District for MSSW and WRM permits.[38] He offered the District a conservation easement on the southern section of the property to offset his proposal's environmental effects.[39] A District staffer agreed to recommend that the District approve the permit if Koontz (a) deeded the offered conservation easement *and* paid to either replace culverts four and a half miles away from the property or plug a number of drainage canals on property seven miles away, or (b) reduced his development to one acre and deed a conservation easement on the remaining fourteen acres.[40] The District also indicated it would consider alternatives to the suggested offsite mitigation.[41] In the course of reviewing Koontz's permit application,

31 *Koontz*, 133 S. Ct. at 2592.

32 *Id.* (quoting FLA. STAT. § 373.403(5) (2014)).

33 *Id.* ("[T]he relevant district . . . may impose 'such reasonable conditions' on the permit as are 'necessary to assure' that construction will 'not be harmful to the water resources of the district.'" (quoting FLA. STAT. § 373.413(1))).

34 *Id.* (quoting 1984 Fla. Laws 204–05).

35 *Id.*

36 *Id.*

37 *Koontz II*, 861 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring).

38 *Koontz*, 133 S. Ct. at 2592.

39 *Id.* at 2592–93.

40 *Koontz II*, 861 So. 2d at 1269.

41 *Koontz*, 133 S. Ct. at 2593.

Elizabeth Johnson, the District's "supervising regulatory scientist," visited the site.[42] During her visit, Ms. Johnson observed not a single fish or animal.[43] She later acknowledged that the site contained no fish and that she did not perform a wildlife survey of the property.[44] Nonetheless, Ms. Johnson concluded that Koontz's development would "adversely affect fish and wildlife."[45] As such, the District made its demands, Koontz refused them, the District denied Koontz his permit, and a lawsuit commenced.[46]

Koontz filed an action in state court, claiming, inter alia, monetary relief under a Florida statute that provides damages for parties subjected to "an unreasonable exercise of the state's police power constituting a taking without just compensation."[47] The trial court applied *Nollan* and *Dolan* to the offsite-mitigation condition and found that the condition violated both standards.[48] An intermediate appellate court affirmed, but the Florida Supreme Court reversed, distinguishing the case from *Nollan* and *Dolan* in that (a) the District *denied* Koontz's application for a permit because he failed to meet its demands, while the government actors in *Nollan* and *Dolan* issued permits with unconstitutional conditions attached, and (b) the District demanded money, while *Nollan* and *Dolan* involved interests in real property.[49] The United States Supreme Court granted certiorari and reversed the Florida Supreme Court.[50]

## II. THE MAJORITY OPINION

Writing for the Court, Justice Alito framed the protection at issue as an application of the unconstitutional conditions doctrine, and then described *Nollan*'s and *Dolan*'s history, purposes, and effects.[51] The Court held that those cases apply to permit denials as well as to permit approvals.[52] Justice Alito explained that "[t]he principles that undergird . . . *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so."[53] The Court found

42 *Koontz II*, 861 So. 2d at 1270.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Koontz*, 133 S. Ct. at 2593.
47 *Id.* (quoting FLA. STAT. § 373.617(2) (2014)).
48 *Id.*
49 *Id.* at 2593–94.
50 *Id.* at 2586.
51 *Id.* at 2594–95.
52 *Id.* at 2603.
53 *Id.* at 2595.

support for this proposition in cases that condemned conditions to denials of other, unrelated public benefits.[54] The majority also expressed concern that exempting permit denials from *Nollan* and *Dolan* "would enable the government to evade the limitations of [those cases] simply by phrasing its demands for property as conditions precedent to permit approval."[55]

The majority then explained that Koontz suffered a cognizable injury despite the fact that no taking actually occurred. The Florida Supreme Court had held that the government's demand could not have violated the Takings Clause because "no property of any kind was ever taken."[56] The Court clarified that the Taking Clause protects private actors from the actual taking of property and, through the unconstitutional conditions doctrine, from "the impermissible denial of a government benefit."[57] The only pertinent difference between conditions that accompany approvals and those that accompany denials is that the Fifth Amendment prescribes a remedy for the imposition of the former conditions: just compensation.[58] Absent a "consummated taking," only a separately established cause of action can lead to damages.[59] A state law created Koontz's cause of action, so the Court passed on what remedies *Nollan* and *Dolan* might justify absent such a cause of action.[60] The majority left it to the Florida courts to decide whether the state statute that created Koontz's cause of action—which provided monetary damages for "unreasonable exercise[s] of the state's police power constituting a taking without just compensation"[61]—applied to unconstitutional conditions claims.[62]

The Court then held that *Nollan* and *Dolan* apply to monetary exactions, including the District's demand for money to pay for offsite mitigation.[63] As an initial matter, the majority observed that "it would be very easy for land-use permitting officials to evade" *Nollan* and *Dolan* if

54 *Id.* (citing Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974); Perry v. Sindermann, 408 U.S. 593 (1972)).

55 *Id.*

56 St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1225 (Fla. 2011).

57 *Koontz*, 133 S. Ct. at 2596. "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Id.*

58 *Id.* at 2597.

59 *Id.*; *see also id.* ("[W]hether *money damages* are available is not a question of federal constitutional law but of the cause of action . . . on which the landowner relies." (emphasis added)).

60 *Id.*

61 FLA. STAT. § 373.617(2) (2014).

62 *Koontz*, 133 S. Ct. at 2598.

63 *Id.* at 2603.

demands to spend money were not subjected to their limitations.[64] In expanding *Nollan* and *Dolan*, Justice Alito distinguished this case from an unfavorable precedent. A four-Justice plurality previously held in *Eastern Enterprises v. Apfel* that the United States government's retroactive imposition on a former mining company of an obligation to pay for retired employees' medical benefits "was so arbitrary that it violated the Takings Clause."[65] But in the same case, five Justices—one of whom concurred in the result and four of whom dissented—concluded that "the Takings Clause does not apply to government-imposed financial obligations that 'd[o] not operate upon or alter an identified property interest.'"[66] In *Koontz*, the District argued that because five Justices concluded in *Apfel* that the Takings Clause could not apply to a monetary burden, the District's demand for money to pay for offsite mitigation could not be a violation of the unconstitutional conditions doctrine. The Court acknowledged that "[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing,"[67] but distinguished this case in that, unlike *Apfel*, "the monetary obligation burdened petitioner's ownership of a specific parcel of land."[68] The Court compared the District's hypothetical exaction of Koontz's money to the taking of a lien or of the "right to receive income from land."[69] The majority asserted that "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."[70]

The Court also addressed several of the dissent's concerns. First, Justice Alito turned to the District's and the dissent's arguments that the extension of *Nollan* and *Dolan* to monetary exactions allows for "no principled way of distinguishing impermissible land-use exactions from property taxes."[71] The Court offered a twofold defense: first, the problem of distinguishing taxes from takings is not unique to the context of land use;[72] and second, distinguishing taxes from takings is easier in practice than it is in theory.[73] To support these points, the Court cited two types of monetary seizures previously invalidated as takings: interest on funds held

64 *Id.* at 2599.
65 *Id.* (citing E. Enters. v. Apfel, 524 U.S. 498, 529–37 (1998) (plurality opinion)).
66 *Id.* (quoting *Apfel*, 524 U.S. at 540 (Kennedy, J., concurring)).
67 *Id.* at 2598.
68 *Id.* at 2599.
69 *Id.* at 2600.
70 *Id.*
71 *Id.*
72 *Id.* at 2600–01.
73 *Id.* at 2601.

in escrow[74] and liens.[75] The Court also suggested state law will often answer the question of what is or is not a tax.[76] For example, Florida's statutes "greatly circumscribe[]" how various government entities can go about taxation.[77]

The Court declined to offer guidance regarding the point at which land-use permitting charges rise to the level of taxation, though the opinion alluded to a deciding factor being the fee's arbitrariness.[78] The Court was careful to preserve governments' abilities "to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[79]

## III. THE DISSENT

Writing for four Justices, Justice Kagan dissented, departing from the Court's extension of *Nollan* and *Dolan* to monetary exactions.[80] Justice Kagan voiced two fundamental objections to the expansion of *Nollan* and *Dolan*: it violated a valid Court precedent[81] and would unduly restrict local governments.[82] The dissent agreed with the Court that *Nollan* and *Dolan* apply to permit denials as well as conditional approvals,[83] but asserted that even on the majority's terms, the case should have been dismissed instead of remanded.[84]

The dissent asserted that the Court's extension of *Nollan* and *Dolan* to monetary exactions violated *Apfel*, arguing that the Justices' consensus—that the Takings Clause did not apply to monetary exactions—controlled the issue.[85] Justice Kagan suggested the Court should have resolved Koontz's claim under the regulatory takings doctrine governed by *Penn Central Transportation Co. v. New York City*.[86] The *Penn Central* doctrine

74 *Id.* (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 232 (2003)).

75 *Id.* (citing Armstrong v. United States, 364 U.S. 40 (1960); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)).

76 *Id.*

77 *Id.*

78 *Id.* at 2602 (declining to comment on the point at which "a land-use permitting charge denominated by the government as a 'tax' becomes 'so arbitrary . . . that it [is] not the exertion of taxation but a confiscation of property'" (quoting Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1916))).

79 *Id.* at 2601.

80 *Id.* at 2603 (Kagan, J., dissenting).

81 *Id.* at 2603–04.

82 *Id.* at 2604.

83 *Id.* at 2603.

84 *Id.* at 2609.

85 *Id.* at 2603–04.

86 438 U.S. 104 (1978).

generally prohibits governments from "unduly restricting the *use* of property."[87]

Justice Kagan's second major objection was to the decision's practical effects. She predicted that, absent any meaningful constraints, the majority's view would lead to unnecessary judicial commandeering of local law.[88] She also criticized the Court's refusal to explain how one might distinguish taxes from exactions.[89] The dissent concluded that "the majority's analysis seems to grow out of a yen for a prophylactic rule" that would prevent governments from evading *Nollan* and *Dolan*, but that there was no real problem to be prevented.[90] Justice Kagan also commented on the dearth of empirical evidence that local governments routinely evade *Nollan* and *Dolan* when given the chance.[91]

The issue of monetary exactions aside, Justice Kagan would have dismissed the case on two separate grounds: first, that the District's negotiations with Koontz never rose to the level of "demands,"[92] and second, that since no taking occurred, the Takings Clause provided Koontz with no remedy.[93] As to her first argument, Justice Kagan asserted that "*Nollan* and *Dolan* apply only when the government makes a 'demand[]' that a landowner turn over property in exchange for a permit."[94] She found support for that requirement—that there be a *demand* over and above a mere condition—in the majority's view that the unconstitutional conditions doctrine "rests on the fear that the government may use its control over benefits (like permits) to 'coerc[e]' a person into giving up a constitutional right."[95] Justice Kagan predicted that unless *Nollan* and *Dolan* were limited to "unequivocal" demands, mere negotiations between localities and developers would come under judicial scrutiny and thus, "no local government official with a decent lawyer would have a conversation with a developer."[96] Citing Koontz's "refus[al]" to return to the negotiating table

87 *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting) (emphasis added).

88 *Id.* at 2607 (noting that the majority's decisions might lead to "[t]he Federal Constitution . . . decid[ing] whether one town is overcharging for sewage, or another is setting the price to sell liquor too high").

89 *Id.*

90 *Id.* at 2608.

91 *Id.* ("No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs.").

92 *Id.* at 2609 ("[T]he District never *demanded* that Koontz give up anything . . . as a condition for granting him a permit." (emphasis added)).

93 *Id.*

94 *Id.* at 2609–10 (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546 (2004)).

95 *Id.* at 2610 (quoting *id.* at 2594 (majority opinion)).

96 *Id.*

with the District, Justice Kagan concluded that "the District never made a demand or set a condition."[97]

Justice Kagan's final ground for dissent was that because there was no real taking, Koontz's only available method of relief was invalidation of the condition.[98] Koontz's hope for monetary relief depended on judicial construction of the Florida statute that established his cause of action; for him to recover, the Court would have to read the statute to allow for relief "*beyond* just compensation."[99] Where the majority remanded the question of relief under the Florida statute to the Florida Supreme Court,[100] Justice Kagan observed that the statute's plain language "authorize[d] damages only for 'an unreasonable exercise of the state's police power constituting a taking without just compensation,'" and she concluded that since no taking occurred, Koontz could not possibly recover.[101]

## IV. ANALYSIS: WHY THE FACTS JUSTIFY THE COURT

A behind-the-scenes analysis of *Koontz* reveals two important observations. First, the District's actions were less justified than either the Court or the dissent recognized, suggesting that the majority's fear of localities evading *Nollan* and *Dolan* was reasonable. Second, on remand, the Florida courts did in fact read the statute under which Koontz brought his claim to allow for monetary damages, justifying the Court's decision to remand the case.

A thorough reading of the lower courts' opinions reveals that the District's actions were cause for serious concern. Concurring with an intermediate appellate court's decision to dismiss the District's appeal for lack of jurisdiction, Judge Robert Pleus wrote a short description of the District's actions in "hope that upon remand to the District, it [would] . . . stop the extortionate demands on property owners which this case demonstrate[d]."[102] Judge Pleus also described the expert testimony regarding the environmental value of the property Koontz wanted to develop—a crucial aspect of the case, given that the District's permit-granting power came from environmental legislation. A 2001 "environmental audit" of the property indicated that its environmental

97 *Id.* at 2611.

98 *Id.*

99 *Id.*

100 *Id.* at 2603 (majority opinion).

101 *Id.* at 2612 (Kagan, J., dissenting) (quoting FLA. STAT. § 373.617(2) (2014)).

102 *Koontz II*, 861 So. 2d 1267, 1268–69 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring).

value was already diminished[103] and that the environmental impact of the proposed development would be "minimal."[104] Two other experts' testimonies supported that finding,[105] one noting that the suggested "offsite mitigation was unnecessary and 'very excessive.'"[106] At trial, the District offered the testimony of Elizabeth Johnson, its in-house "supervising regulatory scientist" who, despite observing not a single fish or animal on the site, "concluded that the proposed development would adversely affect fish and wildlife."[107] The rest of the Florida courts' opinions and orders contain a shocking dearth of evidence that Koontz's development would have a cognizable environmental impact.[108]

Judge Pleus's description sheds light on the Supreme Court's decision, not because of the ridiculousness of the District's assertion that Koontz's development would have a real environmental impact,[109] but because it highlights that the District's actions demonstrated incompetence, if not malice. It is shocking that in twenty years—from the litigation's commencement in 1994 through its final disposition in 2014[110]—the District was unable to prove that the development would have any cognizable environmental impact. The Supreme Court's discussion of this aspect of the case is short and mild,[111] but the concern that refusing to expand *Nollan* and *Dolan* to monetary conditions "would enable the government to evade" those standards "simply by phrasing its demands for property as conditions precedent to permit approval"[112] might be quite

103 *See id.* at 1269 (explaining that an expert witness testified that the property "had been impacted by surrounding roads, a drainage ditch, a power line easement and urbanization").

104 *Id.*

105 *Id.* at 1269–70.

106 *Id.* at 1270.

107 *Id.*

108 *See, e.g.*, St. Johns River Water Mgmt. Dist. v. Koontz (*Koontz IV*), 5 So. 3d 8, 9–10 (Fla. Dist. Ct. App. 2009) (discussing the entirety of the case's factual and procedural history, with no mention of any environmental impact the development may have threatened); Koontz v. St. Johns River Water Mgmt. Dist., No. CI 94-5673, 2002 WL 34724740, at 873–74 (Fla. Cir. Ct. Oct. 30, 2002) (noting that the District failed to satisfy *Nollan* and *Dolan*, with no mention of environmental impact); Koontz v. St. Johns River Water Mgmt. Dist., No. CI 94-5673, 1997 WL 34854535, at 514 (Fla. Cir. Ct. Oct. 29, 1997) (dismissing Koontz's original complaint, with no mention of environmental impact).

109 By itself, that information would only inform a *Dolan* rough proportionality inquiry, and the question before the Court was whether *Dolan* should apply at all.

110 *See Koontz V*, No. 5D06-1116, 2014 WL 1703942, at *2 (Fla. Dist. Ct. App. Apr. 30, 2014) (affirming the trial court's disposition).

111 *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591–93 (2013).

112 *Id.* at 2595.

strong in the face of a state agency that evidently felt no need to justify exacting up to $150,000 from a private citizen.[113] Perhaps this history indicates nothing but incompetence or a bureaucratic oversight. But if the District's actions were malicious or manipulative—or indicated a larger movement towards the unjustified exaction of private money in the permitting process to serve policy goals—they may provide a novel defense of the majority's opinion.

Second, the Florida courts' resolution of the case on remand indicates that the majority was right not to dismiss the case. Justice Kagan colorfully asserted that the State of Florida is not the "inside-out, upside-down universe" in which "a law authorizing damages only for a 'taking' also provide[s] damages when (as all agree) no taking has occurred."[114] Alas, there remains an argument that the State of Florida is precisely that universe. On remand from the United States Supreme Court, the Florida Supreme Court in turn remanded the case to the intermediate appellate court.[115] The appellate court affirmed $376,000 in damages[116] to Koontz for the taking that all nine Supreme Court Justices agree never occurred. Dissenting from the appellate court's affirmation, Judge Griffin observed that in accordance with the United States Supreme Court's decision, "[b]ecause there was no 'taking' . . . the question remain[ed] whether Koontz ha[d] a damages remedy under" the Florida statute.[117] However, neither the appellate court nor the Florida Supreme Court expressly reviewed that question,[118] and after the smoke cleared, the $376,000 award still stood.[119]

Surely the award indicates that Justice Alito was right to remand the case. If the Florida appellate court interpreted the statute sub silentio to allow for monetary damages in situations like Koontz's, dismissing the case would have gravely intruded on a state's right to interpret its own laws. Whether the Florida appellate court was right to interpret (or not interpret) the statute as it did is beyond the scope of this Comment—the

113 *See* Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673, slip op. at 868 (Fla. Cir. Ct. Oct. 29, 2002), *available at* 2002 WL 34724740 (noting that the offsite mitigation "could cost between $90,000.00 and $150,000.00," but also acknowledging "there is evidence it could cost as little as $10,000.00").

114 *Koontz*, 133 S. Ct. at 2612 (Kagan, J., dissenting).

115 St. Johns River Water Mgmt. Dist. v. Koontz, 129 So. 3d 1069, 1069 (Fla. 2013).

116 *Koontz V*, No. 5D06-1116, 2014 WL 1703942, at *2 (Fla. Dist. Ct. App. Apr. 30, 2014) (Griffin, J., dissenting) (noting the still-valid "$376,000 award of compensation to Koontz for the District's 'temporary taking'").

117 *Id.* at *4.

118 *See id.* at *2 (majority opinion) (summarily adopting and reaffirming *Koontz IV* in response to the Supreme Court's decision); *see also Koontz IV*, 5 So. 3d 8, 10 (Fla. Dist. Ct. App. 2009) (acknowledging the award of damages for the alleged taking).

119 *Koontz V*, 2014 WL 1703942, at *2 (affirming the trial court's disposition).

point is that Justice Alito's decision to remand demonstrated restraint, wisdom, and laudable sensitivity to federalism concerns. Far from an empty formality, the decision had a six-digit impact on the litigants.

## CONCLUSION

The behind-the-scenes reality of *Koontz*—in particular, the extortionate actions of St. Johns River Water Management District and the Florida courts' decision to award monetary damages—indicates that the Court was right to dispose of the case as it did. In particular, the District's behavior may have justified the majority's concern that localities would evade the constitutional requirements of *Nollan* and *Dolan*, and the award of damages, notwithstanding the Florida statute's clear language, shows that the majority was right to remand the case. The effects of expanding *Nollan* and *Dolan* to monetary exactions remain to be seen, but the Court's resolution of the facts before it was certainly justified, if not admirable.

# BOND V. UNITED STATES

## *Supreme Court Holds Chemical Weapons Convention Implementation Act Inapplicable to Jilted Wife's Attempt to Injure Husband's Lover*

*Dean M. Nickles**

### I. CASE FACTS AND PROCEDURE

Petitioner Carol Bond was a microbiologist from Pennsylvania. Mrs. Bond's husband had been having an affair with her friend, Myrlinda Haynes, who became pregnant by Mr. Bond in 2006. After learning the details of the affair, Mrs. Bond attempted sought revenge against Ms. Haynes. She ordered one chemical (potassium dichromate) over the Internet, stole a second chemical from her workplace, and over the course of eight months, Mrs. Bond on numerous occasions went to Ms. Haynes' home and spread the chemicals in locations with which Ms. Haynes was likely to come into contact, including her mailbox. Due to the visible nature of the chemicals, all but one of Mrs. Bond's attempts were unsuccessful, and Ms. Haynes suffered only a minor chemical burn in the successful attempt. It is undisputed that Mrs. Bond did not intend to kill Ms. Haynes, but was simply attempting to give her an uncomfortable rash. While the local authorities did not respond to Ms. Haynes's requests for assistance, the post office responded to the alleged tampering with Ms. Haynes' mailbox and placed surveillance cameras. These cameras recorded Mrs. Bond stealing an envelope and placing chemicals in the muffler of Ms. Haynes's car.[1]

Federal prosecutors charged Mrs. Bond with two counts of mail theft, as well as two counts of possessing and using a chemical weapon in

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1 Bond v. United States, 134 S. Ct. 2077, 2085 (2014).

violation of 18 U.S.C. § 229(a), the Chemical Weapons Convention Implementation Act. Mrs. Bond filed a motion to dismiss the chemical weapons counts on the grounds that they exceeded Congress' powers and violated the Tenth Amendment; the district court denied the motion.[2] The district court accepted Mrs. Bond's conditional guilty plea, sentenced her to six years imprisonment, and ordered her to pay a $2,000 fine and $9,902.79 in restitution.[3] Mrs. Bond then appealed to the Court of Appeals for the Third Circuit on Tenth Amendment grounds, and the court of appeals agreed with the government that she lacked standing to bring this challenge. When the Supreme Court granted certiorari in 2011, however, the government confessed error, stating that it had changed its position, and the case was reversed and remanded to the Third Circuit. On remand, the Third Circuit rejected Mrs. Bond's arguments that her conduct was not among the "warlike" activities Congress designed the statute to prohibit and that section 229 exceeded Congress' powers.[4] At no stage in this case did the government attempt to use the Commerce Clause as justification for the statute.[5] The Supreme Court again granted certiorari in 2014.[6]

## II. HOLDING OF THE CASE

Chief Justice Roberts, writing for the majority, held that section 229 did not cover Mrs. Bond's conduct in this case.[7] The Chief Justice begins by discussing the federal nature of the U.S. government, the general principle that the states "have broad authority to enact legislation for the public good—often called a 'police power,'"[8] and that usually the national government cannot legislate in this area. Although the government often uses the Commerce Clause to defend its power to legislate in this area, the government could not make that argument here.[9] Despite the parties spending significant time over constitutional questions surrounding the Necessary and Proper Clause and the treaty power, the majority found itself able to resolve the case on other grounds.[10]

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2 *Id.*

3 *Id.* at 2086.

4 *Id.*

5 *Id.* at 2087.

6 *Id.* at 2086.

7 *Id.* at 2093.

8 *Id.* at 2086 (citing United States v. Lopez, 514 U.S. 549, 567 (1995)).

9 *Id.* at 2087 (stating that "the Court of Appeals held that the Government had explicitly disavowed that argument before the District Court").

10 *Id.* (asserting "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case'" (quoting Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam))).

Taking into consideration several factors, the Court ultimately decided that Congress did not provide a clear enough statement evidencing its intent to regulate purely local conduct. The Court explained that interpreting the statute to include Mrs. Bond's conduct would be a "'dramatic[] intru[sion] upon traditional state criminal jurisdiction.'"[11] The Court found that, here, "ambiguity derives from the improbably broad reach of the [statutory definition of] 'chemical weapon,'" and thus, absent a "clear indication"[12] that Congress meant to reach local crimes, the statute cannot be read to do so. The Court additionally argued that the reach of the statute is not as broad as it may at first appear, because despite the definition of "chemical weapon" within the statute, "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition."[13] Compounded by the presence of other prosecutorial options[14] and the federalism concern that the more expansive reading would intrude upon a traditional state police power,[15] the Court required a clear statement that Congress meant to regulate this purely local conduct before reading the statute to reach the conduct here.[16]

## III. ANALYSIS

It is important to begin with the plain text of the statute. Section 229(f)(1)(A) defines a "chemical weapon" as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose."[17] A "toxic chemical," for purposes of the statute, is

> any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.[18]

Section 229(a) provides that it is "unlawful for any person knowingly to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[19] Given the straightforward nature of this language, Justice

11 *Id.* at 2088 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)).
12 *Id.* at 2090.
13 *Id.* at 2091.
14 *Id.* at 2092.
15 *Id.* at 2091–92.
16 *Id.* at 2093.
17 18 U.S.C. § 229F(1)(A) (2012).
18 *Id.* § 229F(8)(A).
19 *Id.* § 229(a)(1).

Scalia's assertion that "[t]he meaning of the Act is plain"[20] appears to be the more persuasive argument. Looking at the facts of the case, though, the chemicals Mrs. Bond used did inflict a chemical burn on Ms. Haynes, and thus clearly seem to meet the statutory definition of "toxic chemicals." In turn, this means they satisfy the definition of a "chemical weapon" under the statute. It would seem, then, that Mrs. Bond knowingly used the "chemical weapon" on the property of Ms. Haynes, for a purpose not protected under section 229F and therefore in violation of section 229(a).[21]

Given that the language of the statute appears to be clear, it is odd the Court found it to be ambiguous. The Court's determination that the ordinary meaning of "chemical weapon" would not cover Mrs. Bond's conduct may very well be true, but as Justice Scalia states, "[this is] beside the point, since the Act supplies its own definition of 'chemical weapon,' which unquestionably does bring Bond's action within the statutory prohibition . . . . [T]he ordinary meaning of [chemical weapon] is irrelevant, because the statute's own definition . . . is utterly clear."[22] Justice Scalia quotes *Stenberg v. Carhart* for the proposition that "'[w]hen a statute includes an explicit definition, we must follow that definition, *even if it varies from that term's ordinary meaning*.'"[23] With the clarity of the statutory definitions, the majority's clear statement requirement seems to suggest that even when Congress clearly states the definition of the conduct it intends to reach, something more is needed. It would now seem advisable for Congress in the future to make clarifying statements about the scope of any statutory announcement, given the Court's concern for the "improbably broad reach of the key statutory definition."[24] Prior to this case, however, it did not seem to be necessary to do so to satisfy the clear statement rule.[25]

Had the Court concluded that the statute, as written, reached Mrs. Bond's conduct, the next step would have been to analyze whether the Act, as applied to her conduct, was constitutional. The Court did not discuss this question, since the majority resolved the case via the clear statement rule. The concurrences, however, did discuss this issue. Justice Scalia

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20 *Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring).

21 18 U.S.C. §§ 229F(7)(A)–(C) lists the purposes not prohibited by the statute, including peaceful, protective, military, and law enforcement purposes.

22 *Bond*, 134 S. Ct. at 2096 (Scalia, J., concurring).

23 *Id.* (quoting Stenberg v. Carhart, 530 U.S. 914, 942 (2000)). The Court in *Carhart* also quoted several other cases which stand for the same principle. *See* Meese v. Keene, 481 U.S. 465, 484–85 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term."); Colautti v. Franklin, 439 U.S. 379, 392–93 n.10 (1979) ("As a rule, 'a definition which declares what a term 'means' . . . excludes any meaning that is not stated.'" (quoting 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. Supp. 1978)).

24 *Bond*, 134 S. Ct. at 2090 (Scalia, J., concurring).

25 *See id.* at 2096.

disagrees with the government's proposition that the Necessary and Proper Clause,[26] combined with the President's Article II power to make treaties,[27] gives power to Congress to enact laws to execute treaties.[28] Although Justice Scalia's point that the Constitution does not distinguish between self-executing and non-self-executing treaties is true,[29] this was the result of neither an oversight nor conscious decision by the Framers.[30] At the time of the drafting, treaties would have been understood to be self-executing, and there was thus no need to distinguish between the two.[31] The difference "was introduced into U.S. jurisprudence by the Supreme Court in *Foster v. Neilson* . . . . [The Court] said only that treaties that 'operate of themselves' are applicable by the courts without legislative implementation. The Court's qualification is the source of the distinction between self-executing and non-self-executing treaties."[32] With that in mind, it seems at least plausible that the original combination, with only one type of treaty in mind, naturally led to Congress having the power to pass laws necessary and proper to carry into execution the power to make treaties which would have the force of law. There was no need to provide a clearer distinction between making and carrying out the treaty, as making a treaty would have included carrying out its obligations.

The Necessary and Proper Clause and treaty-making power, however, should also be sufficient on their own, barring other constitutional constraints, to permit Congress to pass laws carrying out the obligations of treaties. It is necessary and proper for the making of treaties that the obligations of treaties be given the force of law.[33] Without the assurance

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26 U.S. CONST. art. I, § 8, cl. 18 (Congress has the power "[t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution . . . all other [p]owers vested by this Constitution in the Government of the United States or in any Department or Officer thereof").

27 *Id.* art. II, § 2, cl. 2 (The President "shall have [p]ower, by and with the [a]dvice and [c]onsent of the Senate, to make Treaties").

28 *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring).

29 *Id.* at 2099.

30 This summary does not intend to represent any original historical research, but instead relies on the prior work of other scholars.

31 Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 764 (1988) ("[M]ost of the Framers intended all treaties *immediately* to become binding on the whole nation, superadded to the laws of the land . . . . In these ways at least, all treaties (to the extent of their grants, guarantees or obligations) were to be self-executing.").

32 Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 700–01 (1995); *see id.* at 700 n.27 ("The *Foster* self-execution holding was an alternative ground for denying relief. Before reaching the self-execution issue, the Court held that the treaty was inapplicable . . . ." (internal citations omitted)). *See generally* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

33 Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 76 (2014) (arguing that Justice Scalia's reasoning "fails to account for the possibility that some treaties may require implementing legislation in order

(and likelihood) of treaty obligations being enforced, the power to make treaties would be hindered. Other nations would hesitate to make treaties with the United States if it was unable to trust that the United States would actually enforce the agreed upon terms.[34] *Missouri v. Holland*[35] was the most recent, prominent case prior to *Bond* in which the Supreme Court considered the treaty power. Although Justice Scalia dismisses the Court's single sentence[36] from that opinion dealing with the treaty-implementing power as "unreasoned and citation-less," his statement does not necessarily reflect the whole story. Missouri's brief "focused on challenging the scope of the treaty power and did not offer any clear separate challenge to Congress' treaty-implementing power"[37] because, at that time, "Congress'[] treaty-implementing power was uncontroversial. It had a straightforward textual basis in the Necessary and Proper Clause combined with the Treaty Clause . . . [and it] had the sanction of historical practice in the political branches and the approval of leading commentators . . . ."[38] In this context, it no longer seems as odd that the issue of the Necessary and Proper Clause did not receive a more in-depth treatment in *Missouri*. Furthermore, separating the power to make treaties from Congress' power to carry out the obligations of the treaty is not as simple as Justice Scalia makes it seem.

Justice Scalia based the second portion of his concurrence on the structure of the Constitution and notions of enumerated and separated powers.[39] He seemed concerned with the possibility of the government utilizing the treaty power to regulate areas which it normally could not,

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to be 'made'—that is, to be ratified or to enter into force. . . . [H]istorically, U.S. practice sometimes required that the implementation of treaties occur prior to their ratification or entry into force").

34 *Id.* at 76–77 ("[T]his reasoning does not account for the possibility that implementing legislation might in fact facilitate the making of treaties. . . . [B]asic accounts of treaty negotiation . . . recognize that treaty negotiators take the likelihood of compliance into account and may demand stiffer terms or decline to negotiate with countries known to have past difficulties complying with treaties." (citing Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 596 (2005) (explaining that when a state with past compliance problems "seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less willing to offer concessions of their own in exchange for promises from that country. If there is enough suspicion, potential partners may simply refuse to deal with the state"))).

35 252 U.S. 416 (1920).

36 *Id.* at 432 (stating that "there can be no dispute about the validity of the statute under Article I, § 8 as a necessary and proper means to execute the powers of the Government").

37 Galbraith, *supra* note 33, at 108–09.

38 *Id.* at 108. *See generally id.* at 81–108 (reviewing the historical development of the treaty-implementing power prior to *Missouri v. Holland*).

39 Bond v. United States, 134 S. Ct. 2077, 2099–100 (2014) (Scalia, J., concurring).

rendering it "one treaty away from acquiring a general police power."[40] Although there has been some argument for the treaty power having no limitations on subject matter,[41] others, including Justice Thomas in his concurring opinion, advocate for a "domestic concern" limitation.[42] Justice Scalia's concern that the treaty power could be used for the creation of pretextual treaties also appears to be a problem with a solution. The powers being discussed here are a combination of the treaty power and Necessary and Proper Clause. It is here the oft-quoted words of Justice Marshall pertaining to the Necessary and Proper Clause come to mind: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[43] If the government—with, as in this case, the acquiescence of the President, two-thirds of the Senate, and the passage of a statute by the Congress—conspired to create a pretextual treaty to overrule a decision of the Supreme Court, it would be a situation wherein the end would be illegitimate, outside the scope of the Constitution, and the means both inappropriate and not plainly adapted. Such a law would be unconstitutional and would fail.

If one considers the political safeguards of federalism to be a functioning check on the national government in any way, the process for a non-self-executing treaty appears to be the most stringent—outside of the amendment process—and yet, is still able to be repealed by the same process as other statutes. Requiring the approval of both the President and two-thirds of the Senate, then having the domestic component undergo bicameralism and presentment, provides perhaps the best opportunity for political safeguards to work. Although the power of non-self-executing treaties creates concern, self-executing treaties are more worrisome because they are not required to go through bicameralism and presentment. The need for congressional action should be seen as beneficial, allowing Congress to craft laws which comply with the treaty but also represent the concerns of their constituents.[44] That is not to say there should be no limits on the treaty power once combined with the Necessary and Proper Clause.

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40 *Id.* at 2101.

41 *See id.* at 2100 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 191, 197 (2d ed. 1996)). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 433–39 (2000).

42 *Bond*, 134 S. Ct. at 2103–11 (Thomas, J., concurring). This limitation will be discussed *infra*.

43 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

44 Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 437 (2003) (stating that the Founders "took special steps to ensure that the treaty power would not be used to abuse state interests"); *see also id.* at 437 n.138 ("Ordinary legislation requires [Presidential agreement or a two-thirds supermajority] . . . . The

As discussed previously, the restrictions on the Necessary and Proper Clause should already provide some restrictions on Congress' use of the treaty power.[45] Justice Thomas, in his concurrence, brings up the potential limit of domestic concerns.[46] After reviewing the history of the Treaty Power through statements from the Founders[47] and caselaw,[48] Justice Thomas concludes that although "the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases[,] . . . hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit," positing to "draw a line that respects the original understanding of the Treaty Power."[49] There are different ways to draw the line between domestic and international affairs. Professor Curtis Bradley discusses two main ways that this "subject matter limitation" could be read.[50] The first aligns with Justice Thomas's concurrence and limits the treaty power to matters that have international effects.[51] The second limits the power to those matters that need "international cooperation in order to be addressed."[52] The problem with the first understanding is that, given the interconnectedness of nations in the modern world, "almost any issue can plausibly be labeled 'international.'"[53] The second understanding is subject to similar issues, though it appears to be consistent with the decision in *Holland*, in which the limitation required that the nations involved agree on a cooperative approach.[54] There is a concern about the ability of the courts to draw this line in a consistent, applicable way,[55] but the difficulty should not

significance of that difference turns in part on the Senate's value in protecting state prerogatives." (citing Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 722 (2002))).

45 *See supra* note 43 and accompanying text.

46 *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring).

47 *Id.* at 2103–08 ("The postratification theory and practice of treaty-making accordingly confirms the understanding that treaties by their nature relate to intercourse with other nations . . . rather than to purely domestic affairs.").

48 *Id.* at 2108–10 ("[T]he holding in *Holland* is consistent with the understanding that treaties are limited to matters of international intercourse. The Court observed that the treaty at issue addressed *migratory* birds that were 'only transitorily within the State and ha[d] no permanent habitat therein.'" (citing Missouri v. Holland, 252 U.S. 416, 435 (1920))).

49 *Id.* at 2110.

50 Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 451–56 (1998).

51 *Id.* at 452–53.

52 *Id.* at 453.

53 *Id.* at 451–52.

54 *Id.* at 453.

55 *Id.*

necessarily mean the courts disregard this potential limit, as Justice Thomas asserted.[56]

Others suggest that the treaty power distinction between domestic and international is not really a workable distinction,[57] and there are other constitutional constraints that might apply.[58] This case in particular presented an odd situation in light of the government's decision not to argue that the Commerce Clause supported its enactment. However, due to the purely local, criminal nature of Mrs. Bond's conduct, it seems that this is an instance where the Court could have made clear what is *not* "international."

## CONCLUSION

Although the majority's outcome was correct, the application of the clear statement rule in this situation seems incorrect. The majority misconstrues the statute not to reach Mrs. Bond's conduct when it should have done so. The concurrences properly assert that despite the conduct here falling within the clear definition of the statute, the Court should have reversed the conviction on constitutional grounds. As a result of this decision, Congress should now plan to make clarifying statements about the scope of the statute in order to avoid the clear statement problem identified here.

Separately, although only dicta, Justice Scalia's assertion that the Necessary and Proper Clause does not extend beyond the "making" of treaties does not seem correct. It appears necessary and proper for the making of treaties that the power to execute be implied, and the non-self-executing treaty was a later judicial invention that the original language could not have taken into account. However, Justice Thomas's use of the domestic and international matter distinction appears to be a useful limit on the treaty power, and it is on that point that future cases could seek to draw a distinction.[59]

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56 Bond v. United States, 134 S. Ct. 2077, 2110 (Thomas, J., concurring).

57 *See* Symposium, *The Treaty Power After* Bond v. United States*: Interpretative and Constitutional Constraints*, 90 NOTRE DAME L. REV. (forthcoming 2015).

58 Bradley, *supra* note 50, at 456–61 ("[T]here is a strong case—based on history, doctrine, and policy—for subjecting the treaty power to the same federalism limitations that apply to Congress's legislative powers.").

59 *See supra* notes 45–56 and accompanying text.

ESSAYS

# AN APP FOR THAT: LOCAL GOVERNMENTS AND THE RISE OF THE SHARING ECONOMY

*Andrew T. Bond**

The revolution of the Internet in the late 1990s brought consumers together in unique and unprecedented ways. The evolution of the sharing economy in the early twenty-first century builds upon the Internet's revolution by connecting consumers and unused resources in a readily accessible and efficient manner.

At the same time, the sharing economy puts new pressures on local governments in choosing how to respond to this evolution. One method of evaluating local government responses is through a paradigmatic example. In this Essay, that case study is Uber: a novel and unabashedly antagonistic transportation service that offers on-demand taxi access through a cell phone application. Uber is no stranger to starting fights—and winning. Uber has simultaneously fought the taxi industry, regulators, its rivals, and even its customers.[1] Local governments should not be on the losing side of that laundry list. This Essay focuses on local government responses to Uber and the new sharing economy. Both Uber's impact on the taxi industry and municipal reactions provide insight into the larger question of how local governments respond to rapid advances in technology.

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1 *See* Kara Swisher, *Man and Uber Man*, VANITY FAIR, Dec. 2014, http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy (detailing Uber's willingness to engage its foes, and even its friends, to gain competitive advantage).

## I. THE SHARING ECONOMY

The sharing economy is a microeconomic system built around the utilization of unused human and physical resources.[2] This collaborative economic model attempts to make full utilization of available resources, as opposed to the traditional singular focus on the initial buying and selling of goods and human resources.[3] For example, an off-duty sales associate at Walmart may utilize the same car that she drives to and from work as an "Uber" vehicle, taking passengers to and from destinations in her hometown.[4] Alternatively, a large family with a vacant bedroom for the weekend may rent out that room to a visiting couple that cannot afford a local hotel of comparable quality.[5] The sharing economy connects unused resources with consumers via technology.[6] Although the sharing economy certainly predates the Internet, the Internet is responsible for substantially reducing information costs, resulting in the sharing economy's transformation and dramatic expansion.

The genesis of the sharing economy comes from the contention that the traditional linear production and distribution scheme is misguided in a

2 *See* Dave Roos, *How the Sharing Economy Works*, HOWSTUFFWORKS, http://money.howstuffworks.com/sharing-economy.htm (last visited Feb. 6, 2015) (discussing how the sharing economy functions); *see also* Sophie Curtis, *Sharing Economy to Create a Nation of 'Microentrepreneurs'*, TELEGRAPH, Nov. 26, 2014, http://www.telegraph.co.uk/technology/news/11253016/Sharing-economy-to-create-a-nation-of-microentrepreneurs.html (commenting on the sharing economy's ability to create a new culture of entrepreneurism).

3 *See* Roos, *supra* note 2.

4 *See* Carys Mills, *Tale of the Taxi Tape: Uber vs. Traditional Cabs*, OTTAWA CITIZEN, (Oct. 14, 2014, 10:50 AM), http://ottawacitizen.com/news/local-news/tale-of-the-taxi-tape-uber-vs-traditional-cabs (explaining how Uber compares and contrasts with traditional taxis).

5 *See* Thomas L. Friedman, *Welcome to the 'Sharing Economy'*, N.Y. TIMES, July 20, 2013, http://www.nytimes.com/2013/07/21/opinion/sunday/friedman-welcome-to-the-sharing-economy.html ("In a world where . . . the skills required for any good job keep rising—a lot of people who might not be able to acquire those skills can still earn a good living now by building their own branded reputations, whether it is to rent their kids' rooms [or something else]."); *see also Peer-to-Peer Rental: The Rise of the Sharing Economy*, ECONOMIST, Mar. 9, 2013, http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy (discussing how nearly any commodity can form a marketplace through the Internet).

6 The Internet is the predominate communication resource on which the sharing economy relies. *See* Roos, *supra* note 2. *But see* Noam Scheiber, *Corporate America Is Using the Sharing Economy to Turn Us into Temps*, NEW REPUBLIC (Nov. 23, 2014), http://www.newrepublic.com/article/120378/wonolo-temp-worker-app-shows-scary-future-sharing-economy (critiquing the sharing economy for leading to a perpetual state of temporary employment).

world of finite resources.[7] The realization that we often use natural and human resources inefficiently, and in a manner that frequently leads to environmental harm, in part led to the sharing economy's effort to maintain full utilization of available resources.[8] The traditional "cradle to grave" (from creation to disposal) production model contains significant unused value in terms of the time that products, services, and talents lay idle.[9] Allowing human and physical resources to lay idle is value wasted. For example, the average car is only used eight percent of the time.[10] This untapped value creates a significant resource for the sharing economy.[11] With the rise of the Internet and the ability to quickly communicate through mobile phone applications and peer-to-peer programs, owners of these unused resources now have the means to connect them with consumers.

## II. THE TAXI INDUSTRY AND THE RISE OF UBER

The advent of Uber provides a ripe example for exploration of the benefits derived from the sharing economy and the detriments imposed on preexisting, traditional economic models competing in the same industry. This Part begins with a brief overview of the history of the taxi industry, from horse-drawn carriages to modern-day yellow taxicabs, before turning to the introduction of Uber and its effects on the traditional taxi paradigm. It concludes with three different case studies of Uber's effect on major cities—San Francisco, New York, and the District of Columbia—in order to estimate and evaluate Uber's current and future impact.

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7 *See* Susan Fournier, *Understanding Consumption in the New Sharing Economy*, BOSTON UNIV. SCH. OF MGMT. (Sept. 22, 2014), http://management.bu.edu/blog/2014/09/22/understanding-consumption-in-the-new-sharing-economy/ (explaining resource allocation within the shared economy model).

8 *Id.*

9 *Id.*

10 *See* Marcus Wohlsen, *Make Your Car Pay for Itself by Renting It to Someone Else*, WIRED (Mar. 4, 2013, 6:30 AM), http://www.wired.com/2013/03/relayrides-now-in-fifty-states/ ("As with other digitally driven sharing-economy services, such as Uber for taxis or AirBnb for lodging, RelayRides runs on the realization that there's money to be made in idleness. According to the company, most cars sit unused about 92 percent of the time.").

11 *See* Michael Petricone, *Gains in the 'Sharing Economy'*, N.Y. TIMES, Nov. 16, 2014, http://www.nytimes.com/2014/11/17/opinion/gains-in-the-sharing-economy.html ("'Sharing economy' platforms enable New Yorkers to offer unused resources like a spare bedroom or a car for sale or rent. These micro-entrepreneurs create jobs and consumer choice. In 2013, Airbnb contributed $632 million to the city's economy. The median income of an UberX driver in New York is more than $90,000.").

### *A. The Taxi Industry*

The end of the nineteenth century saw the beginning of automobiles appearing on American city streets;[12] soon thereafter, taxicabs began competing with horse-drawn carriages.[13] Initially, electric-powered taxicabs did not present a tremendous threat to carriages, mostly due to the impractical weight of their batteries.[14] Even still, by 1899 there were over one hundred taxicabs meandering the dusty and dirty streets of New York City.[15] Part of the appeal of electric taxicabs was their promise of a cleaner, safer, and faster alternative to carriages. Although this promise largely came true, progress is never without costs. Henry H. Bliss, a thirty-five year New Yorker—who was hit by a taxicab while (ironically) helping his friend exit *another* streetcar—earned the dubious distinction as the first American killed by a taxi on September 13, 1899.[16]

At the start of the new century, the New York Taxicab Company began importing gasoline-powered taxicabs from France.[17] Even though the Company imported six hundred cars, taxicabs still made up a small portion of New York City traffic in the first decade of the twentieth century.[18] The second decade saw the introduction of the taximeter, which is used to gauge the miles traveled and time elapsed.[19] This invention

12 *See* Martin V. Melosi, *The Automobile Shapes the City*, AUTO. IN AM. LIFE & SOC'Y, http://www.autolife.umd.umich.edu/Environment/E_Casestudy/E_casestudy3.htm (last visited Feb. 14, 2015) (recounting the evolution of walking cities to automobile cities in America).

13 *Id.*

14 *See* Daniel Yergin, *Back to an Electric Future for Cars*, L.A. TIMES, Dec. 11, 2011, http://articles.latimes.com/2011/dec/11/opinion/la-oe-yergin-smog-20111211 ("In 1900, more battery-powered electric cars ran on the streets of New York City than cars with internal combustion engines . . . . But the arrival in 1908 of Henry Ford's Model T . . . made the electric car a historical curiosity.").

15 *Id.*

16 *See Automobile Victim Dead*, N.Y. TIMES, Sep. 15, 1899, http://query.nytimes.com/mem/archive-free/pdf?res=9A00E7DE133DE633A25756C1A96F9C94689ED7CF (discussing Mr. Bliss's untimely demise at the hands of a rogue taxicab).

17 *See* Graham Russell Gao Hodges, *'Taxi!': The Creation of the Taxi Man: 1907-1920*, N.Y. TIMES, June 17, 2007, http://www.nytimes.com/2007/06/17/books/chapters/0617-1st-hodg.html (detailing Harry N. Allen's importation of French taxicabs due to his frustration with American cars).

18 *See Taxi Dreams: Taxi History*, PBS, http://www.pbs.org/wnet/taxidreams/history/index.html (last visited Feb. 14, 2015) (chronicling the history of taxis in America).

19 *See* Megan McArdle, *Why You Can't Get a Taxi*, ATLANTIC (Apr. 2, 2012, 3:39 PM), http://www.theatlantic.com/magazine/archive/2012/05/why-you-cant-get-a-taxi/308942/# ("In 1907, an innovation hit the streets of New York: 65 gasoline-powered vehicles were equipped with taximeters. Invented by Wilhelm Bruhn in 1891, the taximeter could record time spent on a journey and distance traveled in order to calculate fares.").

enabled the taxi industry to flourish, although at fifty cents per mile traveled, taxis proved accessible to only the relatively wealthy.[20] Ten years later, during the "Roaring Twenties," yellow-and-black-checkered cabs appeared, which would become synonymous with taxis in New York City. The Checkered Cab Manufacturing Company produced these iconic cabs in Kalamazoo, Michigan and saw expansive growth into the thirties.[21] This decade also witnessed the downsides of the largely unregulated taxi industry: cab drivers often suffered from unfair labor practices and passengers became the victims of price gouging.[22] Tensions came to a head in 1934, when two thousand taxi drivers went on strike and took over Times Square in protest.[23]

Mayor Fiorello H. La Guardia signed the Haas Act of 1937 in response to years of taxi unrest.[24] The Haas Act was revolutionary for its time and still forms the basis of New York City's taxi regulation scheme today.[25] It set forth the official administration of taxi licenses and the medallion system.[26] Medallions are small plates that affix to the exterior of cabs, certifying a car's legal authority to pick up passengers for a fee. The medallion system gave New York City's government the ability to keep a closer eye on the quality and quantity of taxi drivers. Legislators intended the Haas Act to provide better working conditions for the largely immigrant population that drove New York taxis.[27] Like nearly all regulations, however, the Haas Act had an unintended consequence: narrowing the control of the taxi industry to a handful of large fleet owners.

By mid-century, taxis were an integral part of New York's transportation scheme. They became so important, in fact, that in 1960

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20 *See Taxi Dreams: Taxi History*, *supra* note 18 (chronicling the history of taxis in America).

21 "For the next sixty years production swelled. At the company's peak over one hundred vehicles a day and five thousand a year rolled off of the line." *See Checker Motors: Taxicab Makers*, KALAMAZOO PUB. LIBRARY, http://www.kpl.gov/local-history/business/checker.aspx (last visited Feb. 14, 2015).

22 *See The Early Years: 1907–1935*, NYC TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/media/totweb/taxioftomorrow_history_earlyyears.html (last visited Feb. 14, 2015).

23 *Id.* ("In one of the largest strikes of the taxicab industry's early days, the Taxi Strike of 1934, taxi drivers went from peaceful protesters to angry rioters. They shut down the City and injured dozens of people."); *see also Taxi Dreams: Facts & Figures*, PBS, http://www.pbs.org/wnet/taxidreams/data/index.html (last visited Feb. 14, 2015).

24 *See* Lawrence Van Gelder, *Medallion Limits Stem From the 30's*, N.Y. TIMES, May 11, 1996, http://www.nytimes.com/1996/05/11/nyregion/medallion-limits-stem-from-the-30-s.html ("That law [the Haas Act] limited the number of hack licenses—medallions—that made it legal for taxis to transport passengers who hailed them on the street.").

25 *See id.*

26 *See id.*

27 *See id.*

New York City ordered all taxis be painted yellow in order to distinguish officially licensed taxi drivers from unofficial drivers, who, although illegal, proved increasingly more common.[28] Unofficial drivers saw much of their business in neighborhoods dominated by racial minorities, which were underserved by official drivers.[29]

In 1971, the City founded the Taxi and Limousine Commission to address the growing number of taxi drivers and the issues they confronted.[30] Although New York's economy and population grew rapidly into the 1980s, the Commission kept the number of officially licensed cabs steady, creating an artificial cap. This synthetic limit on the number of cabs saw the price of medallions skyrocket to more than $125,000 per medallion.[31]

Since its introduction at the end of the nineteenth century, the taxi industry has seen tremendous growth and success in America. Today, in New York City alone, there are 12,187 taxis and more than 40,000 drivers.[32] Those taxis take more than 200 million passengers almost 800 million miles per year.[33] The New York City taxi industry boasts more than one billion dollars in annual revenue and operates twenty-four hours per day.[34] This expansive taxi industry, and its regulatory state, remained unchallenged until 2009, when two entrepreneurs from San Francisco rejected the conventional wisdom of the status quo.

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28 *See A History of the New York Cab*, TELEGRAPH, May 4, 2011, http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8491507/A-history-of-the-New-York-cab.html (detailing the history of the New York taxicab).

29 This phenomenon is not unlike the modern-day jitneys, or share taxis, which predominately cater to inner-city immigrants. *See* Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 228 (2001) ("The experience of Miami and New York suggests that, if permitted to operate, jitneys can contribute invaluably and permanently to efforts to improve the economic prospects of America's inner-city residents."); *see also* Ron Grossman, *Before Uber There Was Jitney*, CHI. TRIB., Mar. 9, 2014, http://articles.chicagotribune.com/2014-03-09/site/ct-jitney-cab-flashback-0309-20140309_1_jitney-cabs-taxi ("The current battle between cabbies who pull a meter and upstarts who book fares via a smartphone app is evocative of an action-packed taxi drama that long ran on Chicago streets. Decades before Uber and Lyft, taxis that operated outside municipal regulations were called jitneys, named from a slang expression for a nickel, the original fare.").

30 *See About TLC*, NYC TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/about/about.shtml (last visited Feb. 14, 2015) (explaining the founding of the NYC Taxi & Limousine Commission).

31 *Taxi Dreams: Taxi History*, *supra* note 18.

32 *Taxi Dreams: Facts & Figures*, *supra* note 23.

33 *Taxi Dreams: Taxi History*, *supra* note 18.

34 *Id.*

### *B. The Introduction of Uber*

Technology entrepreneurs Garrett Camp and Travis Kalanick first approached the concept of Uber while at a web conference in Paris.[35] Mr. Camp had just sold "StumbleUpon" to eBay,[36] and Mr. Kalanick had just sold "Red Swoosh" to Akamai.[37] Both were hungry for the next big startup idea. As natives of San Francisco, California, both were frustrated with the unavailability and unreliability of taxis in the Bay Area. Mr. Camp pitched the idea of a "limo timeshare service" to Mr. Kalanick, which peaked his interest.[38]

By March 2009, work on Uber's iPhone application began in earnest. Mr. Camp hired Mr. Kalanick to be Uber's "Chief Incubator," which essentially entailed getting the startup off the ground. In January 2010, Uber had its first test run in New York, using just three cars.[39] The company launched in San Francisco in late May 2010.[40] Since then, the company has expanded to 45 countries and more than 200 cities.[41] On June

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35 *See* Travis Kalanick, *Uber's Founding*, UBER (Dec. 22, 2010), http://blog.uber.com/2010/12/22/ubers-founding/ (chronicling the founding and evolution of Uber); *see also About*, LEWEB, http://leweb.co/about/ (last visited Feb. 14, 2015) ("Founded in 2004 by French entrepreneurs Loic and Geraldine Le Meur, LeWeb is an internationally-renowned conference for digital innovation where visionaries, startups, tech companies, brands and leading media converge to explore today's hottest trends and define the future of internet-driven business."). *But see* Farhad Manjoo, *Uber, a Start-Up Going So Fast It Could Miss a Turn*, N.Y. TIMES, Nov. 18, 2014, http://www.nytimes.com/2014/11/19/technology/uber-a-start-up-going-so-fast-it-could-miss-a-turn.html ("The hot start-up [Uber] is facing its toughest challenge yet—curbing its ugliest, most aggressive impulses before its win-at-all-cost culture begins to turn off investors, potential employees and the ride-hailing public at large."); Adam Komarnicki, *Why Uber's International Expansion Will Fail*, LINKEDIN (Nov. 22, 2014), https://www.linkedin.com/pulse/20141122143519-2804924-why-uber-s-international-expansion-will-fail ("Uber's success is very US-specific and not easily transferrable to other countries. In most markets Uber will fail to reach enough scale to bring into life its vision of becoming THE urban logistics grid for on-demand economy. However, it will spend a lot of investors' money to find that out.").

36 Kalanick, *supra* note 35.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *See* Patrick Hoge, *Uber Doubles Reach to 200 Cities in Four Months*, SACRAMENTO BUS. J. (Sept. 2, 2014, 11:43 AM), http://www.bizjournals.com/sacramento/blog/morning-roundup/2014/09/uber-doubles-reach-200-cities.html ("Just over four months after launching service in its 100th city, Uber Technologies is now operating in 205 metropolitan regions worldwide, with two dozen U.S. locations added on Thursday alone and 43 markets launched in August."); *see also* Chris O'Brien, *New Job Map Details Staggering Scope of Uber's Global Expansion*, VENTUREBEAT (Nov. 26, 2014, 3:31 AM), http://venturebeat.com/2014/11/26/new-job-map-

6, 2014, Uber raised $1.2 billion in funding from a group of investors led by Fidelity Investments, who valued Uber at $18.2 billion.[42] Later that year, Bloomberg reported Uber's valuation at between $35 and $40 billion.[43]

The launch of "UberX" in 2012 contributed substantially to Uber's rapid growth and mammoth valuation.[44] UberX expanded the Uber universe—originally restricted to only luxury "black cars"—to any qualified driver with a vehicle meeting Uber's safety standards.[45] The introduction of UberX, coupled with the company's success at raising money, allowed Uber to decrease the price of UberX rides across several major cities, including San Francisco, Los Angeles, San Diego, and the District of Columbia.[46] This aggressive pricing scheme is not without its detractors, mostly compromised of taxi commissions and drivers.[47]

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details-staggering-scope-of-ubers-global-expansion/ (discussing Uber's rapid international expansion).

42 *See* Evelyn M. Rusli & Douglas Macmillan, *Uber Gets an Uber-Valuation*, WALL ST. J., June 6, 2014, http://online.wsj.com/articles/uber-gets-uber-valuation-of-18-2-billion-1402073876 ("At $18.2 billion, Uber is worth about the same as Hertz Global Holdings Inc. and Avis Budget Group Inc. combined."). Uber's $18.2 billion valuation is greater than "regional bank Fifth Third Bancorp, retailer Gap and supermarket chain Whole Foods." *See* Adam Samson, *If Uber Scores Valuation North of $17B, It Will Trump These Firms*, ADAM'S ANGLE (Nov. 7, 2014, 6:01 PM), http://adamtsamson.tumblr.com/post/102042672843/if-uber-scores-valuation-north-of-17b-it-will (charting the valuation of several publicly traded companies).

43 *See* Serena Saitto, *Uber at $40 Billion Valuation Would Eclipse Twitter and Hertz*, WASH. POST, Nov. 26, 2014, http://washpost.bloomberg.com/Story?docId=1376-NFMB0O6KLVR601-7DE3B9ATPFMU65ICCCSTSOOS0B ("The startup is close to raising a round of financing that would value it between $35 billion and $40 billion, according to people familiar with the situation, who asked not to be identified because the details are private.").

44 *See* Brian Feldt, *One Month in, Uber Ready to Launch UberX in St. Louis*, ST. LOUIS BUS. J. (Nov. 12, 2014, 10:40 AM), http://www.bizjournals.com/stlouis/blog/biznext/2014/11/one-month-in-uber-ready-to-launch-uberx-in-st.html (discussing the introduction of UberX into the St. Louis market only one month after Uber's own introduction in the city).

45 *Id.*

46 *See* Alex Wilhelm & Ryan Lawler, *In Another Strike Against the Competition, Uber Lowers UberX Prices in San Diego, LA, and DC*, TECHCRUNCH (Oct. 3, 2013), http://techcrunch.com/2013/10/03/in-another-strike-against-the-competition-uber-lowers-uberx-prices-in-san-diego-la-and-dc/ (citing Uber's ability to cut the price of UberX due to its recent success at raising money).

47 *See* Alexis Kleinman, *President of Taxi Association Compares UberX to ISIS*, HUFFINGTON POST (Oct. 30, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/10/29/uberx-isis_n_6070472.html ("The President of the Pennsylvania Taxi Association . . . compared one arm of the car service Uber to the terrorist group ISIS. 'I try to equate this illegal operation of UberX as a terroristic act like ISIS invading the Middle East,' Alex Friedman said. 'It is exactly the same menace.'"); *see*

Uber's pricing system is similar to metered taxis, but all payment is handled exclusively through Uber rather than the driver personally.[48] Uber calculates the price of each ride based on either distance or time, depending upon the city. The company automatically bills the fare, which includes a tip, to the customer's credit card.[49] During times of high demand—such as major holidays or inclement weather—Uber increases its prices to "surge" levels.[50] Surge pricing often leads to consumer backlash and anger, but does not appear to make a tangible dent in Uber's growth.[51] Mr. Kalanick

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*also* Peter Terlato, *A For-Hire Car Driver is Making Citizen's Arrests Against Uber Drivers*, BUS. INSIDER (Nov. 24, 2014, 6:52 AM), http://www.businessinsider.com/sydney-hire-car-owner-making-citizens-arrests-against-uberx-drivers-2014-11 ("As popular ride-sharing business Uber continues to grow rapidly throughout Australia, one Sydney hire car owner has decided to fight back, taking the law into his own hands by making legal citizen's arrests against UberX drivers."). Uber encountered some of its most significant resistance to date from taxi drivers in Germany. *See* Ulrike Dauer, *German Taxi Drivers to Appeal Lifting of Uber Ban*, WALL ST. J. (Sept. 16, 2014, 10:51 AM) http://online.wsj.com/articles/court-overturns-ban-on-uberpop-in-germany-1410872575 ("German taxi drivers will appeal a decision by a Frankfurt court removing a nationwide ban on Uber Inc.'s UberPop service, the drivers' association said Tuesday."); Mark Thompson, *Is it Over for Uber in Germany?*, CNN MONEY (Sept. 2, 2014, 8:28 AM), http://money.cnn.com/2014/09/02/technology/mobile/uber-germany/ ("How many blows can Uber take? The latest is a potential ban in Germany after a regional court issued a temporary injunction against the taxi company."); *see also* Raphael Minder & Mark Scott, *Sharing Economy Faces Patchwork of Guidelines in European Countries*, N.Y. TIMES, Sept. 21, 2014, http://www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html (discussing the uneven regulatory environment faced by Uber and Airbnb in Europe).

48 *See* Joshua Brustein, *The Smartphone Way to Beckon a Car*, N.Y. TIMES, May 16, 2011, http://www.nytimes.com/2011/05/15/nyregion/uber-and-weeels-offer-car-services-by-phone-app.html (recounting a New York Uber ride from start to finish).

49 *Id.*

50 *See* Joe Nocera, *Uber's Rough Ride*, N.Y. TIMES, Nov. 21, 2014, http://www.nytimes.com/2014/11/22/opinion/joe-nocera-ubers-rough-ride.html ("If you want a ride during a heavy commuter time, it will charge you more—surge pricing, as they call it at Uber—but you'll know in advance how much extra, and you'll be given a chance to decide whether to accept or not."); Eric Randall, *Uber's Surge Pricing Once Again Makes People Mad*, BOSTON MAGAZINE (Nov. 7, 2014, 9:16 AM), http://www.bostonmagazine.com/news/blog/2014/11/07/ubers-surge-pricing-makes-people-mad/ ("Uber is priced where the market wants it, no matter why the market is seeking it out. When that uptick comes for unhappy reasons, it accentuates just how mechanical Uber's plan can be. But it doesn't reveal something we didn't already know."); *see also* Jen, *A Walk Through Surge Pricing, 2010–2012*, UBER (Jan. 1, 2012), http://blog.uber.com/2012/01/01/take-a-walk-through-surge-pricing/ (explaining Uber's surge pricing methodology).

51 Randall, *supra* note 50; *see also* James Surowiecki, *In Praise of Efficient Price Gouging*, MIT TECH. REV. (Aug. 19, 2014), http://www.technologyreview.com/review/529961/in-praise-of-efficient-price-gouging/ ("When Uber jacked up prices during a snowstorm in New York last December, for

responded to surge pricing complaints: "Sure it's about the regularity, but someone who is driving a car on a regular occurrence deals with dynamic pricing all the time: it's called gas prices."[52] Mr. Kalanick added, "Because this is so new, it's going to take some time for folks to accept it. There's 70 years of conditioning around the fixed price of taxis."[53] If Uber's past success is any indication, it will rewrite that seventy years of conditioning sooner than later.

### *C. Uber's Impact*

Uber's expanse is impressive, but only from looking to specific case studies can we determine the company's current and future impact on localities generally. This Section chronicles Uber's impact on three major American cities: San Francisco (the birthplace of Uber), New York City (the American birthplace of taxis and the medallion system), and the District of Columbia (America's capital and regulatory hub).

#### 1. San Francisco

As the birthplace of Uber, San Francisco is (perhaps unsurprisingly) the city that the company most affected with its arrival more than four years ago.[54] Two recent presentations, one from the San Francisco Municipal Transportation Agency, and the other from Uber itself,

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instance, there was an eruption of complaints, the general mood being summed up by a tweet calling Uber 'price-gouging assholes.'").

52 Nick Bilton, *Disruptions: Taxi Supply and Demand, Priced by the Mile*, N.Y. TIMES BITS (Jan. 8, 2012, 3:05 PM) (internal quotation marks omitted), http://bits.blogs.nytimes.com/2012/01/08/disruptions-taxi-supply-and-demand-priced-by-the-mile/ (detailing Uber's dynamic pricing model); *see also* Erika Morphy, *Dynamic Pricing in a Post-Uber World*, FORBES (Aug. 31, 2014, 5:40 PM), http://www.forbes.com/sites/erikamorphy/2014/08/31/dynamic-pricing-in-a-post-uber-world/ ("Here is one more thing we can thank (or blame depending on your perspective) Uber for: the widespread acceptance of dynamic pricing in the retail and consumer service sector.").

53 Bilton, *supra* note 52 (internal quotation marks omitted); *see also* Rafi Mohammed, *Uber's "Price Gouging" Is the Future of Business*, HARVARD BUS. REV. (Dec. 16, 2013), https://hbr.org/2013/12/ubers-price-gouging-is-the-future-of-business ("Uber instead lets the market rule and drops prices. This discounting steals customers from taxis and, just as importantly, attracts new customers. This walk down the demand curve entices customers who otherwise might not have used a taxi or car service."). *But see* Kevin Roose, *Here's How Uber Should Fix Its Surge Pricing Problem*, N.Y. MAG. (Dec. 16, 2013, 1:02 PM), http://nymag.com/daily/intelligencer/2013/12/ubers-surge-pricing-problem.html ("[Uber] should cap the amount riders pay at two or three times the normal rates . . . [i]f a surge ride would normally cost $200, with $160 going to the driver, Uber should still pay that driver $160, but keep the costs for riders contained to, say, $80, and eat the other $80.").

54 Kalanick, *supra* note 35.

substantiate media outlets' claims that Uber dramatically impacted San Francisco's taxi industry.[55]

At a meeting in September 2014, the San Francisco Municipal Transportation Agency (SFMTA) discussed the substantial threat Uber poses to the taxi industry in San Francisco.[56] The SFMTA carefully prefaced its presentation with a statement of its substantial interest in promoting taxi regulation.[57] Indeed, the SFMTA's mission is to "promote a vibrant taxi industry through intelligent regulation, enforcement and partnership."[58] The SFMTA links the importance of regulation to "maintaining a strong taxi industry."[59] The SFMTA's presentation transitioned into a graphical showcase of Uber's impact on the taxi industry from January 2012 (approximately 1,400 trips per taxi) to July 2014 (approximately 500 trips per taxi).[60] Within eighteen months of Uber's introduction, San Francisco witnessed a sixty-five percent decline in taxicab use.

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55 The media portrayal of Uber's effect on San Francisco's taxi industry is nearly apocalyptic in tone. *See* Tero Kuittinen, *Mobile Apps are Absolutely Murdering San Francisco's Taxi Industry*, BGR (Sept. 19, 2014, 6:30 PM), http://bgr.com/2014/09/19/uber-vs-lyft-vs-taxis/ ("According to the new SFMTA director Kate Toran, the number of average trips per taxicab in San Francisco has plunged to 504 in this past July from 1,424 in March of 2012. This drop came despite the fact that rides from the airport remain a taxi industry monopoly."); Emily Badger, *This Chart Bodes Very Badly for the Taxi Industry in Its Battle Against Uber*, WASH. POST. WONKBLOG (Sept. 17, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/17/this-chart-bodes-very-badly-for-the-taxi-industry-in-its-battle-against-uber/ ("This week . . . the Taxis and Accessible Services Division of the San Francisco Municipal Transportation Agency pulled out some pretty dramatic numbers: The office, which manages regulation of the local industry, reported that taxi trips taken in the city have fallen by 65 percent in the last year and a half . . . ."); Michael Cabanatuan, *Ride Services Decimate S.F. Taxi Industry's Business*, S.F. CHRON., (Sept. 16, 2014, 6:42 PM), http://www.sfgate.com/bayarea/article/Taxi-use-plummets-in-San-Francisco-65-percent-in-5760251.php ("The fall of the taxi industry in San Francisco, as less-regulated ride services haven taken hold, has been both steep and sharp. . . . It's been evident that the booming popularity of app-dispatched ride services like Lyft and Uber have dramatically eaten into the taxi industry's business.").

56 *See Taxis and Accessible Services Division: Status of Taxi Industry,* S.F. MUN. TRANSP. AGENCY (2014), http://www.sfmta.com/sites/default/files/agendaitems/9-16-14%20Item%2011%20Presentation%20-%20Taxicab%20Industry.pdf (showcasing the slide deck presented to the San Francisco Municipal Transportation Board Meeting on September 16, 2014).

57 *Id.*

58 *Id.*

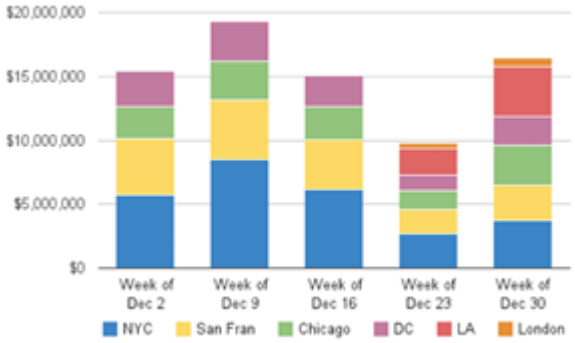
59 *Id.*

60 *Id.*

FIGURE 1: IMPACT OF UBER AND LIKE SERVICES ON SAN FRANCISCO TAXI INDUSTRY (AVERAGE TRIPS PER TAXI)[61]


A leaked Uber presentation reflecting astounding revenue and tremendous growth corroborates the SFMTA's data.[62] Uber's presence in San Francisco alone generated nearly eighteen million dollars of revenue in December 2013.[63] A year of revenue at that monthly rate would make the San Francisco market a $212 million business, assuming no growth.

FIGURE 2: UBER REVENUE IN TOP MARKETS–DECEMBER 2013[64]




San Francisco has not altered its regulatory scheme of the taxi industry or imposed any new regulations on Uber. However, the SFMTA is active in its recommendations regarding how it would like to see San Francisco respond to Uber. Although perhaps in a somewhat paradoxical manner, given its emphasis on promoting regulations, SFMTA wants to see the taxi

61 *Id.*

62 *See* Alyson Shontell, *LEAKED: Internal Uber Deck Reveals Staggering Revenue and Growth Metrics*, BUS. INSIDER (Nov. 20, 2014, 5:58 PM), http://www.businessinsider.com/uber-revenue-rides-drivers-and-fares-2014-11 ("Business Insider obtained an internal Uber presentation that's nearly 60 pages long last week that was produced in early 2014. In it, there's city-by-city data in terms of revenue, active drivers, average fares, active users, trips per week, and more.").

63 *Id.*

64 *Id.*

industry *less* regulated.[65] The SFTMA recommends that San Francisco reduce the medallion retransfer fee by twenty percent, waive the five-hundred dollar ramp taxi medallion use fee, and lower the medallion renewal fees for transferable medallion holders.[66] Perhaps Uber's lasting impact on San Francisco was convincing the very agency designed to advocate *for* the taxi industry that its regulations were actually a hindrance.

2. New York City

Uber's arrival in New York City produced marginally fewer alarmist reactions than in San Francisco.[67] Uber's biggest impact in the Empire State, however, may be its effect on the system the City pioneered: taxi medallions. In the year the New York Taxi Commission introduced taxi medallions, it issued 11,787 medallions in the City.[68] That number remained constant until 2004, when it increased to 13,150.[69] The scarcity in the number of medallions available led to a rapid rise in their price. As of 2010, a taxi medallion cost more than one million dollars.[70]

65 *Taxis and Accessible Services Division*, *supra* note 56.

66 *Id.*

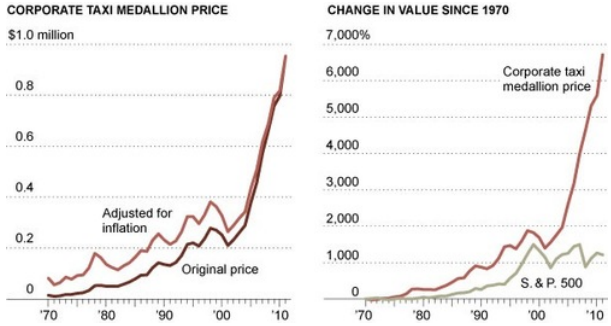
67 *See* Tero Kuittinen, *Uber and Lyft Appear Poised to Destroy New York's Iconic Taxi Industry*, BGR (July 9, 2014, 2:20 PM), http://bgr.com/2014/07/09/uber-vs-lyft-new-york/ ("Are there more empty taxis than usual rolling around Manhattan today? It seems that way . . . because the New York transportation system is going through its biggest upheaval since 1900. And as you may have guessed, one of the world's hottest mobile apps is the new omen of turmoil in 2014.").

68 Rohin Dhar, *The Tyranny of the Taxi Medallions*, PRICEONOMICS (Apr. 10, 2013), http://blog.priceonomics.com/post/47636506327/the-tyranny-of-the-taxi-medallions (discussing the unintended consequences of New York's medallion system).

69 *Id.*

70 *Id.*

FIGURE 3: DRAMATIC RISE IN NEW YORK TAXI MEDALLION PRICE[71]




The great cost of taxi medallions almost necessitates that corporations buy the medallions and "lease" them to drivers. Under this popular scheme, when a taxi driver starts her shift she incurs approximately one hundred dollars in debt to her taxi company for the use of its medallion, or the legal right to drive a taxi.[72] In a short amount of time, Uber changed this paradigm dramatically. Now, taxi medallion prices are falling.[73] The average price of an individual New York City taxi medallion fell to $872,000 in October 2014, down seventeen percent from its peak in 2013.[74]

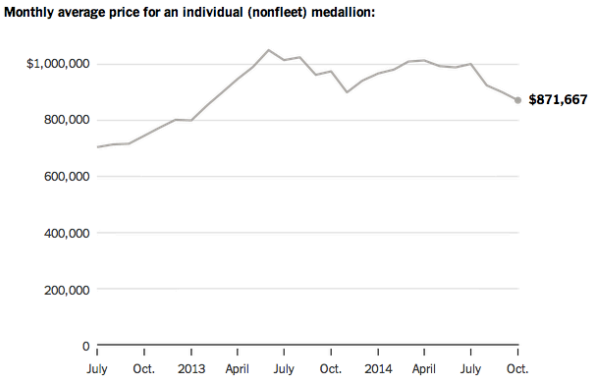
71 *Id.*

72 *Id.*

73 *See* Josh Barro, *Under Pressure from Uber, Taxi Medallion Prices are Plummeting*, N.Y. TIMES UPSHOT (Nov. 27, 2014), http://www.nytimes.com/2014/11/28/upshot/under-pressure-from-uber-taxi-medallion-prices-are-plummeting.html (analyzing the fall of New York taxi medallion prices due to competition from Uber); *see also* David Morrison, *Uber, Lyft Challenge Taxi Medallion Value*, CREDIT UNION TIMES (Oct. 27, 2014), http://www.cutimes.com/2014/10/27/uber-lyft-challenge-taxi-medallion-value ("App based transportation services such as Uber and Lyft have brought increased competition to New York City's taxicab industry and have introduced an element of uncertainty into the value of New York City's taxicab medallions.").

74 Barro, *supra* note 73.

FIGURE 4: DECLINE IN NEW YORK MEDALLION PRICE POST-UBER[75]




Whether taxi medallion prices will continue to fall remains unclear, but the relevant damage to their reputation may already be done. Medallion owners exert their power over taxi drivers by maintaining control over the exorbitantly expensive medallions. Once taxi drivers begin to recognize that this monopolization artificially inflates the medallion's price in response to the limited supply, and that an alternate avenue to pursue their occupation exists—Uber—it will likely be too late to salvage the medallion system.[76]

3. District of Columbia

Although the District of Columbia is the regulatory hub of the United States, it arguably took the most free-market approach toward Uber's introduction.[77] This is not necessarily a surprise, as Washington, D.C., does not regulate traditional taxi drivers in the same manner as San Francisco and New York City. Indeed, the nation's capital has no

75 *Id.*

76 *See* Emily Badger, *Taxi Medallions Have Been the Best Investment in America for Years. Now Uber May Be Changing That.*, WASH. POST WONKBLOG (Nov. 27, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/27/as-uber-fights-new-battles-over-privacy-an-older-war-simmers-with-the-cab-industry/ ("Now, however, a market built on restricted supply is showing cracks with the arrival of start-ups that turn anyone with a car into a driver for hire. In Chicago, those cracks have triggered fears that medallion values are tottering.").

77 *See* Emily Badger, *Free Market Advocates Say D.C. is the Uber-friendliest City in the Nation*, WASH. POST WONKBLOG (Nov. 12, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/12/free-market-advocates-say-d-c-is-the-uber-friendliest-city-in-the-nation/ ("By R Street's counting, Washington, D.C., has the freest transportation market in the country. The city just passed regulation legalizing 'transportation network companies' that allow people with their private cars to operate like quasi-cab drivers.").

medallion system, thereby freeing D.C. taxi drivers of the significant cost of doing business in other cities.[78]

The D.C. Council passed the Vehicle-for-Hire Innovation Act of 2014 in response to Uber's arrival.[79] Uber praised the bill, while taxi drivers widely criticized it as too lenient on the new company.[80] Specifically, the bill requires Uber drivers to submit to background checks going back seven years, undergo annual safety inspections, and hold one million dollars in liability insurance.[81] The bill essentially legalizes Uber in Washington, D.C., while simultaneously requiring Uber to observe safety and insurance requirements the company *already mandated*.[82]

The D.C. Taxi Operators Association and Teamsters Local 992 lashed out at the new bill. The Association said in a statement: "The illegal private sedan services currently do not follow the same rules and regulations that taxi drivers must follow, and the bill in its current form falls far too short in providing fairness."[83] Both organizations added complaints that "D.C. taxi drivers are losing work and are struggling to make ends meet."[84] Uber hopes the D.C. Council's bill will serve as a model for other cities as they look to respond to Uber in a regulatory fashion.[85]

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78 *Id.*

79 *See* Jacob Fischler, *DC Just Passed a Law that Uber Says Could Serve as a "Model for the Rest of the Country"*, BUZZFEED NEWS (Oct. 28, 2014, 2:28 PM), http://www.buzzfeed.com/jacobfischler/dc-just-passed-a-law-that-uber-says-could-serve-as-a-model-f (discussing the District of Columbia's regulatory response to Uber).

80 *See* Debra Alfarone, *DC Council Passes Bill to Clear Way for Uber, Lyft*, WUSA9 (Oct. 28, 2014, 6:20 PM), http://www.wusa9.com/story/news/2014/10/28/dc-taxi-drivers-protest-uber-vote/18044889/ ("Taxi drivers argue that the app-based services have an unfair competitive advantage because they don't have to follow the same rules and regulations as cabs, and therefore can afford to charge cheaper fares."); *see also* Sam Ford, *D.C. Cab Drivers Rally Downtown Against Uber, but Council Ignores Protest*, ABC 7 NEWS (Oct. 28, 2014, 7:12 PM), http://www.wjla.com/articles/2014/10/cab-drivers-rally-against-uber-in-downtown-d-c--108499.html ("Hundreds of taxi drivers in the District of Columbia descended on Freedom Plaza Tuesday to draw attention to the D.C. Council's embrace of car services like Uber and Lyft.").

81 Fischler, *supra* note 79.

82 *Id.*

83 *Id.*

84 *Id.*

85 *See* Darinka, *DC Leads the Nation with Passage of Innovative Ridesharing Bill*, UBER (Oct. 27, 2014), http://blog.uber.com/dc_clears_path_for_uberX ("Councilmembers Cheh and Grosso have displayed tremendous leadership in pushing through this bill, and we are proud that Uber's safety standards have set the bar for ridesharing in DC, and throughout the country.").

## III. HOW SHOULD LOCAL GOVERNMENTS RESPOND?

The sharing economy—and specifically Uber—presents a unique challenge to local governments. Sharing economy companies, unlike traditional blue chip corporations, threaten to upset the status quo of local regulatory frameworks. When confronted with a novel paradigm like sharing economy companies, local governments have two options: embrace the new economic model or attempt to regulate it.

### *A. Generational Shift: Millennial Expectations and the Rise of the Sharing Economy*

As the Millennial generation begins to take over both the American workforce and the bulk of consumer spending, the Baby Boomer generation and its influence will begin to retire.[86] With the Millennials' rise come changes in the way consumers wish to conduct business.[87] The Baby Boomer generation places a large degree of its trust in established institutions, such as political parties, organized religions, and blue chip corporations.[88] The Millennials, largely in response to significant distrust

86 *See The "Millennials" are Coming*, CBS, (May 23, 2008), http://www.cbsnews.com/news/the-millennials-are-coming/ (discussing the rise of the millennial generation as the Baby Boomer generation heads into retirement); *see also* Alastair Mitchell, *The Rise of the Millennial Workforce*, WIRED (Aug. 15, 2013, 2:13 PM), http://www.wired.com/2013/08/the-rise-of-the-millennial-workforce/ ("[A]re businesses truly prepared for the rise of millennials in the workplace? The U.S. Bureau of Labor Statistics predicts that by 2015 millennials will overtake the majority representation of the workforce and by 2030 this hyper-connected, tech savvy generation will make up 75% of the workforce.").

87 *See Talking to Strangers: Millennials Trust People over Brands*, BAZAAR VOICE 4 (2012), http://resources.bazaarvoice.com/rs/bazaarvoice/images/201202_Millennials_whitepaper.pdf ("Eighty-four percent of Millennials report that UGC [user-generated content] on company websites has at least some influence on what they buy, compared to 70% of Boomers. In fact, there are many purchase decisions—big and small—that Millennials won't make without UGC.").

88 *See Millennials in Adulthood*, PEW RESEARCH CENTER (Mar. 7, 2014), http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/ (noting the Baby Boomer generation's attachment to, and the Millennials' disassociation from, established institutions).

of big corporations after the financial crisis,[89] place trust in individuals rather than businesses.[90]

Uber, although a "corporation" in the traditional sense, is an organic outgrowth in response to the Millennials' shifting desires.[91] As the Baby Boomer generation enters retirement, so too will companies that solely cater to their desires.[92] With the rise of the Millennials will come companies uniquely suited to meet the new generation's needs and desires, and challenges for those older companies unable to adapt.

Local governments should embrace Uber because it is primed to benefit from the Baby Boomer to Millennial shift due to its peer-reviewed model of service.[93] This feedback loop of instant reviews not only best serves the rising tax base of local governments, but also gives localities a window into what Millennials will expect and demand of them in the future. Although Uber may one day overpower legacy taxi companies, it is just as likely that its less-than-subtle influence will force the taxi industry to adapt.[94]

### *B. Inherent Difficulty of Local Attempts to Regulate the Sharing Economy*

With the rise of Millennial expectations and the twilight of the Baby Boomer generation, the sharing economy is here to stay. As such, municipalities must recognize inherent limitations in attempting to regulate that economy. Uber unlocked the power of the Internet when it comes to capitalizing unused resources. Local governments restricting the use of

89 *See* Bourree Lam, *Quantifying Americans' Distrust of Corporations*, ATLANTIC (Sept. 25, 2014, 7:50 AM) http://www.theatlantic.com/business/archive/2014/09/quantifying-americans-distrust-of-corporations/380713/ ("Only 36 percent of Americans feel corporations are a 'source of hope' for their economy, compared with 84 percent of people in China.").

90 *See* Laurie Sullivan, *Millennials Trust People, Not Brands, When Buying*, MEDIAPOST (Jan. 26, 2012, 3:14 PM), http://www.mediapost.com/publications/article/166630/millennials-trust-people-not-brands-when-buying.html ("This generation trusts people rather than brands, and values the opinions of like-minded strangers as much as people they know, according to a new study . . . .").

91 *Id.*

92 *See Millenials in Adulthood*, *supra* note 88.

93 *See* Julie Weed, *For Uber, Airbnb and Other Companies, Customer Ratings Go Both Ways*, N.Y. TIMES, Dec. 1, 2014, http://www.nytimes.com/2014/12/02/business/for-uber-airbnb-and-other-companies-customer-ratings-go-both-ways.html (discussing Uber's peer-reviewed model).

94 *See* Nick Jayson, *Chicago and New York Could Soon Compete with Uber and Lyft*, BIO & TECH INSIGHTS (Dec. 13, 2014), http://biotechinsights.com/chicago-and-new-york-could-soon-compete-with-uber-and-lyft/14615/ ("According to news reports, New York and Chicago Cities could soon become rivals of Uber and Lyft, after they launch their own smartphone apps for e-hailing taxis, similar to Uber and Lyft.").

social media—in whatever form—appears unlikely. To be sure, powerful interest groups, such as the taxicab lobby, may be able to assert some influence over municipalities. The sharing economy, however, is only growing in political power and influence. Given these difficulties and the inherent geographic limitations of municipalities, it is better to join the sharing economy than to fight it.[95]

Municipalities might be skeptical of doing nothing in response to the rise of large, dynamic, sharing economy companies. Yet, as the deregulation of the telecommunications industry in the 1990s demonstrates, freeing local markets to compete can provide substantial benefits to consumers while simultaneously ensuring better services.[96] Likewise, to the extent municipalities are concerned about ensuring high-quality services and consumer safety, these issues can be addressed through disclosure laws for the former and tort and criminal laws for the latter.[97]

### *C. Uber is an Organic Response to Regulatory Market Failures*

Instead of attempting to regulate aspects of the sharing economy out of existence or subordinating them to unwieldy rules, local governments should concentrate on ways to embrace these innovations. One possible approach is to provide transitional relief for industries transformed by the sharing economy.[98] For instance, given the competitive state of Uber, municipalities that rely on a taxicab medallion system might consider expanding the accessibility of medallions to lower the costs of competing with Uber and like companies. Some might argue this simply will result in a "race to the bottom" in terms of regulation, but municipalities should

95 Indeed, some municipalities already are joining the sharing economy in the context of Uber. *See supra* subsection II.C.3.

96 Jeffery A. Eisenach & Kevin W. Caves, *What Happens When Local Phone Service is Deregulated?*, 35 REGULATION 34, 35–36 (2012) (noting the substantial benefits to consumers obtained when the federal government deregulated local telephone markets); *id.* at 36 ("The course taken by the FCC in implementing the act was highly controversial, but the end result is not in dispute: the market today is far more competitive than when the act was passed. Indeed, state regulators from coast to coast have concluded that competition from cable, wireless, CLECs, and internet 'VoIP' providers effectively disciplines prices in most areas and for most products.").

97 For example, in the tragic instance of the rape of an Uber customer, criminal prosecution and tort law provide avenues of relief for the victim, while the crime simultaneously incentivizes Uber to further improve its verification procedures. *Cf.* Mike Isaac, *Uber Driver in Boston Area Charged with Rape*, N.Y. TIMES BITS (Dec. 18, 2004, 1:13 PM), http://bits.blogs.nytimes.com/2014/12/18/uber-driver-in-boston-area-charged-with-rape (noting that prosecutors criminal rape charges against an Uber driver and that "the incident comes as Uber reexamines its safety and driver screening policies" amidst a series of alleged assaults in multiple cities around the world).

98 San Francisco might do this with regard to its regulation of taxis in light of the rise of Uber. *See supra* notes 65–66 and accompanying text.

instead view it as an opportunity to further blend established industries with the sharing economy—thus creating value for all parties involved.

Given the pervasive power of the Internet and the inability of municipalities currently to control sharing companies, the best approach for municipalities is to embrace innovation. Local governments should work to achieve collaborative agreements with sharing economy companies while also making locally regulated industries more competitive through deregulation.

## CONCLUSION

The sharing economy presents new challenges and opportunities to municipalities. On one hand, through unlocking previously underutilized resources, the sharing economy offers new avenues of wealth creation, particularly for those disadvantaged by the status quo. On the other hand, the sharing economy challenges existing structures of municipal regulation. Rather than attempting to impose prior regulatory structures, municipalities should embrace shifts in consumer preferences—especially those of Millennials. It is through collaboration, rather than regulation, that municipalities can best achieve benefits for both enterprising individuals and communities as a whole.

# A HYPOTHETICAL ENGAGEMENT: GATT ARTICLE XX(A) AND INDONESIA'S *FATWA* AGAINST TRADE IN ENDANGERED SPECIES

*Lisa M. Meissner**

*There is not an animal (that lives) on the earth, nor a being that flies on its wings, but (forms part of) communities like you. Nothing have We omitted from the Book, and they (all) shall be gathered to their Lord in the end.*[1]

## INTRODUCTION

The greatest recognized threat facing biodiversity conservation today is habitat destruction.[2] Other threats include but are not limited to global climate change, encroachment, illegal wildlife trafficking, and overexploitation through intensive agricultural and commercial uses.[3] Although wildlife trafficking is not the main source of biodiversity loss, the pressures generated by the international demand for endangered species and their derivative products adversely affect not only individual species, but also entire ecosystems and rural livelihoods through the removal of flagship species from the environment.[4] In response to the growing threats

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1 QUR'AN, sura Al-An'am 6:38, *translated in* THE HOLY QUR'AN: TEXT AND TRANSLATION 146 (Abdullah Yusuf Ali ed., 2009).

2 *See* ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES 8 (2002).

3 *Id.*

4 *Id.* The exploitation of wildlife at unsustainable levels through the activities of wildlife trafficking not only threatens biodiversity conservation but also results in harm to local communities because when the species disappear, the income they provide to rural populations also disappears. Melissa Geane Lewis, *CITES and Rural Livelihoods: The Role of CITES in Making Wildlife Conservation and Poverty Reduction Mutually Supportive*, 12

facing our shared natural world, environmental issues are now being incorporated into multilateral agreements and development bank operations.[5] Despite these positive advancements, however, international trade regimes remain a relatively underdeveloped arena for enforcing environmental controls.[6]

The slow sedimentation of environmental policy objectives within international trade regimes—specifically the World Trade Organization (WTO)—is compounded by the fact that nations continue to artificially separate trade and the environment, rather than uniting them as mutually reinforcing goals.[7] Nevertheless, international environmental policies increasingly rely on trade restrictions in order to implement and enforce their objectives in an attempt to reunite these fields on the international level. For example, on the one hand, environmentalists would use international trade law as a method of compliance enforcement within multilateral environmental agreements; free trade proponents, on the other hand, would perceive such measures as jeopardizing the current regime through cloaked protectionist motives.[8] The adverse nature of trade and

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J. INT'L WILDLIFE L. & POL'Y 248, 249–50 (2009). These negative effects have led interested parties to contend that, from an ethical standpoint, international trade law should be required to consider the livelihoods of local communities in the decision-making process as these individuals and groups rely on wildlife and natural resources not just as a source of income, but also for subsistence purposes and as elements of cultural or religious practice. *Id.* at 254 (noting the example of the Appendix I listing of leopards by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which "negatively impacted some African populations of this species by removing the animals' financial value to local farmers," who already "viewed leopards as pests that preyed upon livestock," thus eliminating "any incentive the rural communities had *not* to eradicate those leopards in their vicinity" (emphasis added)).

5 *See generally* WORLD BANK, MAKING DEVELOPMENT SUSTAINABLE (Ismail Serageldin et al. eds., 1994), *available at* http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-3042-X (collection of essays, curated by the World Bank, discussing key current environmental issues); *Early Warning System*, BANK ON HUMAN RIGHTS, http://bankonhumanrights.org/ews/ (last visited Feb. 18, 2015) (a web-based tool identifying the international banks and finance institutions behind current development projects and the impacts such projects may have on local communities and ecosystems).

6 *See generally* John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992). The World Bank has modified its operations in response to this perceived weakness, including the establishment of a new vice-presidency of environmentally sustainable development and the provision of expert assistance in the preparation of national environmental action plans. *Id.* at 1227, 1256.

7 Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 843 (1996).

8 See Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341, 349–50 (1996).

environmental conversation thus poses significant challenges to the international community.[9] Within this framework, the top clerical body of the nation-state of Indonesia has taken the progressive step of uniting these two factors through the issuance of a *fatwa* against all hunting and trade in endangered species.[10] Should Indonesia seek to enforce this *fatwa* as national policy, however, it is unclear whether such action would endure WTO scrutiny under an Article XX(a) public morals analysis.

Part I will introduce the World Trade Organization's framework for liberalizing trade, including the exceptions available under Article XX that enable Member States to legislate on matters critical to their domestic constituencies despite trade obligations to the contrary. Part II then broadens the scope of the discussion to consider the association between Islamic Shari'a law and international trade law, and the challenges facing these two regimes in the arena of wildlife trafficking. Lastly, Part III delves into an analysis of a hypothetical situation in which Indonesia adopts, as a matter of national policy, an official *fatwa* against all trade in endangered species, evaluating the components of the public morals exception of the General Agreement on Tariffs and Trade (GATT) as they apply in light of prevailing WTO jurisprudence.

## I. GATT ARTICLE XX EXCEPTIONS UNDER THE WTO FRAMEWORK

The World Trade Organization was established January 1, 1995 with the primary aim of liberalizing trade within the international community.[11] To reach this goal, the WTO requires all member countries to "ensure the conformity of its laws, regulations and administrative procedures with its

9 *Id.*

10 Bryan Christy, *First Ever Fatwa Issued Against Wildlife Trafficking: Invoking the Koran, Indonesia's Top Clerical Body Declares Wildlife Trafficking to Be Forbidden*, NAT'L GEOGRAPHIC (Mar. 4, 2014), http://news.nationalgeographic.com/news/2014/03/140304-fatwa-indonesia-wildlife-trafficking-koran-world/.

11 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]. The Agreement marked the conclusion of more than seven years of extensive negotiations in the Uruguay Round on the General Agreement on Tariffs and Trade (GATT) and incorporated the GATT and all other related treaties into the new WTO framework. The primary objectives of the WTO, as recognized in the United States' enactment of the WTO Agreements are "to obtain: (1) more open, equitable, and reciprocal market access; (2) the reduction or elimination of barriers and other trade-distorting policies and practices; and (3) a more effective system of international trading disciplines and procedures." 19 U.S.C. § 2901(a) (2012). For an authoritative discussion of these negotiations, including the heated debate concerning the treatment of culture under the GATT, see JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND (2d ed. 1999).

[WTO] obligations."[12] At the heart of this system are four essential governing principles: (1) most-favored nation;[13] (2) national treatment;[14] (3) non-discrimination;[15] and (4) reciprocity.[16] A member country alleged to be in violation of one or more of these obligations must either amend its noncomplying activities or be subject to WTO-authorized sanctions under the organization's Dispute Settlement Understanding.[17] Alleged violations are evaluated by WTO-appointed Dispute Settlement Bodies, which are authorized to assign penalties and suspend concessions or other obligations under WTO Agreements.[18] As of June 26, 2014, 160 nations are members of the WTO, whose related agreements are estimated to govern ninety percent of global trade.[19]

In order to be accepted by an international community of vastly different histories, cultures, and levels of development, the WTO recognized that there can be compelling reasons for a nation to breach its core membership obligations.[20] Article XX of GATT 1994 thus describes "measures that are recognized as *exceptions to substantive obligations* . . . because the domestic policies embodied in such measures have been

12 WTO Agreement, *supra* note 11, art. XVI, para. 4; *see* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 9 (1994). *See generally Understanding the WTO: Overview*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Feb. 18, 2015) (providing a general overview of the WTO's purpose and operations).

13 General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT] (requiring members to extend the trade treatment offered to any one nation to all others in order to avoid discriminatory effects in trade).

14 *Id.* art. III (prohibiting discrimination between domestic and foreign goods in domestic regulation).

15 *Id.* art. I, III (substantiating the basic trade rules of the nondiscrimination principle with the prohibition on quantitative restrictions).

16 WTO Agreement, *supra* note 11, pmbl. ("*Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations").

17 *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

18 Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 98 n.10 (2003).

19 *Understanding the WTO: Members and Observers*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 18, 2015); *see also* RAJ BHALA, INTERNATIONAL TRADE LAW 85 (1996) (describing the institutional foundations of GATT-WTO and NAFTA).

20 TANIA VOON, CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION 10 (2007).

recognized as important and legitimate in character."[21] Article XX(b), for instance, exempts measures "necessary to protect human, animal or plant life or health," while Article XX(g) exempts those "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption," and Article XX(a) exempts those actions "necessary to protect public morals."[22] These exemptions are subsequently subject to the preamble (or "Chapeau") of Article XX, which requires that restrictions not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[23] Securing international adherence to multilateral trade agreements like the WTO therefore requires assurances—or perhaps *insurance*—to nations that they will maintain their legislative jurisdiction over matters critical to their domestic governance, notwithstanding trade obligations to the contrary.[24] In predominately Muslim nations like Indonesia, the WTO's flexibility accommodates the provision of Shari'a law over areas of domestic concern, such as wildlife trafficking.

## II. SHARI'A LAW AND THE INTERNATIONAL TRADE IN ENDANGERED SPECIES

Shari'a is an all-encompassing Islamic code of conduct that is fundamentally and inseparably social, political, and religious in nature.[25] In the realm of international trade, Shari'a law is crucial because financial

21 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*] (complaint by India, Malaysia, Pakistan, and Thailand).

22 GATT, *supra* note 13, art. XX, para. I(a), I(b), I(g). To come within the strictures of these exceptions, certain thresholds must be met. An Article XX(b) measure, for example, must be shown to be "necessary" to further legitimate health goals, which both panel and Appellate Bodies interpreted to signify either the: (a) "least GATT-inconsistent" means of realizing the stated environmental goal; or (b) "least trade-restrictive" and most reasonably available means to achieve the stated objective. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 48–49 & n.15 (1994); *cf.* Appellate Body Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 72, 74, DS10/R-37S/200 (Oct. 5, 1990).

23 GATT, *supra* note 13, art. XX, pmbl.

24 *See* VOON, *supra* note 20, at 10.

25 Noel James Coulson, *Muslim Custom and Case-Law*, 6 INT'L J. FOR STUDY MOD. ISLAM 13, 13 (1959). Positive Shari'a law derives from four essential sources: (1) the Quran (Muslim Holy Book); (2) the *sunna* (the traditions and practices of the Prophet Muhammad); (3) the *ijma* (consensus of learned scholars); and (4) *qiyas* (method of analogical deduction). Together these sources govern the whole of Islam and the lives of believers—from social interactions to methods of prayer to international financial transactions. *Id.*

transactions engage the whole of society—from the individual to the nation—in the business of earning a living.[26] Relevant Islamic teachings in this area hold that social stability is furthered by a commercial society in which all benefit from earning a living in a wholesome and lawful manner.[27] Accordingly, at the heart of Islamic finance are the religious standards governing that which is lawful and good (*halal*), and that which is unlawful or forbidden (*haram*).[28]

Shari'a law carries within it numerous mechanisms for bringing economic transactions into conformity with the principles of Islam.[29] These materialize in practice in the form of *fatwas*, authoritative statements on unresolved legal questions by recognized Islamic scholars.[30] *Fatwas* materialize in practice as prohibitions, restrictions, obligations, and religious duties.[31] For example, throughout Shari'a law, prohibitions against the activities of "middlemen" are prevalent.[32] These are based on the belief that such activities result in unearned profits or violate the principle of harmlessness, i.e., that one should refrain from harming others to the greatest extent possible and avoid waste in all forms (including waste of natural resources).[33]

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26 Shaykh Yusuf Talal DeLorenzo, *Shari'ah Compliance Risk*, 7 CHI. J. INT'L L. 397, 407 (2007).

27 *Id.* The principle of equality, for example, prohibits extreme inequalities in the distribution of goods, while the principle of fairness holds that economic gains must be earned by the individual. *See* Timur Kuran, *On the Notion of Economic Justice in Contemporary Islamic Thought*, 21 INT'L J. MIDDLE EAST STUD. 171, 172 (1989). Thus, in a very small nutshell, Islamic economic justice requires the commercial system to treat "similar economic contributions similarly, and different contributions differently." *Id.*

28 DeLorenzo, *supra* note 26, at 407.

29 *See* Kuran, *supra* note 27, at 173. In modern Islamic finance, a *fatwa* is a formal certification of a financial product or service by a qualified Shari'a expert, or a group of such experts (also called a Shari'a Supervisory Board). *See* DeLorenzo, *supra* note 26, at 399–402. Certification therefore signifies to the Muslim consumer that a product complies not only with jurisdictional regulations, but that it has also been subjected to scrutiny by an authority on Islamic transactional law and is therefore consistent with Shari'a rules and standards. *Id.* at 400. Of course, the presence of a *fatwa* is insufficient in itself to guarantee complete market compliance: "*fatwa* risk" has to do with the possibility that the *fatwa* is ambiguous and will not be understood by any but those with specialized knowledge. *Id.* at 400, 402–04.

30 *What is a Fatwa?*, ISLAMIC SUPREME COUNCIL OF AM., http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/44-what-is-a-fatwa.html (last visited Feb. 20, 2015).

31 Kuran, *supra* note 27, at 173.

32 *Id.* at 175.

33 *Id.*; *see also* BAKER AHMAD ALSERHAN, THE PRINCIPLES OF ISLAMIC MARKETING 7–8 (2011).

Illegal wildlife trafficking, an insidious and lucrative business,[34] violates both of these fundamental principles of Islam. In terms of "unearned gains," profits are invariably concentrated at the level of the middlemen and above, where a product's value typically increases from twenty-five to fifty percent from the point of capture.[35] An African gray parrot exported from the Ivory Coast, for example, increases from $20 at capture to $100 at the point of export, to $600 for the importer at the consumer state, and to $1,100 for the specialist retailer.[36] Thus, harm is done not only to the frequently impoverished communities engaged in the dangerous and ill-paying activity of capturing the animals in the wild, but also to the species themselves. In Brazil, for instance, approximately thirty-eight million animals are illegally captured annually; of these, up to ninety percent die in the process of capture and movement through the supply chains.[37]

In March 2014, the Indonesian Council of Ulama,[38] the nation's top Islamic clerical body, responded to the growing environmental and social crises caused by wildlife trafficking in Indonesia[39] by issuing a *fatwa*

34 The World Wildlife Fund estimates that wildlife smuggling follows only drug and arms trafficking in terms of illicit profits, with approximately $15–25 billion generated annually. *See* DONALD R. LIDDICK, CRIMES AGAINST NATURE 41 (2011).

35 *Id.* at 43.

36 *Id.*; *see also* JACQUELINE L. SCHNEIDER, SOLD INTO EXTINCTION 5–6 (Graeme R. Newman ed., 2012); *cf.* REEVE, *supra* note 2, at 12–13. An argument often used to support the trade is the economic benefit accruing to range states and in particular to rural communities. But the reality is that those who benefit most from the wildlife trade are the middlemen and kingpins at the head of the chain, while the trappers and poachers at the bottom often put their lives at risk, but receive a relative pittance in return. *Id.* at 13.

37 Liddick, *supra* note 34, at 42. Such startling and tragic percentages precipitate an even greater harvesting of stressed and endangered species in order to meet the basic economic principle of supply and demand. *See* SCHNEIDER, *supra* note 36, at 12–13.

38 Mark E. Cammack & R. Michael Feener, *The Islamic Legal System in Indonesia*, 21 PAC. RIM. L. & POL'Y J. 13, 33 (2012). The Council has "no formal authority or institutional capacity for the enforcement of Islamic doctrine in Indonesia," nor has it been cited directly in Indonesian court cases. *Id.* at 34. Despite these formalities, the pronouncements of the Council nevertheless carry considerable weight as the councilors of approximately 205 million Muslims, roughly thirteen percent of the world's Muslim population. *See Muslim Population of Indonesia*, PEW RESEARCH CENTER (Nov. 4, 2010), http://www.pewforum.org/2010/11/04/muslim-population-of-indonesia/ (noting that approximately eighty-eight percent of Indonesia's population is Muslim). For a critical examination of the normative and legally pluralistic practices that have emerged in contemporary Indonesia, see John R. Bowen, *Normative Pluralism in Indonesia: Regions, Religions, and Ethnicities*, *in* MULTICULTURALISM IN ASIA 152–69 (Will Kymlicka & Baogang He eds., 2005).

39 The *fatwa* was issued during a period of unprecedented transnational wildlife crime, with disproportionate burdens on countries such as Indonesia that stand as one of the last bastions of natural biodiversity. *See* Christy, *supra* note 10. For a general analysis of

against all hunting of, and trade in, endangered species.[40] The Council's secretary in charge of fatwas, Asrorun Ni'am Sholeh, explained to the Associated Free Press: "All activities resulting in wildlife extinction without justifiable religious grounds or legal provisions are *haram*. . . . These include illegal hunting and trading of endangered animals."[41] It is difficult to anticipate what, if any, regulatory changes the *fatwa* could put into motion at the national-level.[42] For the purposes of this Essay, assume arguendo that the Indonesian government has adopted the ban on all trade in endangered species as a matter of national policy.

## III. HYPOTHETICAL *FATWA* ANALYSIS UNDER THE ARTICLE XX(A) PUBLIC MORALS EXCEPTION

Presuming the Indonesian government adopted its *fatwa* against all hunting of, and trade in, endangered species as national policy, the key issue becomes how the WTO might respond under an Article XX(a) exception based on the protection of public morals.[43] Notwithstanding the presence of Article XX(a) as an established element of international trade law, it is only recently that the WTO has begun applying the exception within the framework of its Dispute Settlement Body.[44] Panels have since

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the biodiversity crisis in Indonesia, see *Indonesian Biodiversity and Action Plan (2003-2020)*, CENTER FOR BIOLOGICAL DIVERSITY, INDONESIAN NATIONAL PLANNING AGENCY, AND U.N. GLOBAL ENVIRONMENT FACILITY (2003), *available at* http://www.bas.ynu.ac.jp/data2011/strategy/indonesia2.pdf.

40 For the full English-language text of the resolution, see FATWA COMM'N, INDONESIAN COUNCIL OF ULAMA, PROTECTION OF ENDANGERED SPECIES TO MAINTAIN THE BALANCED ECOSYSTEMS (2014) [hereinafter FATWA TEXT], *available at* http://www.arcworld.org/downloads/Fatwa-MUI-English-Jun-2014.pdf (citing Quranic verses, hadiths of the Prophet, principles of Islamic jurisprudence, and national legislation in support of the ban on all hunting and trade in endangered species).

41 J.T. Quigley, *Divine Intervention? Indonesian Clerics Issue Fatwa to Protect Endangered Species*, THE DIPLOMAT (Mar. 8, 2014), http://thediplomat.com/2014/03/divine-intervention-indonesian-clerics-issue-fatwa-to-protect-endangered-species/ (emphasis added) (internal quotation marks omitted). Sholeh went on to explain: "Whoever takes away a life, kills a generation. This is not restricted to humans, but also includes God's other living creatures, especially if they die in vain." *Id.*

42 *See* Cammack & Feener, *supra* note 38, at 34–35.

43 GATT, *supra* note 13, art. XX, para. I(a) ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect public morals . . . .").

44 Tamara S. Nachmani, *To Each His Own: The Case for Unilateral Determination of Public Morality Under Article XX(a) of the GATT*, 71 U. TORONTO FAC. L. REV. 31, 33 (2013). Recent cases under the WTO Dispute Settlement System addressing invocations of

held that "public morals" should be interpreted progressively as "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[45] Public morals were additionally found to embody "standards of right and wrong conduct maintained by or on behalf of a community or nation."[46] The bifurcated designation of a "community *or* nation" suggests an Article XX(a) exception may apply even if only a single nation, such as Indonesia, adopts the moral perspective in question.[47] Analyzing the elements of the public morals assists in determining whether a WTO Dispute Settlement Body would affirm Indonesia's Article XX(a) assertion.

### *A. Biodiversity Conservation: An Issue of Morality*

The first factor for a WTO panel to consider would be whether the measure in question covers an area of moral concern. Over the course of the WTO's history, trade regulations based on human and animal welfare and religious interests have qualified as valid grounds for raising an Article XX(a) exception.[48] In light of these diverse and subsequently substantiated concerns, Indonesia's *fatwa* against the hunting in and trade of endangered species should be entitled to a defense under Article XX(a). Biodiversity conservation is a pressing moral subject in Indonesia and much of the modern world. The *fatwa* supports domestic legislation previously implemented to protect citizens and species from environmental

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Article XX(a) include: *Shrimp-Turtle*, *supra* note 21; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, *U.S.-Gambling*]; Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009) [hereinafter *China-Audiovisual*]; and Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R (Nov. 25, 2013) [hereinafter *Seal Products*].

45 Panel Report, *U.S.-Gambling Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/R (Nov. 10, 2004) [hereinafter *U.S.-Gambling Measures*].

46 *Id.* ¶ 6.465 (emphasis added).

47 Nachmani, *supra* note 44, at 46.

48 *See, e.g.*, *Seal Products*, *supra* note 44, ¶ 8 (banning the import of seal products from Canada based in part on preserving public morality); OFFICE OF CHIEF ECONOMIST, SAMBA FIN. GRP., SAUDI ARABIA AND THE WTO 42 (2006), *available at* http://jeg.org.sa/data/modules/contents/uploads/infopdf/38.pdf (citing the WTO's "religious or cultural grounds" exception in support of the assertion that Saudi Arabia's WTO membership would not require it to import alcohol or pork); WTO Secretariat, *Israel—Trade Policy Review*, 57, WT/TPR/S/272 (Sept. 25, 2012) (stating that Israel continues to ban the import of non-kosher meats).

degradation, and the ban is seen as the only way to protect morality by filling the gap between national law and illegal trafficking activities.[49] As a result, these circumstances support the fundamental moral nature of the *fatwa* in question.

### *B. "Necessary" to Protect Public Morals*

Though it would appear that the *fatwa* in furtherance of endangered species preservation would likely satisfy the base-level test of Article XX(a)—the presence of a moral concern—it is more contestable whether the complete ban is "necessary." Article XX necessity requirements are generally understood as adopting the "minimum derogation principle," which evaluates whether "alternative measures [are] reasonably available that would be as effective as the one adopted" and, if WTO inconsistent, "less trade restrictive than the measure which was actually adopted."[50] Accordingly, in determining whether a regulation is necessary, a WTO panel considers two factors: (1) the nexus between the regulated product and the regulating country;[51] and (2) whether there are less trade-restrictive measures available to achieve the same goal.[52]

#### 1. The Nexus Requirement

In *Shrimp-Turtle*, the Appellate Body indicated that Article XX requires a significant "nexus" between the restrictive trade measure and the goals of the regulating country.[53] This requirement is arguably satisfied in the case of Indonesia, as a *fatwa* against the endangered species trade aims to protect the public morality of the country's own citizenry, rather than

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49 *See* FATWA TEXT, *supra* note 40, at 19–20 (noting national legislation and initiatives on the conservation of biodiversity already in print, including, *inter alia*, "The Law of the Republic of Indonesia (RI) Number 5/1990 on Conservation of Natural Resources and Its Ecosystem;" "Government Regulation No. 7/1999 on the Preservations of Plant and Wildlife Species;" and the World Wildlife Fund of Indonesia and the Tiger Conservation Forum's study entitled, "Protecting Tigers and Other Endangered Species with Islamic Wisdom"); *see also* Christy, *supra* note 10.

50 Christopher Doyle, Note, *Gimme Shelter: The "Necessary" Element of GATT Article XX in the Context of the* China-Audiovisual Products *Case*, 29 B.U. INT'L L.J. 143, 152 (2011) (citing KEVIN C. KENNEDY, INTERNATIONAL TRADE REGULATION 270 (Vicki Been et al. eds., 2009)).

51 *See, e.g.*, *Shrimp-Turtle*, *supra* note 21, ¶ 133.

52 *See, e.g.*, Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 165, WT/DS161/ABR (Dec. 11, 2000) [hereinafter *Korea-Beef*] (citing Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439-36S/345 (Nov. 7, 1989) [hereinafter *U.S.-Section 337*]).

53 *Shrimp-Turtle*, *supra* note 21, ¶ 133 (noting a "sufficient nexus" between the object being regulated and the state imposing the trade restriction).

that of the international community or neighboring nations.[54] The endangered products and derivatives are imported and exported from Indonesia. Consequently, the country has direct contact with the products affronting public morals that are therefore subject to the national ban.[55] The nexus requirement of Article XX's Chapeau would hence be satisfied, since morality, not arbitrary discrimination or disguised restrictions, forms the locus of the *fatwa*'s objectives.

2. Least Restrictive Means

The second factor under Article XX's "necessary" test is whether the regulating nation adopted the least restrictive means available to obtain its goal.[56] According to the Appellate Body in *Korea-Beef*, "a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[57] However, the panel in *Brazil-Tyres* nonetheless recognized that "there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective."[58] In such cases, it is possible to "successfully defend[] an import ban on importation under Article XX," despite the continued perspective on import bans as draconian, last-resort measures under international trade law.[59]

Given that Indonesia's trade restriction would plainly encompass a ban on certain products, i.e., endangered species, the question thus remains whether it is the least restrictive means available for achieving the goal of protecting public morals in this area. The WTO has acknowledged that answering this question requires a skilled balancing of interests.[60] In

54 *See* Robert Galantucci, *Compassionate Consumerism Within the GATT Regime: Can Belgium's Ban on Seal Product Imports Be Justified Under Article XX?*, 39 CAL. W. INT'L L.J. 281, 294 (2009) (discussing this principle with regard to Belgium's seal product import ban).

55 *Id.* Moreover, Indonesia would not be arguing for a more limited or even more appropriate trade in endangered species. Rather, the complete ban is concerned with preserving Indonesia's public morals from associating with what Shari'a law considers to be an immoral or *haram* trade. *See* Notification, *Comment on Technical Barriers to Trade*, ¶ 7, G/TBT/N/BEL/39 (Mar. 8, 2006).

56 *Korea-Beef*, *supra* note 52, ¶ 165.

57 *Id.* (citing *U.S.-Section 337*, *supra* note 52, ¶ 5.26).

58 Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.211, WT/DS332/R (June 12, 2007) [hereinafter *Brazil-Tyres*].

59 *Id.* ¶ 7.211 n.1377.

60 *See* Galantucci, *supra* note 54, at 296.

*Korea-Beef*, the WTO held that "[t]he more vital or important [the] common interests or values are, the easier it would be to accept as 'necessary' a measure designed [to achieve those goals]."[61] Subsequently, a country invoking an Article XX exception must consider four factors in its determination of whether a proposed trade regulation is the least restrictive means available: (1) the importance of the stated objective; (2) the restrictive nature of the regulation; (3) the nexus of the regulation to the stated objective; and (4) the availability of alternative measures in place of that being proposed.[62]

First, a country must evaluate the importance of its stated objective as embodied by the proposed trade restriction. Indonesia's interest in protecting public morals is of the "highest degree" as it relates to "protecting human health and life."[63] Previous disputes before the WTO considered goals of an arguably lesser degree—including money laundering, fraud, and underage gambling—and held these to be legitimate objectives of restrictive trade policies.[64] As such, the first factor will most likely be satisfied in the instant case because wildlife trafficking activities endanger both animal and human health and serve as grounds for national, and international, moral concern.

Next, the regulating country must consider the degree of coverage proposed by the restriction.[65] Indonesia's *fatwa* represents a complete ban on the hunting of, and trade in, endangered species. It is based on the inherent nature of the products themselves, and not on a particular process or method of production.[66] This is in contrast to the *Shrimp-Turtle* case, wherein the Appellate Body permitted processing standards to be imposed before importation of a product when there was not an outright ban.[67] Indonesia's law, in contrast, provides that absolutely no trade in endangered species and products is allowed regardless of the required standards (or rather lack thereof) under which the products were handled. Although the comprehensive nature of the prohibition furthers Indonesia's policy goals of protecting public morals by closing any potential loopholes around the *fatwa*, the total ban may consequently fail the second factor

61 *Korea-Beef*, *supra* note 52, ¶ 162. The Appellate Body later reaffirmed this principle. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (Mar. 12, 2001).

62 *Brazil-Tyres*, *supra* note 58, ¶¶ 7.108, 7.113, 7.115, 7.149.

63 *Id.* ¶ 7.151 (holding that protection of human health and life "is both vital and important in the highest degree").

64 *See U.S.-Gambling Measures*, *supra* note 45, ¶ 6.533.

65 *See* Galantucci, *supra* note 54, at 298.

66 *Shrimp-Turtle*, *supra* note 21, ¶ 141 (discussing the permissibility of a U.S. import restriction based on the process by which shrimp are harvested).

67 *Id.*

under the WTO's least restrictive means analysis due to its very nature—a sweeping prohibition tolerating no derogation in coverage.

Third, the country in question must gauge the connection between the actual trade measure and its stated purpose. The *fatwa* here most likely satisfies this nexus requirement as it applies equally to all endangered trade within Indonesia's borders and is consistent with Indonesia's policy priorities.[68]

Finally, under the fourth consideration, a country must demonstrate why its adopted measure is necessary even if alternative measures may be available.[69] While it is true that a ban is the most restrictive option to affect a product's movement within the realm of international trade, such restrictions are not per se prohibited and have been recently upheld by WTO panels.[70] Indonesia could convincingly argue that its objectives represent a categorical opposition to the exploitation of certain species. As a result, only a measure designed to completely eliminate the market for such activities and products would be able to meet this important domestic goal.[71] Although the *fatwa* is trade-restrictive, it should still be considered the least-restrictive measure available within the context of international wildlife trafficking.[72]

### *C. The "Chapeau" of Article XX*

As Appellate Bodies have emphasized throughout the course of the WTO's dispute settlement history, compliance with the Chapeau of Article XX constitutes a separate requirement that must be satisfied when invoking an Article XX exception.[73] In essence, the Chapeau requires that a country imposing trade restrictive measures act in good faith.[74] Such a requirement ensures the proper balancing of rights between the consulting Member States, i.e., between the substantive right to liberalized trade in the international arena and the sovereign right of nations to legislate regarding

68 *See* FATWA TEXT, *supra* note 40, at 19–20 (outlining the various national policies and programs the Indonesian government has adopted in furtherance of biodiversity conservation objectives).

69 Appellate Body Report, *U.S.-Gambling*, *supra* note 44, ¶ 311.

70 *See generally Brazil-Tyres*, *supra* note 58; *Seal Products*, *supra* note 44.

71 Galantucci, *supra* note 54, at 299.

72 *See generally* Vanda Felbab-Brown, *Indonesia Field Report IV: The Last Twitch? Wildlife Trafficking, Illegal Fishing, and Lessons from Anti-Piracy Efforts*, BROOKINGS INSTITUTE (Mar. 26, 2013), http://www.brookings.edu/research/reports/2013/03/25-indonesia-wildlife-trafficking-felbabbrown (reviewing the impacts of wildlife trafficking on, *inter alia*, global security, human health and livelihoods, and revenue streams).

73 *Shrimp-Turtle*, *supra* note 21, ¶¶ 156–57.

74 *Id.* ¶ 158 ("The chapeau of Article XX is, in fact, but one expression of the principle of good faith.").

areas of domestic concern.[75] In the instant case, Indonesia appears to be acting in good faith as it is neither protecting a domestic industry from foreign competition nor discriminating between the exports of different countries. Consequently, the nation is not engaging in actions that "would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[76]

## CONCLUSION

In light of the above analysis, it seems likely that the hypothetical situation in which Indonesia adopts as national policy a *fatwa* against all trade in endangered species would survive a challenge before a WTO Dispute Settlement Body. WTO jurisprudence accentuates the continually evolving nature of public morals within the sphere of international trade. However, stemming from this jurisprudential precedent is the equally compelling principle that states must have the authority—and flexibility—to construe their own domestic understanding and protection of public morals. In the instant case, biodiversity conservation emerges as a legitimate moral concern as a result of overexploitation of natural resources and wildlife trafficking activities. Indonesia's *fatwa* supplements already-in-place domestic legislation directed at protecting citizens and species from the negative influences of *haram* trading practices. As a result of the environmental, social, and religious crises that the overharvesting of species generates through wildlife trafficking, Indonesia had no viable alternative besides the issuance of a complete ban on the trade in order to meet its domestic objective of protecting public morals. Ultimately, these factors coalesce into a strong case for the validity of Indonesia's trade restriction, and indicate a hopeful (if only hypothetical) trend in future WTO jurisprudence.

75 *Id.* ¶ 159.

76 GATT, *supra* note 13, art. XX.