

2013

Biting the Hand that Feeds: The Takings Clause and AIG

Matthew Berger

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/jibl>



Part of the [Law Commons](#)

Recommended Citation

Berger, Matthew (2013) "Biting the Hand that Feeds: The Takings Clause and AIG," *Journal of International Business and Law*: Vol. 12: Iss. 2, Article 16.

Available at: <http://scholarlycommons.law.hofstra.edu/jibl/vol12/iss2/16>

This Notes & Student Works is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in *Journal of International Business and Law* by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

BITING THE HAND THAT FEEDS: THE TAKINGS CLAUSE AND AIG

Matthew J. Berger*

I. INTRODUCTION

It was the worst economic climate in over seventy years.¹ The Dow Jones Industrial Average plummeted from its high of 14,164 to just over 6,500, causing the index to lose half its value in the span of seventeen months.² The unemployment rate in the United States reached approximately ten percent (10%), its highest level in over two decades.³ Banks and financial institutions were failing in the largest numbers in decades.⁴ The burst of the housing bubble and the resulting recession precipitated the precarious position American International Group, Inc. (AIG) found itself in at the end of 2008. In the wake of failing companies and government bailouts, the United States government took action and partially nationalized AIG. In return for the \$85 billion injection, the government received approximately an eighty percent (80%) equity stake in AIG.⁵ While the steps the government took prevented further economic harm, Starr International Company, Inc. (Starr), AIG's largest shareholder, brought suit under the Takings Clause⁶ against the federal government.⁷ If Starr succeeded, the

* J.D. /M.B.A. Candidate, 2015, Maurice A. Deane School of Law/ Frank G. Zarb School of Business at Hofstra University. I would first like to thank my family for their unwavering support and without whom this Note would not be possible; my parents Dave and Joan, and my brothers Michael and Ryan. I would also like to thank Meredith-Anne Kurz for always being there when I needed help. To Professor Miriam R. Albert for her guidance, suggestions, and encouragement throughout the writing process. Lastly, I would like to thank the staff of the *Journal of International Business and Law*, particularly the Managing Board for providing me with this opportunity, and my Notes and Comments Editor, Arielle Joy Albert for helping me develop this topic.

¹ Marilyn Geewax, *Did the Great Recession Bring Back the 1930s?*, NPR (July 11, 2012, 11:52 AM), <http://www.npr.org/2012/07/11/155991507/did-the-great-recession-bring-back-the-1930s>.

² Kimberly Amadeo, *Stock Market History*, ABOUT.COM, http://useconomy.about.com/od/stockmarket/components/a/Dow_History.htm (last updated Mar. 5, 2013).

³ U.S. BUREAU OF LABOR STATISTICS, *The Recession of 2007-2009*, SPOTLIGHT ON STATISTICS (Feb. 2012), http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

⁴ The last time so many banks failed was during the Savings and Loan Crisis, in which over 2,300 banks failed, including 534 in one year. Jill Konieczko, *The 10 Biggest U.S. Bank Failures*, U.S. NEWS (July 15, 2008), <http://money.usnews.com/money/business-economy/articles/2008/07/15/the-10-biggest-us-bank-failures>.

⁵ Liam Plevin & Serena Ng, *Greenberg Sues U.S. Over AIG Rescue*, WALL ST. J., Nov. 22, 2011, at C3.

⁶ The Takings Clause is the phrase in the Fifth Amendment that limits the government's power of eminent domain: "the authority to take private property when necessary for government activities." ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 656-57 (4th ed. 2011).

⁷ Leslie Scism & Joann S. Lublin, *AIG Board Won't Sue Over Terms of Rescue*, WALL ST. J., <http://online.wsj.com/article/SB10001424127887323442804578231660629820142.html> (last updated Jan. 9, 2013). Starr brought a derivative action, which is a lawsuit brought by shareholders allegedly acting on behalf of the corporation because the management has failed to act. *Id.* AIG's Board of Directors decided not to join the lawsuit after news that it was contemplating joining the suit raised widespread public criticism. *Id.*; see also *The Daily Show with Jon Stewart: Jeff Bridges* (Comedy Central television broadcast Jan. 9, 2013), available at <http://www.thedailyshow.com/watch/wed-january-9-2013/ingrateful-basterds---aig> (displaying a video showing the public opinion of a lawsuit against the U.S. based on the AIG bailout); Jessica Pressler, *The Randian and the Bailout*, NEW YORK, Oct. 29, 2012, at 30, 33 (describing the bailout of AIG as "one of the most despised events in recent American history"). Representative Elijah Cummings compared the idea of AIG joining the

government would be forced to pay just compensation and arguably one of its most effective tools to stabilize the economy would be limited.

This Note addresses the government's ability to take necessary action to stabilize the economy in the face of a collapse. Nationalization has proven to be a successful remedy for stabilizing companies on the brink of failure.⁸ The role of nationalization in times of economic distress is addressed through an analysis of previous economic downturns, including the recession in 2008. The continued viability of nationalization in future downturns is analyzed through an ongoing lawsuit brought by Starr against the United States, which threatens to hinder the government's ability to act in times of economic emergency. Short of a constitutional amendment to the Takings Clause, the only way to protect the government when acting in difficult circumstances is through invoking the Emergency Exception to the Takings Clause.⁹ Part II analyzes the concept of nationalization and its role in previous times of financial distress. Part III explores Starr's lawsuit by analyzing the most recent financial crisis, the merits of the lawsuit, and how the outcome of the lawsuit can impact future government action. Part IV analyzes the international community's actions in preventing economic deterioration, notably nationalization, and what role, if any, that concept should play in the Court's decision regarding the Starr lawsuit. While the United States was hesitant to nationalize failing financial institutions at home, governments around the world nationalized banks in an effort to save their failing economies. Part V offers a solution to the current problem in the form of either a constitutional amendment to the Takings Clause or the expansion of the Emergency Exception.

lawsuit to someone "suing the paramedic who just gave you CPR because he didn't give you a pillow." Jim Puzzanghera, *AIG considers joining lawsuit against U.S. over bailouts*, L.A. TIMES (Jan. 8, 2013), <http://articles.latimes.com/2013/jan/08/business/la-fi-aig-lawsuit-20130109>. In response, the AIG Board released a statement saying, "The AIG Board has determined to refuse Starr's demand in its entirety, and will neither pursue these claims itself nor permit Starr to pursue them in AIG's name." Danielle Kurtzleben, *AIG Will Not Join Lawsuit Against Government*, U.S. NEWS (Jan. 9, 2013), http://www.usnews.com/news/articles/2013/01/09/aig-will-not-join-lawsuit-against-government_print.html.

⁸ Nationalization, the expropriation of a public company by a government, refers to the partial or full nationalization of a company on a temporary basis. Nationalization is an unpopular idea because people either believe the government is not the right actor to run a company, or it affords the government too much power. When the economy has settled, the company should be reprivatized as it was in the case of AIG. Reprivatization is the process of returning private control to an organization that was under public control. *Reprivatized*, DICTIONARY.COM, <http://dictionary.reference.com/browse/reprivatized> (last visited Feb. 13, 2013). Whatever the feeling about nationalization, it has continued to be proven successful in loosening up credit and protecting a failing company. PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS* 186 (2009). As Paul Krugman put it, "[n]othing could be worse than failing to do what's necessary out of fear that acting to save the financial system is somehow 'socialist.'" *Id.*

⁹ The Emergency Exception to the Takings Clause is a theory that is sparsely applied by the Supreme Court when there has been a taking to alleviate the government of the burden of paying just compensation.

CHEMERINSKY, *supra* note 6, at 661. See *infra* Part V.

II. NATIONALIZATION

A. Background

Since the United States was founded and its economic system was established, it has suffered from periods of recessions and depressions.¹⁰ As the country has experienced more downturns and recessions, the government has become more adept at handling these periods of decline by manipulating the economy to avoid entering a depression.¹¹ These methods of manipulation include lowering interest rates, buying bonds, capital injections through bailouts, and nationalization as a measure of last resort.¹²

Nationalization occurs when the government expropriates partial or complete control over a public company or industry.¹³ While often controversial, nationalization is arguably the most effective method of preventing a looming depression.¹⁴ However, it is also one of the most limited. The Takings Clause of the Fifth Amendment of the Constitution prevents the government from taking private property without just compensation.¹⁵ Although this clause is essential to the protection of citizens' rights from government abuse, its limitations may hamper the government's ability to act effectively during an economic crisis.

B. Great Depression vs. Savings and Loan Crisis

An analysis of past United States economic crises shows the importance of the government's ability to act to stabilize the economy. This is illustrated through a comparison of the Great Depression and the Savings and Loan Crisis. The Great Depression is an example of a crisis in which the government did not utilize nationalization and instead let the banking sector fail. In contrast, during the Savings and Loan Crisis the government acted quickly and was able to limit the damage of the downturn by nationalizing failing institutions.¹⁶

¹⁰ A recession is characterized by two consecutive quarters of a declining Gross Domestic Product (GDP). *Recession*, INVESTOPEDIA, <http://www.investopedia.com/terms/r/recession.asp#axzz2J2jr8bIE> (last visited Feb. 13, 2013). A depression is an extended recession with high levels of unemployment. *Depression*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/depression.asp#axzz2J2jr8bIE> (last visited Feb. 13, 2013).

¹¹ PAUL KRUGMAN, *supra* note 8, at 15. The Chairman of the Federal Reserve "Ben Bernanke went on record a few years ago with the claim that while the economy would continue to suffer from occasional setbacks, the days of really severe recessions, let alone worldwide depressions, were behind us." *Id.* For example, when the stock market crashed in 1987, it had declined as much as the market did on the first day of the crash in 1929. *Id.* at 22. However, the Federal Reserve acted immediately by injecting capital into the economy, which facilitated a quick recovery. *Id.*

¹² See generally *The Financial Crisis: A Timeline of Events and Policy Actions*, FED. RESERVE BANK OF ST. LOUIS, <http://timeline.stlouisfed.org/pdf/CrisisTimeline.pdf> (last visited Jan. 19, 2013).

¹³ *Nationalization*, INVESTOPEDIA, <http://www.investopedia.com/terms/n/nationalization.asp#axzz2J2jr8bIE> (last visited Feb. 13, 2013).

¹⁴ See Ken Little, *Government Must Clean Up Financial Institutions*, ABOUT.COM, <http://stocks.about.com/od/investing101/a/030309banks.htm> (last visited Jan. 26, 2013).

¹⁵ U.S. CONST. amend. V.

¹⁶ Nationalization was one of many measures taken to stabilize the economy during the Savings and Loan Crisis. See generally Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and*

Throughout the history of the United States there have been many instances in which private institutions were bailed out when faced with a crisis.¹⁷ For example, President Franklin D. Roosevelt enacted several government bailouts and rescue programs shortly after he took office in the midst of the Great Depression.¹⁸ Similarly, during the Savings and Loan Crisis of the late 1980s, the government spent approximately \$300 billion to shore up the struggling industry.¹⁹

The Great Depression was by far the worst economic climate the United States has ever faced. This unparalleled downturn was precipitated by the stock market crash in 1929 and widespread bank failures.²⁰ The Federal Reserve failed to take action and the banking sector collapsed, creating a ripple effect throughout the entire economy.²¹ Facing an unprecedented economic crisis in which the unemployment rate was approaching twenty-five percent (25%), the government enacted some of the most extensive bailouts and financial rescues in the history of the United States.²² The government established the Home Owner's Loan Corporation to buy defaulted mortgages from banks, invested in public works projects such as the Hoover Dam, rebuilt bridges and highways, and provided subsidies to farmers.²³ While government programs helped in the short run, it was not until the beginning of World War II that the country began to emerge from the Great Depression.²⁴ The Federal Reserve learned from this crisis and it prepared it to take aggressive action to prevent the financial sector from collapsing in the future.²⁵

In contrast, during the Savings and Loan Crisis in the 1980s, the government acted to rescue the Savings and Loan industry by nationalizing the struggling thrifts.²⁶ The Savings and Loan Crisis began when the industry was deregulated and permitted to raise interest rates,

Consequences, 13 FDIC BANKING REV. 26, 28 (2000) available at http://www.fdic.gov/bank/analytical/banking/2000dec/brv13n2_2.pdf.

¹⁷ See Jesse Nankin & Krista Kjellman Schmidt, *History of U.S. Gov't Bailouts*, PROPUBLICA, <http://www.propublica.org/special/government-bailouts> (last updated Apr. 15, 2009). A bailout occurs when a struggling business receives money from another business, individual, or government in order to prevent the business from failing. *Bailout*, INVESTOPEDIA, <http://www.investopedia.com/terms/b/bailout.asp#axzz21LR50Lz1> (last visited Feb. 13, 2013).

¹⁸ Marc Davis, *Top 6 U.S. Government Financial Bailouts*, INVESTOPEDIA (July 12, 2009), <http://www.investopedia.com/articles/economics/08/government-financial-bailout.asp#axzz29wkTvZWa>.

¹⁹ *Id.* A savings and loan is primarily involved in "allow[ing] members to deposit savings and borrow money at rates that were slightly more competitive than commercial banks." *Federal Savings and Loan*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/federal-savings-and-loan.asp#ixzz2CEEuqKaC> (last visited Feb. 13, 2012).

²⁰ David Wheelock, *The Great Depression: Q&A*, FED. RESERVE BANK OF ST. LOUIS, <http://www.stlouisfed.org/greatdepression/qa.html> (last visited Jan. 21, 2013).

²¹ *Id.*

²² Davis, *supra* note 18.

²³ *Id.*

²⁴ Wheelock, *supra* note 20. The question of what really brought the U.S. out of the Great Depression is still widely debated. *Id.* While the New Deal programs are largely attributed with the climb out of a depression, modern economists believe these programs may have actually hindered the recovery. *Id.* The increased production that accompanied the U.S.' preparation for World War II is often credited as the reason for the country's recovery. *Id.* However, most people agree that the depression began to recede when banks stopped failing and the money supply increased. *Id.*

²⁵ *Id.*

²⁶ See Curry & Shibut, *supra* note 16, at 30.

make commercial loans, and invest in speculative real estate.²⁷ When the industry began to struggle, the government established the Federal Savings and Loan Insurance Corporation (FSLIC) and the Resolution Trust Corporation (RTC) to stabilize the financial institutions.²⁸ The RTC was responsible for managing and disposing of the assets of insolvent thrifts in conservatorship.²⁹ Approximately 750 insolvent thrifts were placed into conservatorship, representing approximately twenty-five percent (25%) of the savings and loan industry.³⁰ By 1995, the RTC had sold over ninety-five percent (95%) of these thrifts, achieving a recovery rate of over eighty-five percent (85%).³¹

The Savings and Loan Crisis was not as severe as the Great Depression, due in part to the government taking the appropriate action.³² The government learned from the Great Depression and combined bailouts with nationalization, which prevented the economy from further decline and led to a quicker recovery.

III. STARR INTERNATIONAL COMPANY, INC. V. UNITED STATES

Starr International Company, Inc., the largest shareholder of AIG, was adversely affected when the government took an eighty percent (80%) stake in AIG. As a result, Starr filed a lawsuit against the United States government to recover just compensation for the alleged unconstitutional taking of private property.³³

The lawsuit alleged three distinct violations. The first is a Takings Clause violation based on the alleged “expropriation of the economic value and voting power associated with the shares of AIG common stock owned by Starr and the class.”³⁴ In the second claim, Starr

²⁷ Kimberly Amadeo, *Savings and Loan Crisis*, ABOUT.COM, http://useconomy.about.com/od/grossdomesticproduct/p/89_Bank_Crisis.htm (last visited Feb. 13, 2013).

²⁸ Curry & Shibut, *supra* note 16, at 26. The two agencies closed 1,043 institutions, which held approximately \$519 billion in assets. *Id.* From the beginning of the crisis in 1986 to the end in 1995, approximately 50% of the savings and loans in the U.S. failed. *Id.* The number of federally insured thrift institutions went from 3,234 to 1,645 in the matter of a decade. *Id.*

²⁹ *Id.* at 28. This is similar to the situation involving Fannie Mae and Freddie Mac, both of which were placed under the conservatorship of the U.S. government. Nankin & Kjellman Schmidt, *supra* note 17. Conservatorship occurs when an individual or a company is deemed incapable of handling its legal matters, so a conservator is appointed to handle their legal matters for them. *Conservatorship*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/conservatorship.asp#axzz2IS4O7jR2> (last visited Feb. 13, 2013). A thrift is another name for a savings and loan institution. *Thrift*, INVESTOPEDIA, <http://www.investopedia.com/terms/t/thrift.asp#axzz2L7pQss7f> (last visited Feb. 16, 2013).

³⁰ Frederic S. Mishkin, *Appendix 1 to Chapter 11: The Savings and Loan Crisis and Its Aftermath*, in *THE ECONOMICS OF MONEY, BANKING AND FINANCIAL MARKETS* 44, 49, available at <http://wps.aw.com/wps/media/objects/7529/7710164/appendixes/ch11apx1.pdf>.

³¹ *Id.* The recovery rate is the “[a]mount recovered through foreclosure or bankruptcy procedures in event of a default, expressed as a percentage of face value.” *Recovery Rate*, NASDAQ, <http://www.nasdaq.com/investing/glossary/t/recovery-rate> (last visited Apr. 1, 2013).

³² Kimberly Amadeo, *How Does the Financial Crisis Compare to the S&L Crisis and other Bank Crises?*, ABOUT.COM, http://useconomy.about.com/od/grossdomesticproduct/f/S_L_liquidity.htm (last visited Apr. 1, 2013). In terms of the unemployment rate, the market value lost, and the length of the crisis, the Great Depression was far worse than the Savings and Loan Crisis. *Id.* However, the amount of capital lost as a result of the Financial Crisis of 2008 dwarves both the Savings and Loan Crisis and Great Depression, costing the government over \$1 trillion. *Id.*

³³ *Starr Int’l Co., Inc. v. United States*, 106 Fed. Cl. 50, 59 *reconsideration denied*, 107 Fed. Cl. 374 (Fed. Cl. 2012).

³⁴ *Id.*

seeks “just compensation for the Government’s alleged taking of a 79.9% equity interest in AIG, as well as a portion of the collateral posted by AIG prior to the formation of [Maiden Lane III LLC] ML III.”³⁵ The third allegation against the government alleged “an illegal exaction claim, asserting that the Government exacted and retained AIG’s property in excess of the Government’s statutory and regulatory authority.”³⁶

A. History of American International Group (AIG)

American International Group (AIG) is one of the leading international insurance organizations in the world, selling products to over 88 million customers in more than 130 countries.³⁷

1. The Rise of AIG

AIG started as American Asiatic Underwriters, a modest “two-room, two-clerk insurance agency” founded by Cornelius Vander Starr in China in 1919.³⁸ From that small two room operation it grew into one of the largest and most recognizable financial institutions in the world.³⁹ AIG in its current form was created in 1967 through a corporate reorganization that saw Maurice “Hank” Greenberg emerge as the company’s new President and Chief Executive Officer (CEO), succeeding C.V. Starr.⁴⁰ Following the reorganization, AIG became a holding company for a group of subsidiaries involved in a wide variety of insurance related activities.⁴¹

In 1960, shortly after Greenberg was elected President and CEO, AIG became a publicly traded company.⁴² Greenberg grew AIG through a series of mergers, acquisitions, and consolidations creating what was at one time the largest insurance company in the

³⁵ *Id.* Maiden Lane III is “a limited liability company formed to purchase multi-sector collateralized debt obligations (CDOs) on which AIG had written credit default swap and similar contracts in return for the cancellation of those contracts.” *American International Group (AIG), Maiden Lane II and III*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/newsevents/reform_aig.htm (last updated Dec. 13, 2012).

³⁶ *Starr Int’l Co., Inc. v. United States*, 106 Fed. Cl. at 59.

³⁷ *Key Facts and Figures*, AIG, http://www.aig.com/key-facts-and-figures_3171_437852.html (last updated Nov. 15, 2012); AIG, FORM 10-K 4 (2011) [hereinafter AIG, 10-K], available at http://www.aig.com/Chartis/internet/US/en/2011annualreport_tcm3171-440893.pdf.

³⁸ *American International Group Inc.*, in INTERNATIONAL DIRECTORY OF COMPANY HISTORIES (Derek Jacques & Paula Kepos eds., 2013), available at http://bi.galegroup.com.ezproxy.hofstra.edu/essentials/article/GALE%7C12501313462/6295942d83cb26f7359d07d897c764ad?u=nysl_li_hofs (last visited Feb. 15, 2013) [hereinafter *American International Group Inc.*].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* AIG’s major subsidiaries include Chartis (property-casualty and general insurance), Sun America Financial Group (life insurance and retirement services), United Guaranty (innovative private mortgage insurance), and International Lease Finance Corporation (full-service aircraft lessor). AIG, ANNUAL REPORT 3 (2011), available at http://www.aig.com/Chartis/internet/US/en/2011annualreport_tcm3171-440893.pdf. AIG is involved in “a little of everything: a small bank, an airline-leasing company, and a terrifyingly vast array of international companies that underwrote everything from cows in India to satellites orbiting the Earth.” Pressler, *supra* note 7, at 34. See also *American International Group Inc.*, *supra* note 38.

⁴² *American International Group Inc.*, *supra* note 38.

world.⁴³ This strategy fueled a period of rapid expansion overseas and entrances into new and specialized markets.⁴⁴ By the end of Greenberg's first decade as CEO, AIG's revenue had soared and its size had grown nearly tenfold.⁴⁵ This growth continued for over forty years while Greenberg was at the helm, despite extreme circumstances, such as the September 11th terrorist attacks.⁴⁶ In approximately forty years, Greenberg transformed AIG from a small to moderate size insurance company with a market value of \$300 million into a global financial powerhouse with a market value of over \$180 billion.⁴⁷

2. *Growth through Deregulation*

A substantial portion of AIG's growth can be attributed to the policy of deregulation that began in the early 1980s under President Ronald Reagan and continued for nearly thirty years, leading up to the 2008 financial crisis.⁴⁸ Deregulation continued under George H.W. Bush and was expanded under the Clinton administration with the repeal of the Glass-Steagall Act and the introduction of new financial instruments called derivatives.⁴⁹ AIG used this wave of deregulation to its advantage by selecting its regulator, acquiring a financial products division, and offering a variety of unregulated derivatives, most notably the credit default swap (CDS).⁵⁰ The essence of a CDS is that "[t]he buyer of a credit default swap receives

⁴³ *Id.* At its peak, AIG had a market value of approximately \$239 billion. *Id.* Some of the major acquisitions included National Union, American Home, 20th Century Industries (which later became 21st Century Insurance Group), SunAmerica Inc., and American General Corporation. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* AIG was able to continue its sustained period of excellence despite losing \$820 million after the September 11th attacks. *Id.* That year AIG managed to post strong revenues of \$5.36 billion, a 9.4% increase over the previous year. *Id.* Other extreme circumstances included a payout to Enron when some of its properties were nationalized by the Peruvian Government in 1988. *Id.* Following an arbitration hearing, AIG was forced to pay two-thirds of the \$162 million award, "one of the largest insurance-related arbitration awards in history." *Id.* AIG was also able to maintain a profit despite the presence of fraud. In 2004, a researcher in the insurance industry discovered accounting irregularities that had revealed a history of grossly overstating the company's profits in order to increase the stock price. *Id.* Following an investigation by then New York Attorney General, Eliot Spitzer, AIG admitted to committing approximately \$4.3 billion worth of accounting errors, the majority of which were related to overstated earnings. *Id.* When the errors were corrected, the company lost \$2.3 billion, a 2.7% decrease in market value. *Id.* In addition, the company agreed to pay a fine of \$1.6 billion, the largest in history at the time. *Id.* Despite the irregularities and the fines, many analysts still believed AIG was "one of the most profitable and fiscally sound corporations in the world." *Id.* Unfortunately for AIG, this would soon change two years later when AIG became the target of the one of the largest financial bailouts in American history. See Nankin & Kjellman Schmidt, *supra* note 17.

⁴⁷ *Starr Leadership*, STARR COMPANIES, <http://www.starrcompanies.com/about-starr/starr-leadership> (last visited on Oct. 2, 2012).

⁴⁸ *INSIDE JOB* (Sony Pictures Classics 2010) (transcript available at http://www.sonyclassics.com/awards-information/insidejob_screenplay.pdf).

⁴⁹ *Id.* The Glass-Steagall Act was repealed by the Gramm-Leach-Bliley Act, which separated commercial banking activities (accepting deposits) from investment banking activities (underwriting securities). *What Was The Glass-Steagall Act?*, INVESTOPEDIA (Feb. 26, 2009), <http://www.investopedia.com/articles/03/071603.asp#axzz2CDwKnmoM>. A derivative is "a security whose price is dependent upon or derived from one or more underlying assets." *Derivative*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/derivative.asp#ixzz2BqohpvEz> (last visited Feb 15, 2013).

⁵⁰ *The Role of Derivatives in the Financial Crisis: Hearing Before The Fin. Crisis Inquiry Comm'n*, 2 (2010), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0701-Dinallo.pdf (statement of

credit protection, whereas the seller of the swap guarantees the credit worthiness of the debt security. In doing so, the risk of default is transferred from the holder of the fixed income security to the seller of the swap.”⁵¹

The growing wave of deregulation permitted financial institutions to select their own regulators.⁵² By allowing companies to select their regulators, AIG was able to choose a regulator that was largely unfamiliar with its primary business practices.⁵³ AIG’s primary business is the sale of insurance, yet the company purchased a savings and loan institution in 1999, thus falling under the purview of the Office of Thrift Supervision (OTS).⁵⁴ The OTS regulates companies that own thrifts, which is another name for a savings and loan.⁵⁵ The OTS was primarily involved in the regulation of savings and loans; it was too small to handle a company with the size and complexity of AIG.⁵⁶ Therefore, even though AIG did not really belong in this category, it was able to select an organization inexperienced with its business, including the field of complex derivatives, and essentially remain unregulated.⁵⁷

The second impact of deregulation on AIG’s growth was the impact of repealing the Glass-Steagall Act (also known as the Banking Act of 1933).⁵⁸ The Glass-Steagall Act was enacted in the 1930s with the goal of preventing another “Great Depression.”⁵⁹ The Act

Eric Dinallo, Former Superintendent of the New York State Insurance Department) [hereinafter *The Role of Derivatives in the Financial Crisis*]. “AIG took advantage of the general tide of deregulation, but there are three specific parts of deregulation that working together created a perfect storm of financial disaster: 1. allowing financial institutions to select their own regulator, 2. allowing financial conglomerates by doing away with the divisions required by the Glass Steagall Act, and, 3. deregulation specifically of credit default swaps.” *Id.*

⁵¹ *Credit Default Swap - CDS*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/creditdefaultswap.asp#axzz289H14DLY> (last visited Feb. 15, 2013).

⁵² *The Role of Derivatives in the Financial Crisis*, *supra* note 50.

⁵³ *Id.*; see also Chana Joffe-Walt, *Regulating AIG: Who Fell Asleep On The Job?*, NPR (June 5, 2009, 11:10 AM), <http://www.npr.org/templates/story/story.php?storyId=104979546>. “Two crazy facts about the American system of regulating banks make clear why the parties are so mismatched. The first is that national banks choose their regulators — they go shopping. The second is that regulators want to get picked, because banks pay them for the service of regulation.” *Id.*

⁵⁴ *The Role of Derivatives in the Financial Crisis*, *supra* note 50, at 2-3; *The Federal Reserve Bank of New York’s Involvement with AIG*, THE FED. RESERVE BANK OF N.Y. (May 26, 2010), http://www.newyorkfed.org/newsevents/speeches/2010/bax_dah100526.html, [hereinafter *The Federal Reserve Bank of New York’s Involvement with AIG*]. “The Federal Reserve had no regulatory authority over the firm—no authority over its capital, no authority over its liquidity, and no oversight over its control functions. The Federal Reserve was not engaged in supervision of AIG. It did not have the legal authority to do so. These roles and responsibilities remained with state insurance regulators, and with the comprehensive consolidated supervisor, the Office of Thrift Supervision.” *Id.* As of July 21, 2011, the Office of Thrift Supervision is now called the Office of the Comptroller of the Currency. *About the OTS*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <http://www.ots.treas.gov/?p=AboutOTS> (last visited Feb. 15, 2013).

⁵⁵ Joffe-Walt, *supra* note 53.

⁵⁶ THE FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT 352 (2011) available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>. The regulation of AIG included AIG FP, whose primary business was in the trading of complex derivatives, which was well beyond the scope of the OTS’ normal regulation. *Id.*

⁵⁷ See Joffe-Walt, *supra* note 53. The OTS was too small to regulate an international company the size of AIG. *Id.*

⁵⁸ *The Role of Derivatives in the Financial Crisis*, *supra* note 50, at 3.

⁵⁹ See generally Corinne Crawford, *The Repeal Of The Glass- Steagall Act And The Current Financial Crisis*, 9 J. BUS. & ECON. RES. 127, 127-28 (2011) available at <http://www.unarts.org/H-II/ref/949-3747-1-PB-1.pdf>. Following the stock market crash of 1929, an investigation into the causes of the Great Depression revealed the

separated the activities of commercial and investment banks, forcing each bank to choose whether it would become a commercial bank involved in accepting deposits or an investment bank involved in underwriting securities.⁶⁰ Glass-Steagall was successful in preventing another significant banking crisis until it was repealed in the late 1990s, a period of approximately seventy years of financial stability.⁶¹ While Glass-Steagall was formally repealed in 1999 when Congress passed the Gramm-Leach-Bliley Act (also known as the “Financial Services Modernization Act of 1999”), the law was sparsely enforced.⁶² The Gramm-Leach-Bliley Act allowed commercial banks to engage in activities previously limited to investment banks.⁶³ The passage of this law paved the way for AIG to create AIG Financial Products (AIG FP), a hedge fund involved in underwriting securities.⁶⁴ AIG FP was not only a significant cause of AIG’s collapse, but also the collapse of the U.S. economy and the underlying events surrounding this lawsuit.⁶⁵

AIG FP was created when two traders from the highly profitable junk-bond firm Drexel Burnham Lambert approached Greenberg with the idea of buying a hedge fund that could profit from the gaps in federal regulation.⁶⁶ AIG FP was very successful, finding value

culture of greed and corruption on Wall Street. *Id.* at 128. Through the Pecora Investigation, it was discovered that traders were given higher bonuses based on the riskier the securities they sold. *Id.* Pecora also revealed that J.P. Morgan Jr. had made himself rich by short selling stock in his own company during the Depression. *Id.* Where before bankers enjoyed a strong reputation, they were now viewed with disdain and the public called for tighter regulations. *Id.* The result was the Banking Act of 1933, more commonly known as the Glass-Steagall Act. *Id.* The Act sought to prevent the very causes of the Great Depression by separating investment banking from commercial banking activities and creating the Federal Deposit Insurance Company (FDIC). *Id.* The FDIC insured all the deposits in commercial banks, preventing a future run on the banks. *Id.* As the think tank Demos put it, “Glass-Steagall’s goal was to lay a new foundation of integrity and stability for America’s banks. It worked. Financial panics had been regular and devastating occurrences since before the Civil War. No more. While individual banks continued to fail occasionally, their depositors escaped largely unscathed. Trust in the stock and bond markets also grew; for investors around the world, the U.S. financial system seemed to set a high standard of transparency and reliability.” James Lardner, *A Brief History of the Glass-Steagall Act*, DEMOS (Nov. 10, 2009), <http://www.demos.org/publication/brief-history-glass-steagall-act>.

⁶⁰ *The Long Demise of Glass-Steagall*, PBS (May 8, 2003) <http://www.pbs.org/wgbh/pages/frontline/shows/wallstreet/weill/demise.html>.

⁶¹ See Lardner, *supra* note 59. The repeal of Glass-Steagall allowed banks to consolidate all economic activity in one place, by allowing one institution to engage in the practices of banks, securities firms, and insurance companies. Crawford, *supra* note 59, at 130. By allowing these companies to merge, the law created institutions that were so intertwined with each other and the global economy that a failure of any of them would have been catastrophic. *Id.* However, there is considerable debate about the role of Glass-Steagall in the recent economic recession since the major institutions that were affected, with the exception of AIG and Citigroup, were pure investment banks. *Id.* Whether or not the repeal of Glass-Steagall led to the crisis, it is conceded that the repeal of Glass-Steagall made the crisis worse. *Id.*

⁶² See *The Long Demise of Glass-Steagall*, *supra* note 60. In 1998, Sanford Weill, the CEO of Travelers Group, an insurance company that owned the investment firm Salomon Smith Barney Holdings Inc., contacted Citicorp, a commercial bank, and engineered a merger that created the largest financial services company in the world: Citigroup, and effectively forced Congress to formally repeal the Glass-Steagall Act. *Id.*

⁶³ *Id.*

⁶⁴ Brady Dennis, *After 24 years, AIG lays Financial Products unit to rest*, THE WASH. POST (Aug. 5, 2011), http://www.washingtonpost.com/business/economy/after-24-years-aig-lays-financial-products-unit-to-rest/2011/08/05/gIQAvtY4wI_story.html.

⁶⁵ *American International Group Inc.*, *supra* note 38.

⁶⁶ Dennis, *supra* note 64. A junk bond is a bond with a lower credit rating because of its higher risk of default. *Junk Bond*, INVESTOPEDIA, <http://www.investopedia.com/terms/j/junkbond.asp#axzz2ILR50Lz1> (last visited Jan. 18, 2013). In the 1980s Drexel Burnham Lambert became famous for its junk-bond empire created by

in trades that no other firms saw.⁶⁷ In 1998, ten years before the financial crisis, AIG FP began selling CDSs.⁶⁸

The third impact of deregulation, and arguably the most significant was the sale of unregulated derivatives. The derivatives market fell under the purview of the Commodity Futures Trading Commission (CFTC), which suggested regulating the sector.⁶⁹ The move to regulate derivatives, which now represented a major portion of investment bank's revenues, was opposed at the time by Alan Greenspan (Chairman of the Federal Reserve), Robert Rubin (Secretary of the Treasury), Arthur Levitt (Chairman of the Securities and Exchange Commission), and the major financial institutions, thus the market remained unregulated.⁷⁰ In 2000, Congress passed the Commodity Futures Modernization Act, which ensured that the derivatives market would remain unregulated.⁷¹ When George W. Bush entered office, the banks were more profitable and concentrated than ever before.⁷²

In the early 2000s, one of the growing financial instruments increasingly being used was the collateralized debt obligation (CDO).⁷³ A CDO is a pool of mortgages that are bundled together and sold to investors.⁷⁴ In the new structure of lending, the lender was not concerned with the debtor's ability to repay the loan because he was not accepting the risk.⁷⁵ This perpetuated the crisis because lenders were no longer concerned with the debtor's credit worthiness and investment banks were eager to sell more CDOs because the more they sold, the higher the profits.⁷⁶

Investment banks soon began bundling subprime mortgages into the CDOs, which were the riskiest mortgages because they represented debtors who were unlikely to repay their loans.⁷⁷ Investors still bought these CDOs because even though they were backed by the

Michael Milken. See generally JAMES B. STEWART, *DEN OF THIEVES* 19 (1992). Three traders at Drexel Burnham Lambert approached Greenberg based on his ambitious reputation and goal of growing AIG into a global empire. Dennis, *supra* note 64; see also MICHAEL LEWIS, *THE BIG SHORT* 69-72 (2010).

⁶⁷ Dennis, *supra* note 64.

⁶⁸ *Id.* According to AIG FP's business models there was a 99.85% chance they would never have to pay out on a CDS contract. *Id.* AIG FP started issuing CDS contracts as a side business, but based on its success and apparent minimal risk, it began increasing its CDSs positions. *Id.* In a few years AIG FP became the largest issuer of CDS contracts, increasing its insurance on mortgages throughout the housing boom. *Id.*

⁶⁹ INSIDE JOB, *supra* note 48.

⁷⁰ *Id.*

⁷¹ *Id.* Derivatives, U.S. SEC. AND EXCH. COMM'N, <http://www.sec.gov/spotlight/dodd-frank/derivatives.shtml> (last updated July 11, 2012).

⁷² INSIDE JOB, *supra* note 48.

⁷³ *Id.*

⁷⁴ *Collateralized Debt Obligation – CDO*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/cdo.asp#axzz2J2jr8b1E> (last visited on Jan. 27, 2013).

⁷⁵ INSIDE JOB, *supra* note 48. "In the old system, when a homeowner paid their mortgage every month, the money went to their local lender. And since mortgages took decades to repay, lenders were careful. In the new system, lenders sold the mortgages to investment banks. The investment banks combined thousands of mortgages and other loans — including car loans, student loans, and credit-card debt — to create complex derivatives, called collateralized debt obligations, or CDOs. The investment banks then sold the CDOs to investors." *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* Subprime mortgages were mortgages offered to customers with lower credit ratings because these customers could not receive a conventional mortgage based on their "larger-than-average risk of defaulting on the loan." *Subprime Mortgage*, INVESTOPEDIA, http://www.investopedia.com/terms/s/subprime_mortgage.asp#axzz2HsHkbex9 (last visited Jan. 13, 2013).

BITING THE HAND THAT FEEDS

riskiest mortgages, they still received a triple A (AAA) rating, which was equivalent to the safety of United States Treasury Bonds.⁷⁸ Many CDOs backed by subprime mortgages were given AAA ratings from the three credit agencies (Moody's, Standard and Poor's, and Fitch), all of whom were paid by the investment banks.⁷⁹ The lack of regulation also allowed the financial institutions to increase their leverage, at some points borrowing \$33.00 for every \$1.00 in reserve.⁸⁰ Based on the success of the CDO market, financial institutions continued to borrow money to issue more and more CDOs.⁸¹

AIG became involved in this market through its issuance of CDSs.⁸² CDSs acted as insurance on CDOs in the normal way insurance works, with one major exception: speculators could buy insurance on CDOs they did not own.⁸³ AIG began selling CDS contracts to all the major investment banks and any speculators who wanted protection against CDOs, including CDOs backed by subprime mortgages.⁸⁴ AIG rationalized its large amount of CDS contracts on the basis that it was extremely unlikely that home prices would decline nationally and people would be unable to pay their debts.⁸⁵ Deregulation eliminated the state and federal regulation of CDSs, allowing AIG to enter transactions without having adequate capital reserves to back up their risky behavior.⁸⁶ The lack of strict requirements regarding capital reserves accelerated a crisis at AIG as it would be unable to post the required collateral on its CDS contracts.

As a result of deregulation, AIG was so interconnected with the major investment banks on Wall Street that allowing AIG to fail would have brought down its counterparties and possibly the entire global financial system.⁸⁷

⁷⁸ INSIDE JOB, *supra* note 48. At the time the ratings were given in 2008, Treasury Bonds had an AAA rating. See Damian Paletta & Matt Phillips, *S&P Strips U.S. of Top Credit Rating*, WALL ST. J. (Aug. 6, 2011), <http://online.wsj.com/article/SB10001424053111903366504576490841235575386.html>. However, the U.S.' credit rating was downgraded in August 2011 as a result of the prolonged debates on Capitol Hill over whether the U.S. should raise the debt ceiling. Charles Riley, *S&P downgrades U.S. credit rating*, CNNMONEY (Aug. 6, 2011, 8:13 PM), http://money.cnn.com/2011/08/05/news/economy/downgrade_rumors/index.htm. "The debt limit [ceiling] is the total amount of money that the United States government is authorized to borrow to meet its existing legal obligations." *Debt Limit*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/initiatives/pages/debtlimit.aspx> (last updated Jan. 15, 2013, 3:49 PM).

⁷⁹ INSIDE JOB, *supra* note 48. Under the current system, the ratings agencies are paid by the issuers of the securities they are rating. Cyrus Sanati, *Buffett Defends How Rating Agencies Are Paid*, DEALBOOK, N.Y. TIMES (June 2, 2010, 1:32 PM), <http://dealbook.nytimes.com/2010/06/02/buffett-defends-how-rating-agencies-are-paid/>. As a result, the more securities the ratings agencies gave AAA ratings, the more money they were paid. INSIDE JOB, *supra* note 48. Between 2000 and 2007, the lead up to the financial crisis, Moody's, the largest rating agency, quadrupled its profits, earning billions of dollars. *Id.*

⁸⁰ INSIDE JOB, *supra* note 48.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* "Financial Products became a leader in writing credit-default swaps that insured the massive pools of mortgages fueling the housing boom. The deals were immensely profitable but also deceptively risky." Dennis, *supra* note 64.

⁸⁵ INSIDE JOB, *supra* note 48. Joseph Cassano, the head of AIG Financial Products, said in a shareholder meeting with reference to CDS: "It is hard for us, and without being flippant, to even see a scenario within any kind of realm of reason that would see us losing \$1 in any of those transactions." Anna Schecter, Brian Ross, & Justin Rood, *The Executive Who Brought Down AIG*, ABC NEWS (Mar. 30, 2009), <http://abcnews.go.com/Blotter/story?id=7210007&page=1#.UKFMGYfBHng>.

⁸⁶ THE FINANCIAL CRISIS INQUIRY COMMISSION, *supra* note 56, at 352.

⁸⁷ *Id.*

B. Financial Crisis of 2008

The importance of nationalization was apparent during the recession in 2008. In the beginning, the government was hesitant to take aggressive action and instead brokered deals between investment banks, provided capital injections through the Troubled Asset Relief Program (TARP), and bailed out struggling companies.⁸⁸ It was only after problems began to spread to the rest of the economy that the government took aggressive action and began partially nationalizing failing institutions that threatened to bring down the economy.

The first signs of the looming recession occurred when a leading subprime mortgage lender, New Century Financial Corporation, filed for bankruptcy in April 2007.⁸⁹ This triggered the events that led to the housing bubble bursting as Standard and Poor's (S&P) began watching securities backed by subprime mortgages.⁹⁰ Less than one month later, two hedge funds run by The Bear Stearns Companies Inc. (Bear Stearns) dealing in mortgage backed securities were liquidated, spreading worries about Bear Stearns' solvency.⁹¹ This event marked the beginning of the troubles at Bear Stearns. The company began struggling in March of 2008 as a result of a liquidity crisis brought on by their failed bets on securities backed by subprime mortgages.⁹² On Friday March 17, the panic surrounding Bear Stearns forced the Federal Reserve to consider acting to save the bank as its stock closed at \$30 a share, down forty-seven percent (47%) for the day.⁹³ Fearing the impacts of what the collapse of Bear Stearns would do to the rest of the investment banking industry, the federal government orchestrated a deal in which J.P. Morgan Chase & Co. (J.P. Morgan) would purchase Bear Stearns with assistance from the Federal Reserve.⁹⁴ The Federal Reserve provided \$30 billion and encouraged Bear Stearns to sell at a discount in order to prevent a run on the bank and protect J.P. Morgan from its exposure to Bear Stearns' subprime mortgage division.⁹⁵ While staving off financial crisis in the short term, it was not long before investors began wondering who was next.⁹⁶

⁸⁸ The Troubled Asset Relief Program (TARP) or the "Emergency Economic Stabilization Act of 2008" was a bill designed to help the banks by transferring the bad mortgages on the balance sheets of the financial institutions, to the balance sheet of the U.S. government. See *Troubled Asset Relief Program – TARP*, INVESTOPEDIA, <http://www.investopedia.com/terms/t/troubled-asset-relief-program-tarp.asp> (last visited Jan. 29, 2013). The bill allocated the Treasury Department \$700 billion to buy mortgage backed securities from banks around the country. *Id.*

⁸⁹ *The Financial Crisis: A Timeline of Events and Policy Actions*, *supra* note 12.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Matthew Goldstein, *Bear Stearns' Big Bailout*, BLOOMBERG BUSINESSWEEK (Mar. 14, 2008) <http://www.businessweek.com/stories/2008-03-14/bear-stearns-big-bailoutbusinessweek-business-news-stock-market-and-financial-advice>.

⁹³ David Ellis & Tami Luhby, *JPMorgan scoops up troubled Bear*, CNNMONEY, http://money.cnn.com/2008/03/16/news/companies/jpmorgan_bear_stearns/index.htm (last updated Mar. 17, 2008 3:07 PM). Regulators realized that Bear Stearns was not an isolated problem. ANDREW ROSS SORKIN, *TOO BIG TO FAIL* 59 (2009) [hereinafter *TOO BIG TO FAIL*]. The investment bank did business with hundreds of other financial institutions and represented a possible threat to the entire global economy if it was permitted to fail. *Id.* at 59.

⁹⁴ Nankin & Kjellman Schmidt, *supra* note 17. Bear Stearns was sold to J.P. Morgan for \$236 million, roughly \$2 per share, a significant discount from the book value of \$84 per share and the \$159 per share it was trading at just a year earlier. Ellis & Luhby, *supra* note 93.

⁹⁵ Ellis & Luhby, *supra* note 93. A run on the bank (also known as a bank run) occurs if a large number of customers simultaneously withdraw their money from a financial institution based on concerns of the bank's solvency. *Bank Run*, INVESTOPEDIA, <http://www.investopedia.com/terms/b/bankrun.asp#axzz21LR50Lz1> (last

In July of 2008, just days before the government rendered its first assistance to the government sponsored enterprises, Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), the government was dealing with the bailout of IndyMac Bank (IndyMac).⁹⁷ Due to the decreasing home prices and rising rate of foreclosures, IndyMac was unable to stay afloat without government assistance.⁹⁸ As a result, IndyMac became the largest thrift in the United States to fail.⁹⁹

Just days after the IndyMac failure, the Federal Reserve announced that it was willing to lend to Fannie Mae and Freddie Mac if needed.¹⁰⁰ This statement paved the way for the Treasury to provide aid among investor panic that the two companies were in financial trouble and in danger of collapsing.¹⁰¹ Fannie Mae and Freddie Mac were essentially nationalized in September of 2008 when the Treasury invested billions of dollars to cover the companies' losses and they were placed under the conservatorship of the Federal Housing Finance Agency (FHFA).¹⁰²

A week after the FHFA had placed Fannie Mae and Freddie Mac under conservatorship and on the heels of the Bear Stearns sale, Lehman Brothers Holdings Inc. (Lehman Brothers) stock declined and confidence in the company quickly waned as everyone began to see Lehman Brothers was the next Wall Street bank likely to fail.¹⁰³ After days of negotiations by the largest financial institutions in the United States and England a deal could not be reached and Lehman Brothers filed for bankruptcy.¹⁰⁴ On Monday morning September

visited Jan. 18, 2013). The Federal Reserve also agreed to assume some of the losses associated with the deal, provided J.P. Morgan assumed the first \$1 billion in losses. *The Financial Crisis: A Timeline of Events and Policy Actions*, *supra* note 12.

⁹⁶ Ellis & Lohby, *supra* note 93. Bear Stearns was the first investment bank to fail, but the causes of the failure were not unique to its business model. *TOO BIG TO FAIL*, *supra* note 93, at 6. While the investment banks operated differently, all of them had engaged in the same risky practices. *Id.* Bear Stearns was simply the most leveraged and the first to feel the effects. *Id.* It would not be long before the crisis caught up to the other banks, which would not be able to survive "a full-blown investor panic." *Id.*

⁹⁷ A government sponsored enterprise (GSE) is a private corporation created by Congress to fulfill a public purpose. *Government-Sponsored Enterprise – GSE*, INVESTOPEDIA, <http://www.investopedia.com/terms/g/gse.asp#axzz2ILR50Lz1> (last visited Jan. 18, 2013). Fannie Mae was created to provide access of mortgage credit to working class families so they can afford housing. *Company Overview*, FANNIE MAE, <http://www.fanniemae.com/portal/about-us/company-overview/about-fm.html> (last visited Jan. 18, 2013). Freddie Mac was created in 1970 to stabilize the housing market and provide homeownership opportunities to more people. *Company Profile*, FREDDIE MAC, http://www.freddiemac.com/corporate/company_profile/ (last visited Jan. 18, 2013).

⁹⁸ Catherine Clifford & Chris Isidore, *The fall of IndyMac*, CNNMONEY, http://money.cnn.com/2008/07/12/news/companies/indymac_fdic/index.htm (last updated July 13, 2008, 5:32 PM).

⁹⁹ *Id.*

¹⁰⁰ *The Financial Crisis: A Timeline of Events and Policy Actions*, *supra* note 12.

¹⁰¹ Stephen Labaton & Steven R. Weisman, *U.S. Weighs Takeover of Two Mortgage Giants*, N.Y. TIMES (July, 11, 2008), http://www.nytimes.com/2008/07/11/business/11fannie.html?pagewanted=all&_r=0.

¹⁰² Nankin & Kjellman Schmidt, *supra* note 17.

¹⁰³ *Case Study: The Collapse of Lehman Brothers*, INVESTOPEDIA (Apr. 2, 2009), <http://www.investopedia.com/articles/economics/09/lehman-brothers-collapse.asp#axzz29wkTvZWa>.

¹⁰⁴ Andrew Ross Sorkin, *Merrill Is Sold*, N.Y. TIMES, Sept. 15, 2008, at A1. The Federal Reserve explored a range of options to prevent the failure of Lehman Brothers. *See generally* *TOO BIG TO FAIL*, *supra* note 93. The first option was a private market solution, similar to the one that bailed out Long Term Capital Management. *Id.* at 279. While looking into the private market solution, Paulson was also dealing with individual suitors. *Id.* The Korean Development Bank (KDB) was interested in making a deal with Lehman Brothers, but declined to enter into any deal after Dick Fuld, the CEO of Lehman Brothers complicated

15, 2008, Lehman Brothers declared bankruptcy, becoming the largest bankruptcy in United States history.¹⁰⁵ United States Treasury Secretary Hank Paulson made the decision to let Lehman Brothers fail to send a message to the rest of Wall Street about the dangers of moral hazard and “that the U.S. government ‘is not in the business of bailouts.’”¹⁰⁶ The bankruptcy resulted in over \$10 trillion being lost from global equity markets and intensified the financial crisis.¹⁰⁷ The decision to let Lehman fail was widely criticized and resulted in a different strategy when dealing with struggling financial institutions in the future, such as AIG.¹⁰⁸

The day after Lehman Brothers went bankrupt, the Federal Reserve Board of New York took its first action with regard to AIG.¹⁰⁹ AIG’s role in the financial crisis was the result of two risky business practices that were profitable when the economy was thriving, but catastrophic when the economy slumped.¹¹⁰ These two practices were subprime lending and trading in CDSs.¹¹¹ When the economy began to struggle in 2008 and fewer people were able to pay their debts, the company began losing money, until it found itself unable to pay \$14.5 billion in financial obligations.¹¹² Due to AIG’s massive global presence, many government regulators feared what an AIG bankruptcy would do to an already struggling financial market.¹¹³ These circumstances led to the underlying event in this lawsuit, the federal bailout of AIG.

negotiations. *Id.* at 212-16. Another logical suitor was Bank of America, but the bank also decided not to buy Lehman Brothers and instead bought Merrill Lynch. *Id.* at 306-07, 531. Barclays P.L.C. was also interested in buying Lehman Brothers, but it was prevented from doing so by its regulators. *Id.* at 344-45. As Alistair M. Darling, the Chancellor of the Exchequer, put it, “he didn’t want to ‘import our [U.S.] cancer.’” *Id.* at 348. In a last ditch effort, Dick Fuld contacted John Mack, the CEO at Morgan Stanley, to try and broker a deal, but Morgan Stanley also refused to purchase Lehman Brothers. *Id.* at 353.

¹⁰⁵ Ross Sorkin, *supra* note 104. Lehman Brothers’ bankruptcy was the largest in history, surpassing that of WorldCom and Enron. *Case Study: The Collapse of Lehman Brothers*, *supra* note 103.

¹⁰⁶ TOO BIG TO FAIL, *supra* note 93, at 385. Moral hazard is defined as “any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly.” See KRUGMAN, *supra* note 8, at 63. If the banks saw the Treasury Department bailout Lehman Brothers, right after it had brokered a deal for Bear Stearns, it would send the message that it was alright to take exorbitant risks because in the event of a loss, the government would step in to take the loss. TOO BIG TO FAIL, *supra* note 93, at 385. Instead, by allowing Lehman Brothers to go bankrupt, the banks were put on notice that the government was not going to protect institutions that made risky investments. *Id.*

¹⁰⁷ *Case Study: The Collapse of Lehman Brothers*, *supra* note 103.

¹⁰⁸ *Id.* The banking industry is based on the trust and confidence of investors. TOO BIG TO FAIL, *supra* note 93, at 10. Without investor confidence in an institution’s ability to remain solvent, there will be a run on the bank. *Id.* The bankruptcy of one of the largest investment banks in the world, eroded investor confidence, sending shockwaves through the remaining investment banks. *Id.* at 413. The panic caused by the failure of Lehman Brothers soon spread throughout the rest of Wall Street. *Id.* On the day following Lehman Brothers bankruptcy, the Dow Jones Industrial Average fell over 500 points on news of the bankruptcy and AIG’s impending failure. *Id.* at 390. It was the largest point decline in a single day since the day the market opened after September 11, 2001. *Id.*

¹⁰⁹ *The Financial Crisis: A Timeline of Events and Policy Actions*, *supra* note 12.

¹¹⁰ *American International Group Inc*, *supra* note 38.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* “Because of its size and substantial interconnection with financial markets and institutions around the world, the government recognized that a failure of AIG would have had severe ramifications. In addition to being one of the world’s largest insurers, AIG was providing more than \$400 billion of credit protection to banks and other clients around the world through its credit default swap business...To stabilize AIG and prevent reverberations throughout the economy, the [Federal Reserve Bank of New York] FRBNY extended to AIG a two-year emergency secured loan of up to \$85 billion on September 16, 2008... Additionally, the U.S.

As the bankruptcy of Lehman Brothers sent shockwaves throughout the financial markets, the Federal Reserve and Treasury Department determined that an AIG failure would be a significant blow to an already crippled financial sector.¹¹⁴ The government's first option was a private market solution, similar to the rescue of Long Term Capital Management a decade earlier.¹¹⁵ The private market solution failed when two of the strongest private market actors, Goldman Sachs and J.P. Morgan, refused to accept the risk of taking on AIG's CDS contracts.¹¹⁶ With few other options, the Federal Reserve issued an unprecedented loan of \$85 billion to AIG.¹¹⁷ Part of this agreement involved the U.S. government taking an eighty percent (80%) stake in AIG; the first time during the crisis the government took an equity stake in a company.¹¹⁸ Incredibly, the first loan was not enough and the government would have to issue two subsequent loans to AIG, one worth \$38 billion and another worth \$29 billion.¹¹⁹

C. Takings Clause Analysis

This section analyzes the alleged use of the Takings Clause and how the court's decision would govern the future application of aid in times of economic distress. The Takings Clause is set forth in the Fifth Amendment and states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

Treasury would be entitled to 79.9 percent equity ownership of AIG through preferred stock." *September 2008: Initial Investment from the U.S. Government*, AIGCORPORATE.COM, http://www.aigcorporate.com/aboutaig/sept_2008.html (last visited Oct. 1, 2012). The damage caused by an AIG failure was truly unimaginable. As counterparty to the three largest banks, and the rest of Wall Street, AIG's failure posed serious consequences for the financial sector. *TOO BIG TO FAIL*, *supra* note 93, at 382. In addition, regulators feared that the potential of an AIG failure would cause panicked policyholders to withdraw their policies, creating instability in the insurance industry. *Id.* at 395. Furthermore, AIG also conducted a substantial amount of business outside the U.S., including selling debt to foreign governments. *Id.* at 396. Many foreign governments contacted the Treasury Department, expressing concern about a possible AIG failure. *Id.*

¹¹⁴ *September 2008: Initial Investment from the U.S. Government*, *supra* note 113.

¹¹⁵ *TOO BIG TO FAIL*, *supra* note 93, at 380. Long Term Capital Management (LTCM) was a high risk, speculative hedge fund composed of a group of PhDs, professors, and Nobel Prize winners. ROGER LOWENSTEIN, *WHEN GENIUS FAILED* xix (2000). Despite only having 100 clients, the firm had \$100 billion in assets and positions in derivative contracts worth over \$1 trillion. *Id.* at xviii-xix. In 1998, LTCM was on the brink of failing and a private market solution was devised to save the fund. *Id.* at 206-208. The situation with LTCM was different from the AIG situation in 2008 due to the size of AIG and the economic climate. *The Federal Reserve Bank of New York's Involvement with AIG*, *supra* note 54. A private sector solution involving a consortium of LTCM counterparties was successful because it was in their self interest to rescue LTCM. *Id.* However, when asked to save AIG, the counterparties were facing a liquidity crisis themselves and did not have the capital available to lend to AIG. *Id.* Furthermore, the hole in the LTCM situation was \$3.6 billion, which pales in comparison to the more than \$150 billion needed by AIG. *Id.*

¹¹⁶ *American International Group Inc.*, *supra* note 38.

¹¹⁷ *Id.*

¹¹⁸ *Id.* The terms of the bailout also included provisions that "the company would sell a number of its subsidiaries and other assets in order to regain solvency." *Id.*

¹¹⁹ *Id.* The issuance of the second and third loans a month apart brought the value of the government assistance to AIG to \$153 billion. *Id.* Following the issuance of the third loan, it was revealed that AIG had spent \$1.75 billion of its federal bailout money on bonuses to top executives, effectively paying executives exorbitant bonuses with taxpayer money. *Id.*

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*¹²⁰

Starr bears the burden of showing that property was taken for public use without just compensation. If any one of these elements is lacking, Starr would not be entitled to just compensation.

1. Public Use

The first element of the Takings Clause is the Public Use Clause, which requires a taking be for the benefit of the public.¹²¹ The Public Use Clause prevents the government from transferring private property from one private party to another.¹²²

For more than a century the Supreme Court has broadly interpreted the Public Use Clause to represent a “public purpose.”¹²³ In recent years, the Supreme Court reaffirmed its expansive definition of “public use” such that practically any taking will meet the public use requirement.¹²⁴ This expansive reading of the Fifth Amendment represents the Court’s willingness to apply deference to the legislature’s judgment.¹²⁵ Therefore, the Court would only prohibit a taking if it is not reasonably related to the public purpose it is intended to accomplish.¹²⁶

Due to the expansive nature of the Public Use Clause, Starr must only prove that the government had a reasonable belief that bailing out AIG was in the public’s best interest.

¹²⁰ U.S. CONST. amend. V (emphasis added).

¹²¹ *Id.*

¹²² *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005).

¹²³ Paul W. Tschetter, *Kelo v. New London: A Divided Court Affirms the Rational Basis Standard of Review in Evaluating Local Determinations of ‘Public Use’*, 51 S.D. L. Rev. 193, 221-22 (2006).

¹²⁴ CHEMERINSKY, *supra* note 6, at 679. *See e.g.*, *Kelo v. City of New London, Conn.*, 545 U.S. at 469-70 (holding a taking is for public use as long as there is a reasonable basis the taking will serve a public purpose); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (“where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”).

¹²⁵ David L. Breau, *A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?*, 55 DUKE L.J. 835, 849 (2006). *See also* Tschetter, *supra* note 123, at 194 (“The Court [in *Kelo*] endorsed an interpretation of the Public Use Clause of the Fifth Amendment that is deferential to the decisions of state and local governments. Furthermore, it renewed its stance that the judiciary should play a limited role in reviewing legislative public use decisions.”). *See also* *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.”).

¹²⁶ “In other words, a taking is for public use if a rational basis test is met; it is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public.” CHEMERINSKY, *supra* note 6, at 679.

BITING THE HAND THAT FEEDS

This belief is evident through an analysis of the government's actions leading up to and including the rescue of AIG.¹²⁷

Ultimately, the best evidence of the government's intentions is the statement released by the Federal Reserve Bank of New York (FRBNY) following the AIG rescue. The press release indicated that the FRBNY, with the support of the Federal Reserve Board and the Treasury Department, loaned AIG \$85 billion to "protect the interests of the U.S. government and taxpayers."¹²⁸ The AIG liquidity crisis that precipitated its rescue occurred on the heels of the Lehman Brothers bankruptcy and the effective nationalization of Fannie Mae and Freddie Mac.¹²⁹ The government saw the response to the Lehman Brothers failure and the bailout of Fannie Mae and Freddie Mac and decided that it was in the best interest of the country to save AIG. Due to the size of AIG, the Treasury Department and the Federal Reserve were fearful that an AIG bankruptcy would threaten global commercial and investment banks that contracted and traded with AIG, causing more financial institutions to fail.¹³⁰ As Federal Reserve Vice Chairman Donald Kohn testified before Congress, "[t]he rationale for public investment in the financial industry is not, therefore, any special regard for managers, workers, or investors in that industry over others, but rather the need to prevent a further deterioration in financial conditions that would destroy jobs and incomes in all industries and regions."¹³¹ The bailout of AIG likely saved millions of jobs across the United States in all industries.¹³²

Thus, the public use requirement of the taking would be satisfied.

¹²⁷ The government decided against letting Bear Stearns, Fannie Mae, and Freddie Mac fail because of the damage it would do to the economy. This belief was realized when the consequences of a Lehman Brothers bankruptcy were felt throughout the country. TOO BIG TO FAIL, *supra* note 93, at 413. In order to prevent another bankruptcy on a larger scale, the Government rescued AIG.

¹²⁸ Press Release, Federal Reserve, Federal Reserve Board, with full support of the Treasury Department, authorizes the Federal Reserve Bank of New York to lend up to \$85 billion to the American International Group (AIG) (Sept. 16, 2008) (available at <http://www.federalreserve.gov/newsevents/press/other/20080916a.htm>).

¹²⁹ *Factors Affecting Efforts to Limit Payments to AIG Counterparties: Hearing Before the H. Comm. on Gov't Oversight and Reform*, 111th Cong. 1 (2010) [hereinafter *Factors Affecting Efforts to Limit Payments to AIG Counterparties*] (statement of Thomas C. Baxter Jr., Executive Vice President and General Counsel, Federal Reserve Bank of New York) [hereinafter *Factors Affecting Efforts to Limit Payments to AIG Counterparties*].

¹³⁰ *Id.* at 3. In addition to operating in over 140 countries and serving over 76 million customers globally, "AIG is both the largest life and health insurer, and the second largest property and casualty insurer in the United States." *Id.* at 2. Roughly one-third of all U.S. citizens (106 million people) are employed by companies that have AIG insurance. *Id.* AIG is a primary provider of protection on retirement funds to municipalities, pension funds, and other public and private companies. *Id.* Additionally, since AIG FP was a counterparty to many transactions with major national and international financial institutions, the failure of AIG would have shaken confidence in an already struggling financial market, causing a possible run on the banks. *Id.* at 3.

¹³¹ *Id.* at 4; see also *The Federal Reserve Bank of New York's Involvement with AIG*, *supra* note 54. "In all that the Federal Reserve has done, we have been motivated by two goals: to foster financial stability and to protect the U.S. taxpayer. Had we not acted to prevent an AIG failure, the financial crisis would have been substantially worse and even greater economic damage and suffering would have occurred." *Id.*

¹³² *Factors Affecting Efforts to Limit Payments to AIG Counterparties*, *supra* note 129, at 4. "The failure of AIG in the fall of 2008 would have imposed significant financial losses on many individuals, households and businesses, shattered confidence in already fragile financial markets, and greatly increased fear and uncertainty about the viability of our financial institutions." *Id.* at 5.

2. *Property*

The second element of the Takings Clause is the requirement that what was taken constitute property.¹³³ In this case Starr alleged three different property interests were taken without just compensation.¹³⁴ The property interests allegedly taken by the U.S. government were “(1) the ‘economic value and voting power’ associated with the Plaintiffs’ shares of AIG common stock; (2) the 79.9% equity interest in AIG, ultimately represented by 562,868,096 shares of AIG common stock; and (3) the \$32.5 billion of collateral posted by AIG prior to the formation of ML III.”¹³⁵ While the government is conceding that the 79.9% equity interest in the company is property within the meaning of the Takings Clause, it argued that the economic value and voting power of the common stock and the \$32.5 billion of collateral taken are not legally recognizable property interests.¹³⁶ Therefore, the major portion of the lawsuit would revolve around the equity and voting rights and the \$32.5 billion in collateral because without these elements Starr would not be entitled to just compensation. This issue is complicated by the fact that the scope of property rights protected by the Fifth Amendment are not explicitly laid out in the Constitution.¹³⁷

a. 79.9% Stake in AIG

Since the government did not argue that the 79.9% equity interest in AIG was a taking, it deserves less attention than the other two forms of property. In cases where the government has physically seized private property, courts have consistently found a taking.¹³⁸ In this instance, the government physically took control of approximately eighty percent (80%) of AIG through the seizure of approximately 562.8 million shares of common stock.¹³⁹ Therefore, there is no question this would be a recognizable property interest.

b. Economic Value and Voting Rights

Starr alleged that the economic value and voting power associated with the approximately 562.8 million shares taken by the government was a legally recognized property interest.¹⁴⁰ Shares of common stock represent an equitable interest in a company that entitles the stockholder to share in the company’s profits and exercise voting rights to influence the company’s operations.¹⁴¹ It is precisely these rights which Starr alleged the government took without providing just compensation.

¹³³ U.S. CONST. amend. V.

¹³⁴ *Starr Int’l Co., Inc. v. United States*, 106 Fed. Cl. 50, 71 *reconsideration denied*, 107 Fed. Cl. 374 (Fed. Cl. 2012).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

¹³⁸ *See, e.g., Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982).

¹³⁹ *See, e.g., Grimes v. Alton, Inc.*, 804 A.2d 256, 262 (Del. 2002); *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 538 (Del. Ch. 1999) *aff’d*, 748 A.2d 913 (Del. 2000).

¹⁴⁰ *Starr Int’l Co., Inc. v. United States*, 106 Fed. Cl. at 71.

¹⁴¹ Common stock is defined as “[s]ecurities representing equity ownership in a corporation, providing voting rights, and entitling the holder to a share of the company’s success through dividends and/or capital

Despite failing to specify what types of property interests are protected, the Supreme Court has consistently held that other forms of property rights besides real and personal property are protected under the Fifth Amendment Takings Clause.¹⁴² Since this is a unique form of property that has received little if any attention over the years, the court would likely apply the common characteristics of property rights to determine whether this would be a legally protected interest.¹⁴³ The two elements associated with property rights are transferability and excludability.¹⁴⁴ Therefore, while not dispositive, Starr would benefit by showing that the rights it obtained through ownership of AIG common stock were transferable and excludable.

Transferability has long been considered one of the most important aspects of property rights.¹⁴⁵ Transferability is the ability of a property owner to dispose of his property as he sees fit.¹⁴⁶ Since common stock can be bought and sold, it is transferable.¹⁴⁷

Throughout the history of the Takings Clause, the Supreme Court has consistently held that excludability is an essential right of a property owner.¹⁴⁸ Excludability is the property owner's ability to prevent others from using the property.¹⁴⁹ Common stock in a publicly traded company is not excludable because no one can be prevented from purchasing shares in a public company.

In addition to transferability and excludability, courts often examine state law to determine if the property interest is legally recognized as such. In this case, the state law would be that of Delaware, AIG's state of incorporation.¹⁵⁰ Delaware courts have a history of protecting shareholders' economic value and voting rights by permitting them to seek redress when their interests have been diluted.¹⁵¹

Furthermore, "the [Supreme] Court has expressed a broad view of what constitutes property for purposes of the takings clause."¹⁵² As a result, it is likely that the court would

appreciation." *Common Stock*, INVESTORWORDS.COM, http://www.investorwords.com/986/common_stock.html#ixzz2GsJPsg1B (last visited Jan. 19, 2013).

¹⁴² CHEMERINSKY, *supra* note 6, at 677; *See e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) ("That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court").

¹⁴³ *Starr Int'l Co., Inc. v. United States*, 106 Fed. Cl. at 72.

¹⁴⁴ Property is recognized as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

¹⁴⁵ *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. Gen. Motors Corp.*, 323 U.S. at 378; *Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1332 (Fed. Cir. 2005); *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004).

¹⁴⁶ A property interest is transferable if it is "[c]apable of being transferred, together with all rights of the original holder." BLACK'S LAW DICTIONARY 1636 (9th ed. 2009).

¹⁴⁷ *Knowing Your Rights As A Shareholder*, INVESTOPEDIA (Jan. 2, 2010), <http://www.investopedia.com/articles/01/050201.asp#axzz2HD9IuZvD>.

¹⁴⁸ *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 435; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

¹⁴⁹ *See* David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39, 39-40 (2000).

¹⁵⁰ AIG, 10-K, *supra* note 37, at 1.

¹⁵¹ *See generally* *Gatz v. Ponsoldt*, 925 A.2d 1265 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006); *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 (Del. Ch. 1999).

¹⁵² CHEMERINSKY, *supra* note 6, at 675. The Court has applied this approach to find less traditional forms of property that also meet this requirement, such as interest paid on trust accounts and trade secrets. *Id.* at 675-77.

view the economic value and voting rights associated with a share of common stock as property.

c. Maiden Lane III

The other property interest Starr alleged was taken was the \$32.5 billion of collateral posted by AIG to create Maiden Lane III LLC (ML III). ML III was created to satisfy AIG's obligations to its counterparties because the initial investments in AIG were not enough.¹⁵³ The terms of the CDS contracts allowed counterparties to require AIG FP to post cash collateral in response to an unfavorable event, thus proving it could cover the cost of the contract in the event of a payout.¹⁵⁴ The most likely event that would trigger AIG FP to post cash collateral was a downgrade of AIG's credit rating.¹⁵⁵ Throughout 2008, as the economy continued to struggle, the value of the CDOs declined and AIG FP was forced to post increasing collateral.¹⁵⁶ In order to prevent collateral calls, AIG attempted to renegotiate its CDS contracts with its counterparties, but was unsuccessful.¹⁵⁷ The problem was exasperated by the looming release of AIG's earnings on November 10, which would almost surely result in a downgrade by the ratings agencies, thus triggering additional collateral calls.¹⁵⁸ In order to prevent the downgrade, AIG's earnings would have to be accompanied by a solution, preferably one that included an agreement between AIG and its eight largest counterparties.¹⁵⁹ By now it became clear that the Federal Reserve had only two options: invest more money into AIG or allow AIG to file for bankruptcy.¹⁶⁰ As a result, the Federal Reserve created ML III.¹⁶¹

ML III was created for the sole purpose of purchasing CDOs from AIG FP's counterparties in return for the counterparty terminating its CDS contracts with AIG FP.¹⁶² This solution allowed the FRBNY to lend up to \$30 billion to ML III to buy CDOs from AIG's largest counterparties.¹⁶³ With the \$24.3 billion provided by the FRBNY and the \$5

Additionally, the Court has held that the property interest "is addressed to every sort of interest the citizen may possess." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

¹⁵³ *Factors Affecting Efforts to Limit Payments to AIG Counterparties*, *supra* note 129, at 8-9.

¹⁵⁴ *Id.* at 6. Due to the capital constraints on AIG as the housing market continued to decline and the number of outstanding contracts AIG had insuring subprime mortgages, it was unlikely that AIG would be able to cover the costs of every contract if it was forced to pay out. *Id.* at 6-7. Therefore, the counterparties were entitled to proof that AIG could meet its obligations in the form cash collateral and were entitled to keep the collateral in the event AIG was not able to perform on its contracts. *Id.* at 7.

¹⁵⁵ *Id.* at 6-7. As a subsidiary of AIG, AIG FP's contacts were guaranteed by its parent, making it impossible to separate AIG FP's problems from AIG. *Id.* at 7.

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.* at 8.

¹⁵⁸ *Id.* at 9.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* Allowing AIG to file for bankruptcy after lending it \$85 billion would "have undermined the public's trust in the U.S. government's commitment to the broader range of extraordinary financial stability initiatives underway during that very fragile period." *Id.* at 9-10.

¹⁶¹ *Id.* at 10.

¹⁶² *AIG CDO LLC Facility: Terms and Conditions*, FED. RESERVE BANK OF N.Y. (Dec. 3, 2008), http://www.newyorkfed.org/markets/acbf_terms.html.

¹⁶³ *Factors Affecting Efforts to Limit Payments to AIG Counterparties*, *supra* note 129, at 10.

billion by AIG, ML III purchased CDOs from AIG's 16 largest counterparties.¹⁶⁴ Under the terms of the agreement, the counterparties were permitted to keep the \$35 billion in collateral that was previously posted by AIG (par value),¹⁶⁵ ML III received the CDOs, and AIG was able to tear-up the CDS contracts.¹⁶⁶ The fair market value of the CDOs purchased by ML III was \$29.6 billion.¹⁶⁷

The U.S. government asserted that the \$32.5 billion in collateral invested from AIG to ML III would not be a cognizable property interest. However, the collateral was put up in the event that AIG was not able to meet its obligations and belonged to AIG until it failed to do so. Since AIG was able to meet its obligations with the help of the government, it could be argued that the collateral should not have been given to AIG's counterparties as part of the deal. Therefore, the collateral would be a cognizable property interest.

3. *Just Compensation*

The third and final element of the Takings Clause, and the basis of Starr's lawsuit against the U.S. government, is just compensation. The government is only permitted to take private property for public use if the owner of the property is compensated for the taking.¹⁶⁸ Starr alleged the government owes AIG shareholders just compensation for the Credit Agreement in which the government was granted AIG preferred stock, the reverse stock split, and the use of the \$32.5 billion collateral posted by AIG.¹⁶⁹ It is not explicitly stated in the Fifth Amendment how just compensation should be calculated. As a result, the Supreme Court has consistently held that just compensation is the economic loss to the owner of the private property, not the gain to the taker.¹⁷⁰ In general, most courts value this loss at the fair market value at the time of the taking.¹⁷¹ Thus, Starr is seeking just compensation equivalent to at least \$25 billion.¹⁷²

¹⁶⁴ *Id.*

¹⁶⁵ Par value is the stated (face) value of a security. *Par Value*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/parvalue.asp#ixzz2H70ITU2X> (last visited Jan. 9, 2013).

¹⁶⁶ *Factors Affecting Efforts to Limit Payments to AIG Counterparties*, *supra* note 129, at 10.

¹⁶⁷ *Id.* The par value of a security is not equal to the market value of that security. *Par Value*, INVESTORWORDS.COM, http://www.investorwords.com/3611/par_value.html (last visited Feb. 16, 2013).

¹⁶⁸ U.S. CONST. amend. V. Interestingly enough, AIG businesses were nationalized on two different occasions while Greenberg was CEO, once in Pakistan and once in Iran. *Charlie Rose: President Obama's Mideast Trip; Hank Greenberg* (PBS television broadcast Mar. 18, 2013), available at <http://www.charlierose.com/view/interview/12827>. In both of these instances, AIG was compensated for the unlawful taking. *Id.*

¹⁶⁹ *Starr Int'l Co., Inc. v. United States*, 106 Fed. Cl. 50, 69 *reconsideration denied*, 107 Fed. Cl. 374 (Fed. Cl. 2012).

¹⁷⁰ *CHEMERINSKY*, *supra* note 6, at 681. Based on the Supreme Court's rulings, it is not important that the Government made over a \$22 billion profit when it sold back AIG's shares a few years later. Francesco Guerrero, *It Was a Wonderful Bailout—Sort Of*, WALL ST. J., Dec. 18, 2012, at C1.

¹⁷¹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001); *see, e.g., Olson v. United States*, 292 U.S. 246, 255 (1934). "Fair market value is defined as 'the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market' when the property has been exposed to the market for a reasonable period of time." *Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land*, 195 F. Supp. 2d 314, 320 (D. Mass. 2002) *aff'd*, 318 F.3d 279 (1st Cir. 2003) citing *Newton Girl Scout Council, Inc. v. Mass. Tpk. Auth.*, 335 Mass. 189, 193 (1956).

¹⁷² Verified Class Action Complaint at 48, *Starr Int'l Co., Inc. v. United States*, No. 11-779 C., 2011 WL 5829382 (Fed.Cl.).

However, calculating the fair market value of the assets would be very difficult considering the nature of the assets and the circumstances surrounding the taking. Putting the taking in perspective, the government was forced to partially nationalize AIG because a private market solution could not be negotiated.¹⁷³ AIG stock was falling rapidly; it was below \$2 per share and still falling.¹⁷⁴ On the day AIG was saved, it was minutes away from bankruptcy.¹⁷⁵ Fortunately for AIG, Timothy Geithner, the president of the FRBNY, had extended a \$14 billion loan to keep AIG functioning for the rest of the day.¹⁷⁶ The AIG Board of Directors met that night after receiving the terms of the deal outlining the government's plan to take a 79.9% interest in the company.¹⁷⁷ They had two options: file for bankruptcy in the morning or accept the Federal Reserve's deal.¹⁷⁸ The Board voted in favor of the deal, deciding to look out for AIG's customers and employees rather than the shareholders.¹⁷⁹ Since this deal was accepted by the Board of Directors, the Court may choose to view this transaction as an agreement and not a taking.¹⁸⁰

The similarities between the government's deal and the deal created by the private sector support the government's argument that the deal represented fair market value for the assets. Following the Lehman Brothers bankruptcy, the importance of quick action became apparent. With time running out, a deal to save AIG had to be struck quickly. Therefore, the Treasury and Federal Reserve officials used the deal the private sector advisors from J.P. Morgan and Goldman Sachs had been working on.¹⁸¹ As a result, the terms of the agreement

¹⁷³ The Federal Reserve assembled a list of banks that could provide a line of credit to AIG based on their exposure to the insurance giant. *TOO BIG TO FAIL*, *supra* note 93, at 384. The list included J.P. Morgan, Goldman Sachs, Citigroup, Bank of America, Barclays, Deutsche Bank, BNP, UBS, ING, HSBC, and Santander. *Id.* The group discussed the idea of raising \$50 billion in return for warrants for 79.9% of AIG. *Id.* at 387. This was substantially less than the eventual amount offered by the Federal Reserve for the same interest. Eventually the Federal Reserve's fears were confirmed and the private market solution could not raise the money available needed to bail out AIG. *Id.* at 389.

¹⁷⁴ *Id.* at 397.

¹⁷⁵ John Studzinski, a managing director at Blackstone, was working at AIG calculating its obligations and realized at about 1:00 PM that "AIG was minutes away from bankruptcy." *TOO BIG TO FAIL*, *supra* note 93, at 399.

¹⁷⁶ *Id.* at 400.

¹⁷⁷ *Id.* at 401. Robert B. Willumstad, the CEO of AIG, was informed by Geithner and Paulson that this was the only deal AIG was going to get. *Id.* at 403. While the deal did seem harsh to Geithner, he had to consider the public opinion. *Id.* at 402. The Treasury was likely going to be criticized for bailing out another company, and it would have been worse if they were seen give AIG a "sweetheart deal." *Id.* Greenberg alleges that the failure to offer AIG other options that were open to other financial institutions, such as access to the Federal Reserve Discount Window, or guaranteeing some of AIG's assets and reestablishing its AAA rating as it did with Citigroup, was unfair to AIG shareholders. *Charlie Rose*, *supra* note 168.

¹⁷⁸ *TOO BIG TO FAIL*, *supra* note 93, at 403-04.

¹⁷⁹ *Id.* at 405. When deciding whether to file for bankruptcy or accept the Federal Reserve's deal, Willumstad stated, "[w]e have three constituents. Shareholders, customers, employees. This is not something that's friendly to the shareholders, but it will preserve the customers, keep the company afloat, and you have a better chance these people will keep their jobs." *Id.* In the end, the entire Board, with the exception of one member, voted in favor of the deal. *Id.* at 405-06.

¹⁸⁰ The Government is arguing that neither Starr nor AIG raised any objections to the deal when it was proposed. Furthermore, Starr did not bring a claim until three years after the alleged taking occurred. Plevin & Ng, *supra* note 5.

¹⁸¹ *TOO BIG TO FAIL*, *supra* note 93, at 402.

BITING THE HAND THAT FEEDS

were substantially similar to the terms that would have been offered by the private sector if there was a private market solution available.¹⁸²

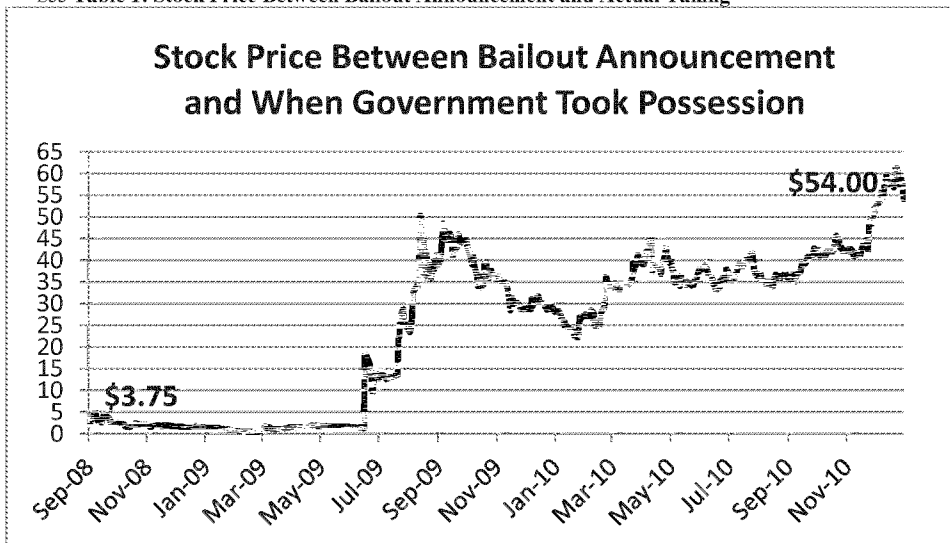
Conversely, if the government's deal did not represent fair market value, there would be several issues with calculating the fair market value. The first issue would be due to the complexity of the financial instruments on AIG's balance sheet. The combination of the complexity of the CDS contracts and the toxic assets behind them made it difficult to calculate the value of the contracts.¹⁸³ Another issue involved in calculating the value of the property taken would be the difference in time when the deal was announced and when the shares were actually taken. The partial nationalization of AIG was announced on September 16, 2008; however the shares were not taken until 2011.¹⁸⁴ During that period AIG's stock price skyrocketed based on the news that the government was not going to allow the company to fail.¹⁸⁵ Case law clearly supports the notion that the government does not have to pay for any increase in the value of property as a result of the taking.¹⁸⁶ Therefore, the value of the

¹⁸² Advisors from J.P. Morgan and Goldman Sachs had been working on a deal for AIG, and were consulted when the Government wrote the terms of the Credit Agreement for AIG. *Id.* As previously mentioned, in a private market solution, the banks would only have been willing to pay approximately \$50 billion in return for a 79.9% stake in AIG. *Id.* at 387.

¹⁸³ Toxic assets refer to assets that cannot be sold because they are guaranteed to lose money. *Toxic Assets*, INVESTOPEDIA, <http://www.investopedia.com/terms/t/toxic-assets.asp#axzz2J2jr8blE> (last visited Jan. 25, 2013). "The term 'toxic asset' was coined in the financial crisis of 2008/09, in regards to mortgage-backed securities, collateralized debt obligations and credit default swaps, all of which could not be sold after they exposed their holders to massive losses." *Id.*

¹⁸⁴ Steve Schaefer, *U.S. Wraps Up AIG Bailout With \$7.6B Stock Sale, Touts \$22.7B Return*, FORBES (Dec. 11, 2012, 10:25 AM), <http://www.forbes.com/sites/steveschaefer/2012/12/11/treasury-wraps-up-aig-bailout-with-7-6b-stock-sale-touts-22-7b-return/>. "At the same time as the Fed's intervention, the Treasury Department took a hefty stake in the insurer, a stake that would be restructured in January 2011, when the Fed and Treasury bailouts were rolled into one stake that left the government owning 92% of AIG's common stock." *Id.*

¹⁸⁵ See Table 1: Stock Price Between Bailout Announcement and Actual Taking



Derived from data taken from *Historical Prices*, YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=AIG+Historical+Prices> (last visited Apr. 28, 2013).

company should be valued when the taking was announced, not at the time it was actually taken.

The other element of the Takings Clause violation alleged by Starr stems from the use of ML III to buy CDOs from AIG's counterparties. Starr alleged that the government failed to negotiate with the counterparties to encourage them to accept a lower price for the CDOs.¹⁸⁷ The Federal Reserve has defended its actions arguing that there was a short period of time to negotiate a deal and all of AIG's previous efforts to renegotiate the terms had been unsuccessful.¹⁸⁸ Furthermore, the Federal Reserve was not in a strong bargaining position considering the time period and the well-known fact that it would not let AIG file for bankruptcy.¹⁸⁹ Finally, the Federal Reserve also had to worry about the interest of the financial sector and the taxpayers.¹⁹⁰ It was possible that the ratings agencies would see the Federal Reserve's attempt to negotiate a better deal as a sign that AIG could not meet its collateral calls and would have downgraded AIG's credit rating, wasting taxpayer dollars.¹⁹¹

The Federal Reserve believed it was acting in the best interests of the public (taxpayers), which received the CDOs and was able to hold them to maturity, eventually making a profit on the deal.¹⁹² The Federal Reserve knew that the major counterparties to AIG's CDS contracts were financial institutions.¹⁹³ At the time ML III was created and began buying CDOs, the financial sector was still struggling, including the counterparties to AIG's contracts. During this period the auto industry asked for a bailout and there was still fear that the remaining investment banks would collapse.¹⁹⁴ By paying par value for the CDOs, the government was shoring up the balance sheets of the investment banks in the hopes of preventing additional failures.¹⁹⁵

D. Potential Impact of the Lawsuit

Regardless of which way the Court rules in this case, it will have ramifications on how the government handles future economic crises. One decision would limit the

¹⁸⁶ *United States v. Fuller*, 409 U.S. 488, 498-99 (1973) (holding the government does not need to pay for any increases in the market value that occurred as a result of its plan to take the property).

¹⁸⁷ Verified Class Action Complaint at 34, *Starr Int'l Co., Inc. v. United States*, No. 11-779 C., 2011 WL 5829382 (Fed.Cl.). The Government's insisted that AIG pay 100 cents on the dollar to investment banks when the government permitted other struggling companies to negotiate their existing contracts to get a lower price. Schaefer, *supra* note 184. The Government did negotiate more favorable terms for other financial institutions earlier in the financial crisis, such as when J.P. Morgan purchased Bear Stearns at a discounted value. Robin Sidel, Dennis K. Berman, & Kate Kelly, *J.P. Morgan Buys Bear in Fire Sale, As Fed Widens Credit to Avert Crisis*, WALL ST. J. (Mar. 17, 2008), <http://online.wsj.com/article/SB120569598608739825.html>. As part of the AIG bailout, Goldman Sachs was paid \$13 billion. Schaefer, *supra* note 184.

¹⁸⁸ *Factors Affecting Efforts to Limit Payments to AIG Counterparties*, *supra* note 129, at 11.

¹⁸⁹ *Id.* at 11-12; *see also The Federal Reserve Bank of New York's Involvement with AIG*, *supra* note 54.

¹⁹⁰ *Factors Affecting Efforts to Limit Payments to AIG Counterparties*, *supra* note 129, at 13.

¹⁹¹ *Id.* at 12. "The default risk would have been exacerbated by the credit rating downgrade that almost certainly would have followed any effort by AIG to coerce creditor concessions." *The Federal Reserve Bank of New York's Involvement with AIG*, *supra* note 54.

¹⁹² *See* Schaefer, *supra* note 184.

¹⁹³ *The Federal Reserve Bank of New York's Involvement with AIG*, *supra* note 54.

¹⁹⁴ *The Financial Crisis: A Timeline of Events and Policy Actions*, *supra* note 12.

¹⁹⁵ *See* TOO BIG TO FAIL, *supra* note 93, at 484.

government's ability to act in the future, while the other would encourage future government intervention.

If the Court ruled in Starr's favor and awarded the company additional compensation, there would be a number of consequences. First, a decision against the United States would encourage other shareholder suits against the government based on the partial nationalization of other companies during the recession.¹⁹⁶ Second, the government's ability to act in the future would be restrained. The threat of a potential lawsuit would force the government to carefully consider what actions to take and slow down its ability to act.¹⁹⁷ If the government was considering defending several lawsuits, quick action would not have been possible and AIG would have declared bankruptcy.

However, if the Court rules in the government's favor, it would have the ability to act in the future. By holding that the government was not liable for just compensation, there would be no further lawsuits regarding an unlawful taking during the recession. Additionally, the government would be able to use this ruling as a precedent when taking action during the next financial crisis. Depending on how broad or narrow the decision, the Federal Reserve and Treasury Department would be free to take whatever action they deemed necessary to stave off financial disaster.

All of the complexities and issues regarding just compensation display the importance of eliminating the restrictions to the government's ability to act in an emergency. If the government is required to provide just compensation, it must carefully consider the value of the company's assets and calculate the appropriate price per share. This process severely restricts the government's ability to act when the entire industry is struggling and there are only days, if not hours, before the next company is on the brink of bankruptcy. In this case, the government only had one day after the Lehman Brothers bankruptcy to figure out what action to take with respect to AIG. Amidst working to negotiate a private market solution and avoiding a potential downgrade by talking to the ratings agencies, the government was also required to calculate just compensation for a deal that the AIG Board could potentially have declined. Despite juggling all these tasks, the government was successful.¹⁹⁸ Yet, it was still sued for not providing enough compensation. The next time the government may not be so lucky. Being able to act freely and focus on a solution, without having to worry about the potential legal repercussions would dramatically increase the government's ability to protect the economy.

¹⁹⁶ AIG was not the only company that was partly nationalized during this crisis. A verdict in favor of Starr would open the floodgates and subject the government to future lawsuits from shareholders in Fannie Mae, Freddie Mac, Citigroup, and General Motors. See, e.g., Nankin & Kjellman Schmidt, *supra* note 17; Ari Levy, *Citigroup, Bank of America May Look 'Nationalized'*, BLOOMBERG (Jan. 23, 2009, 4:26 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVGJfrDzZSN4>; Chris Isidore, *GM bankruptcy: End of an Era*, CNNMONEY (June 2, 2009, 4:03 AM), http://money.cnn.com/2009/06/01/news/companies/gm_bankruptcy/. An unfavorable ruling in these lawsuits would likely restrict the government's ability to act in the future for fear of the costs of litigating and losing.

¹⁹⁷ While in most circumstances careful consideration is encouraged, during a crisis immediate action is often necessary. In this case, immediate action was required as AIG was on the brink of bankruptcy. The FRBNY's deal was delivered minutes before AIG would have been declared bankrupt. TOO BIG TO FAIL, *supra* note 93, at 399.

¹⁹⁸ Not only did the government prevent the collapse of AIG, but it ended up earning a profit on the rescue of AIG. Guerrero, *supra* note 170.

IV. INTERNATIONAL PERSPECTIVE

Due to the global reach of the 2008 recession, nations around the world have been dealing with the similar problem of failing banks. Therefore, it is not surprising to see that many other countries reacted in the same manner. After hesitating to take aggressive action, countries began nationalizing struggling banks and financial institutions. Based on the similarities between the current issues facing countries around the world and the near universal protection of property rights through some form of “Takings Clause,” international law should be considered when reaching a solution. In this instance, the Court should consider how other governments acted and whether their actions represent a model for the United States. An analysis of the international response to a financial crisis when there were no further actions to take show that nationalization of a failing industry is essential to preventing an economic catastrophe.

A. United States Acceptance of International Law

There is no consensus on whether United States justices should take foreign law into consideration when making decisions on a novel or controversial issue. While it has been held that foreign law is not binding in United States’ courts, several justices have displayed a willingness to take international law and actions into consideration.¹⁹⁹

The Court’s willingness to examine international law when deciding cases in the United States has been displayed numerous times over the course of the last century. In the *Paquete Habana*, the Court stated that

[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of [c]ivilized nations.²⁰⁰

More recently in *Roper v. Simmons*, the Court expressed its intent to look at the international community for guidance when dealing with a controversial decision in the United States.²⁰¹ In that case, the Supreme Court discussed the constitutionality of the juvenile death penalty in relation to the Eighth Amendment’s Cruel and Unusual Punishment clause.²⁰² Based on the near universal outlaw of the juvenile death penalty, the Court decided to declare the juvenile

¹⁹⁹ *The Use of International and Foreign Law in Interpreting the U.S. Constitution*, AM. CONSTITUTION SOC’Y FOR LAW AND POL’Y, <http://www.acslaw.org/files/intl%20law%20study%20guide%201-18-06.pdf> (last visited Oct. 2, 2012). Justices Breyer, Ginsburg, and Kennedy have demonstrated a tendency to look towards international law when dealing with issues of Constitutional Law, whereas Chief Justice Roberts and Justices Scalia and Thomas have spoken against the practice of consulting international law. *Id.*

²⁰⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²⁰¹ *See Roper v. Simmons*, 543 U.S. 551, 575 (2005).

²⁰² *Id.*

death penalty unconstitutional.²⁰³ However, the Court was quick to declare that international law was not binding on its decision.²⁰⁴

Even though international law is not dispositive, the Supreme Court has taken international views into consideration because of common themes among nations and the growing trend of globalization. The United States shares many traits with countries around the world, including its origins. Based on these common origins, it is often helpful to see how other countries handle similar issues.²⁰⁵ Additionally, over the last several decades the world has become more interconnected than ever and the international community has played a larger role in decision making. As a result, it is important to consider what other nations are doing with respect to problems all nations face.²⁰⁶

Based on the Court's acceptance of international law, the court in this case should consider how other nations have acted in response to previous times of economic struggle and the current global recession.

B. International Takings Clause

As the leading capitalist country in the world, the United States does not have a strong history when it comes to nationalizing private companies. In the international community, the feeling towards nationalization is similar, but its presence is more prevalent. Based on the successful history of nationalization in times of recessions or depressions, an analysis of nationalization on a global scale displays the importance of nationalization and its role in the direst of circumstances.

The idea behind the Takings Clause existed well before the Framers included it in the Fifth Amendment. The protection of private property from government seizure is a recognized right that dates back as far as biblical times.²⁰⁷ In fact, the basic system established by the Framers for government appropriation of property is based on the ideals of Ancient Rome.²⁰⁸ However, the legal protection designed in the Fifth Amendment can be traced back to the Magna Carta and England.²⁰⁹ The Magna Carta prevented a person's land from being unlawfully taken by the King without some form of hearing.²¹⁰ The protection of property was carried over into modern English law and was the basis for the Fifth Amendment in the Bill of Rights.²¹¹

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116 (2005) ("[T]o the extent constitutional systems perform similar functions, similar concerns may arise about the consequences of interpretive choices. If more than one interpretation of the Constitution is plausible from domestic legal sources, approaches taken in other countries may provide helpful empirical information in deciding what interpretation will work best here.").

²⁰⁶ "No institution of government can afford now to ignore the rest of the world." Sandra Day O'Connor, *Keynote Address: Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y INT'L L. PROC. 348, 349 (2002).

²⁰⁷ Tschetter, *supra* note 123, at 208.

²⁰⁸ *Id.*

²⁰⁹ *Id.* See also Edward J. Sullivan, *A Brief History of the Takings Clause*, LAND USE LAW, http://law.wustl.edu/landuselaw/articles/brief_hx_taking.htm (last visited Jan. 20, 2013).

²¹⁰ Sullivan, *supra* note 209.

²¹¹ "As in other democratic countries, property rights in the United Kingdom are protected. However, since expropriation, or 'compulsory purchase' as it is called in the UK, is considered an attack on these rights, it must

The United Kingdom is not the only country in Europe with a constitution that protects the rights of private property from government control. In fact, the countries that nationalized banks during the recent recession all have constitutions that protect private property. These countries include Belgium,²¹² France,²¹³ Germany,²¹⁴ Greece,²¹⁵ Iceland,²¹⁶ Ireland,²¹⁷ Italy,²¹⁸ Japan,²¹⁹ Luxembourg,²²⁰ the Netherlands,²²¹ Portugal,²²² Spain,²²³ and

be justified to be in the public interest, have a proper process/clear regulations and a compensation code that is regarded as fair and just.” Geoff Fisher, *Compulsory Purchase Compensation: A Glimpse of Eminent Domain in the United Kingdom*, RIGHT OF WAY, Sept./Oct. 2010, at 26, available at http://www.irwaonline.org/eweb/upload/sep_web_Compulsorycompensation.pdf.

²¹² “No one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by the law and in return for fair compensation paid beforehand.” 1994 CONST. art. 16 (Belg.) available at http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf.

²¹³ “Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.” 1789 CONST. art. 17 (Fr.) available at http://www.constitution.org/fr/fr_drm.htm.

²¹⁴ “Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.” GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] May 23, 1949, BGBl. I art. 14(3) (Ger.) available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

²¹⁵ “No one shall be deprived of his property except for public benefit which must be duly proven, when and as specified by statute and always following full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation. In cases in which a request for the final determination of compensation is made, the value at the time of the court hearing of the request shall be considered.” 1975 SYNTAGMA [SYN.][CONSTITUTION] 17 (Greece) available at <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

²¹⁶ “The right of private ownership shall be inviolate. No one may be obliged to surrender his property unless required by public interests. Such a measure shall be provided for by law, and full compensation shall be paid.” STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [CONSTITUTION] June 17, 1944, art. 72 (Ice.) available at http://www.government.is/media/Skjol/constitution_of_iceland.pdf.

²¹⁷ “The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property. The State recognises, [sic] however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.” IR. CONST., 1937, art. 43, available at [http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20\(Eng\).htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng).htm).

²¹⁸ “In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest.” Art. 42 Costituzione [Cost.] (It.) available at http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

²¹⁹ “Private property may be taken for public use upon just compensation therefor.” NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 29, para. 3 (Japan) available at http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html.

²²⁰ “No one may be deprived of his property except on grounds of public interest in cases and in the manner laid down by the law and in consideration of prior and just compensation.” CONSTITUTION DU LUXEMBOURG [CONSTITUTION] Oct. 17, 1868, art. 16 (Lux.) available at http://www.servat.unibe.ch/icl/lu00000_.html.

²²¹ “Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament. Prior assurance of full compensation shall not be required if in an emergency immediate expropriation is called for.” Grondwet voor

Sweden,²²⁴ among others. In addition to individual countries protecting the rights of the private individual, the European Convention on Human Rights also has a clause protecting private property.²²⁵

C. International Examples of Nationalization

For well over a century, governments around the world have been nationalizing private companies in the interest of the state. While nationalizations have frequently occurred during times of war or financial crises, it is not limited to these situations. The prevalence of this trend in many different cultures indicates that many societies view nationalization as a viable solution to a recurring problem.²²⁶ The Court can look to the international consensus on nationalization and determine whether the government was acting in the best interests of the people when it decided to effectively nationalize AIG.

1. Nationalization Prior to 2008

Even before the wave of nationalization that accompanied the recent financial crisis, countries around the world have nationalized various industries, including the financial industry. Due to the nature of the economic crisis currently facing the United States, the analysis of previous nationalization is focused on the financial industry. However, there are many examples of situations in which countries have nationalized entire industries including communications, transportation (rail and air), manufacturing, and banking among others in the interest of protecting those industries.

France has a long history of nationalizing major companies and industries. Following World War II, the French government embarked on a series of policies that would bring its major industries under government control with the goal of economic recovery and prosperity.²²⁷ When the first elected national assembly met in late 1945, it agreed to

het Koninkrijk der Nederlanden (Constitution of the Kingdom of the Netherlands) [GW.], art. 14, *available at* <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

²²² "The requisition of property or its expropriation for public purposes are carried out only on the strength of the law and only against the payment of fair compensation." CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] Apr. 2 1976, art. 62 (Port.) *available at* http://www.servat.unibe.ch/icl/po00000_.html.

²²³ "No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 33, Dec. 29, 1978 (Spain) *available at* http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

²²⁴ "Every citizen whose property is requisitioned by means of an expropriation order or by any other such disposition shall be guaranteed compensation for his loss on the bases laid down in law." REGERINGSFORMEN (RF) [CONSTITUTION] 2:18 (Swed.), *available at* http://www.servat.unibe.ch/icl/sw00000_.html.

²²⁵ "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Protocol to the Convention of Human Rights and Fundamental Freedoms, Mar. 20, 1950, E.T.S. No. 5 *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf.

²²⁶ See *supra* Part IV.B.

²²⁷ David H. Pinkney, *Nationalization of Key Industries and Credit in France After the Liberation*, 62 POL. SCI. Q. 368, 371 (1947).

nationalize the banking industry, the majority of the insurance industry, public utilities, and coal mines.²²⁸ In that first meeting, after only a single day of debate, the legislature agreed to increase government control over the banking industry by creating a state controlled banking system.²²⁹ This was accomplished by nationalizing the Bank of France and the four largest deposit banks, while also placing strict controls over all the banks in France.²³⁰ Shortly thereafter, the government nationalized the thirty-two largest insurance companies, the two largest investment banks, and the Bank of Algeria.²³¹ The plan to nationalize these companies resulted in the government becoming the sole stockholder, with the company free to maintain its former identity and continue to compete with private companies.²³² As the sole stockholder, the State exercised the power to review and approve of all the actions the directors had normally put to a shareholder vote.²³³ In return for the shares the government appropriated as a part of nationalization, the former stockholders received compensation based on the market value of their assets.²³⁴

Beginning in the 1970s, France again suffered from a slumping economy.²³⁵ The trend of nationalization continued in the 1980s as the government attempted to pull the economy out of its slump.²³⁶ This wave of nationalization included forty-six financial institutions, thirty-nine of which were banks, bringing all the banks that were not previously owned by the state under government control.²³⁷ After temporarily nationalizing the banks, the majority of the banks nationalized in 1982 were reprivatized when the economy began to recover.²³⁸

In the early 1980s, most of Latin America was facing a debt crisis that lasted the better part of a decade.²³⁹ The crisis was precipitated by the booming times of the 1970s in Mexico that spread to the rest of Latin America.²⁴⁰ But the boom was short lived as oil prices and interest rates began to decline, unraveling the fabric of the Mexican economy.²⁴¹ In a few short months Mexico was unable to pay its debts and Latin America was entering a financial

²²⁸ *Id.* at 368.

²²⁹ *Id.* at 375.

²³⁰ Margaret G. Myers, *The Nationalization of Banks in France*, 64 POL. SCI. Q. 189, 189 (1949). This measure brought nearly half of all commercial deposits in France under government control. *Id.* at 196. While this regulation did not include the two largest investment banks in France, those banks were subject to strict government controls. *Id.*

²³¹ Pinkney, *supra* note 227, at 375.

²³² *Id.* at 376.

²³³ *Id.* at 378.

²³⁴ *Id.*

²³⁵ Pascal Dumontier & Claude Laurin, *The Financial Impact of the French Government's Nationalization/Privatization Strategy 6* (Jan. 10, 2003) (unpublished manuscript) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=393484).

²³⁶ *Id.*

²³⁷ *Id.* This included all French banks with more than 1 billion francs deposited. *Id.* at 7. As a result of this wave of nationalization, "the entire banking sector was under the control of the French government." *Id.* In return for the nationalization of the banks, the shareholders were paid an amount determined by a committee of experts composed of people from the banks and the government. *Id.* at 8.

²³⁸ *Id.* at 9.

²³⁹ KRUGMAN, *supra* note 8, at 33-34.

²⁴⁰ *Id.* Fueled by the discovery of oil, increasing oil prices, and high foreign investment the Mexican economy expanded rapidly. *Id.*

²⁴¹ Rubén Hernández-Murillo, *Experiments in Financial Liberalization: The Mexican Banking Sector*, 89 FED. RESERVE BANK OF ST. LOUIS REV. 415, 416-17 (Sept./Oct. 2007).

crisis.²⁴² Facing an economic crisis in 1982, the President of Mexico, Jose Lopez Portillo, nationalized the banking industry.²⁴³ This was accomplished through an amendment to the Constitution of Mexico that allowed the Mexican government to take control of fifty-eight of the sixty banks in the struggling sector.²⁴⁴

Two decades before the real estate bubble in the United States burst taking the whole financial sector with it, Sweden and Japan were dealing with a real estate bubble of their own. In the early 1990s, Sweden's banks were on the verge of bankruptcy.²⁴⁵ Initially, Sweden reacted as most countries would and did; trying any solution they could to prevent the banks from failing.²⁴⁶ After a series of bank failures, the government decided to step up its efforts by guaranteeing all deposits in the country's 114 banks.²⁴⁷ The next step was to take an equity stake in the banks in return for capital injections, which led to Sweden nationalizing two of its largest banks.²⁴⁸ Nationalization worked to stabilize the economy and taxpayers benefitted from the privatization of the banks Sweden had taken a stake in.²⁴⁹ Almost twenty years later, Sweden still owns a 19.9% stake in Nordea (Nordbanken), a highly regarded and successful bank in the Baltic region.²⁵⁰ When faced with a banking crisis, Sweden spent approximately four percent (4%) of its gross domestic product (GDP) to nationalize its banks.²⁵¹ It is estimated that the total cost of nationalization to Sweden was less than two percent (2%) of its GDP, although some argue it was closer to zero percent (0%).²⁵²

While this was happening in Sweden, Japan was suffering from the collapse of its own housing bubble and a prolonged period of economic strife.²⁵³ Following a seventy percent (70%) decline in the stock market and a bursting real estate bubble, Japan was in the midst of entering a recession.²⁵⁴ Japan took the same action other countries take when faced with a declining economy, it lowered interest rates, instituted financial stimulus, injected cash into struggling institutions, and sought a private market solution.²⁵⁵ Unfortunately, these

²⁴² KRUGMAN, *supra* note 8, at 34.

²⁴³ Miguel Acosta-Romero, *Consumer Protection in the Mexican Financial System*, 106 DICK. L. REV. 255, 256 (2001).

²⁴⁴ Hernández-Murillo, *supra* note 241, at 417. The amendment to the Mexican Constitution provided that "all banking and financial services activities were to now be considered public services, operated exclusively by the government." Carlos M. Nalda, Note, *Nafta, Foreign Investment, and the Mexican Banking System*, 26 GEO. WASH. J. INT'L L. & ECON. 379, 385-86 (1992).

²⁴⁵ Carter Dougherty, *Sweden's Fix For Banks: Nationalize*, N.Y. TIMES, Jan. 23, 2009, at B1.

²⁴⁶ Carter Dougherty, *How Sweden Handled a Financial Crisis Without Burdening Taxpayers*, N.Y. TIMES, Sept. 23, 2008, at C9.

²⁴⁷ *Id.*

²⁴⁸ Elisa Martinuzzi, Maria Petrakis & Tom Stoukas, *Greek Bank Investors Facing Wipeout as Nationalization Looms*, BLOOMBERG (Oct. 27, 2011, 7:01 PM), <http://www.bloomberg.com/news/2011-10-27/greek-bank-investors-facing-wipeout-as-nationalization-looms.html>.

²⁴⁹ Dougherty, *How Sweden Handled a Financial Crisis Without Burdening Taxpayers*, *supra* note 246.

²⁵⁰ Dougherty, *Sweden's Fix For Banks: Nationalize*, *supra* note 245; see also Dougherty, *How Sweden Handled a Financial Crisis Without Burdening Taxpayers*, *supra* note 246; Martinuzzi, Petrakis & Stoukas, *supra* note 248.

²⁵¹ Dougherty, *How Sweden Handled a Financial Crisis Without Burdening Taxpayers*, *supra* note 246.

²⁵² *Id.*

²⁵³ Hiroko Tabuchi, *In Japan's Stagnant Decade, Cautionary Tales for America*, N.Y. TIMES, Feb. 13, 2009, at B1.

²⁵⁴ *What Japan Got Right*, THE DAILY BEAST (Feb. 6, 2009 7:00 PM), <http://www.thedailybeast.com/newsweek/2009/02/06/what-japan-got-right.html>.

²⁵⁵ Tabuchi, *supra* note 253.

measures did little to stop the approaching crisis as 1997 saw several bank failures.²⁵⁶ Yet Japan still continued to inject stimulus into ailing banks in the hope the banks would recover on their own.²⁵⁷ Finally, Japan decided to take more aggressive action by nationalizing its banks.²⁵⁸ When the banks were nationalized, their toxic assets were sold to the private sector, helping the banks get back on their feet.²⁵⁹ Despite widespread opinion against the nationalization of the banks, it is clear that nationalization helped the Japanese economy recover.²⁶⁰ Less than two decades later, the rest of the world would experience a crisis similar to the one in Japan and Sweden, with one significant difference: it had the blueprint to succeed in less than the decade it took Japan to recover.²⁶¹

2. *Nationalization During Financial Crisis*

The financial crisis of 2008 was a global crisis that showed the first signs of struggle outside the United States. In fact, it arguably had a far greater impact on the rest of the world than it did on the United States.²⁶² Each country was impacted differently and handled the problem in a different manner. However, when the crisis reached its peak the one common theme in every country affected was some degree of nationalization.

The first signs of a world financial crisis began to show themselves shortly after the problems began to surface in the United States. Northern Rock, in Britain, was one of the first financial companies to feel the squeeze of the financial markets stemming from the subprime mortgage crisis. On September 13, 2007, a few months before the bank was nationalized, the company revealed that it was in need of an emergency loan from the Bank of England to meet its obligations.²⁶³ When news of this leaked to the public, Northern Rock suffered the biggest run on the bank in over a century.²⁶⁴ For Northern Rock the problems only got worse until it had to be nationalized in February of 2008.²⁶⁵ As part of the nationalization, shareholders were compensated for their shares at a price set by a government appointed panel.²⁶⁶ Following the nationalization of Northern Rock, Lloyds TSB made a deal to take over the largest mortgage lender in Britain, HBOS, after HBOS' shares slid on news

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*; see also *What Japan Got Right*, *supra* note 254.

²⁵⁹ *What Japan Got Right*, *supra* note 254. This process was very similar to the process in America during the savings and loan crisis in the 1980s. *Id.*

²⁶⁰ *Id.*

²⁶¹ Tabuchi, *supra* note 253. John H. Makin, an economist for the American Enterprise Institute commented after the Japanese recession, "[t]he lesson from Japan in the 1990s was that they should have stepped up and nationalized the banks." *Id.*

²⁶² The financial crisis severely impacted the economies of Europe, hitting Greece, Ireland, Portugal, Spain, and Italy the hardest as each country received a bailout from the European Union. See generally Robert Winnett, *Debt Crisis: Spain and Italy to be bailed out in £600bn deal*, THE TELEGRAPH (June 19, 2012, 9:27 PM), <http://www.telegraph.co.uk/finance/financialcrisis/9343049/Debt-crisis-Spain-and-Italy-to-be-bailed-out-in-600bn-deal.html>.

²⁶³ Hyun Song Shin, *Reflections on Northern Rock: The Bank Run that Heralded the Global Financial Crisis*, 23 J. ECON. PERSP. 101, 101 (2009).

²⁶⁴ *Id.*

²⁶⁵ *Northern Rock to be nationalised*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/7249575.stm> (last updated Feb. 17, 2008).

²⁶⁶ *Id.* Experts believe that some shareholders will sue the Government over the price offered. *Id.*

of Northern Rock's struggles.²⁶⁷ This deal foreshadowed the nationalization of the newly formed HBOS-Lloyds TSB.

A few months later the insurance giant Fortis began to struggle. In late September 2008, the governments of Belgium, the Netherlands, and Luxembourg (collectively "Benelux") invested \$16.4 billion to rescue the bank and insurance giant Fortis.²⁶⁸ In return for the capital injection, each country received a forty-nine percent (49%) stake in Fortis' operations in their country.²⁶⁹ The next day, September 29, trouble again appeared in England when the British government was forced to nationalize the mortgage lender Bradford & Bingley.²⁷⁰

The crisis would only grow worse. In October, Iceland faced a crisis that threatened to bankrupt the entire country and resulted in the nationalization of its three largest banks: Kaupthing, Landsbanki, and Glitnir.²⁷¹ The crisis again hit Great Britain as it was forced to deal with another bailout; the Royal Bank of Scotland (RBS) and HBOS-Lloyds TSB were partly nationalized with the government taking approximately sixty percent (60%) of RBS (later increased to 82%)²⁷² and forty percent (40%) of HBOS-Lloyds TSB.²⁷³ November was only slightly better as Portugal nationalized the Banco Português de Negócios (BPN) due to problems stemming from the financial crisis.²⁷⁴ Additionally, Latvia, who had vehemently stated its banks were financially sound despite the turmoil facing the rest of the European Union, was forced to take a fifty-one percent (51%) stake in its second largest bank, Parex Bank.²⁷⁵

The new year started in the same vane as the last year ended as Germany, one of the strongest economic members of the European Union, also fell victim to the struggling economic climate. On January 8, 2009, Germany was forced to partly nationalize Commerzbank, one of the largest banks in Germany, second only to Deutsche Bank.²⁷⁶ The nationalization involved the government taking a twenty-five percent (25%) stake in the

²⁶⁷ *Lloyds TSB approves HBOS takeover*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/7736722.stm> (last updated Nov. 19, 2008).

²⁶⁸ Aoife White, *European bank giant Fortis partially nationalized*, ABC NEWS, http://abcnews.go.com/Business/story?id=5906619&page=1#.UNB3Ym_BHni (last visited Dec. 18, 2012).

²⁶⁹ *Id.*; Amy Wilson, *Financial crisis: Benelux bank Fortis nationalised to stop collapse*, THE TELEGRAPH (Sept. 28, 2009), <http://www.telegraph.co.uk/finance/financialcrisis/3100606/Financial-crisis-Benelux-bank-Fortis-nationalised-to-stop-collapse.html>.

²⁷⁰ *Britain nationalises Bradford & Bingley*, REUTERS (Sept. 29, 2008 3:04 AM), <http://www.reuters.com/article/2008/09/29/bradfordandbingley-darling-highlights-idUSBINGLEY20080929>.

²⁷¹ David Prosser, *Crisis deepens for Iceland as last of 'big three' banks is nationalised*, THE INDEPENDENT (Oct. 10, 2008), <http://www.independent.co.uk/news/business/news/crisis-deepens-for-iceland-as-last-of-big-three-banks-is-nationalised-956711.html>; see also Kimberly Amadeo, *Iceland Goes Bankrupt - Is the U.S. Next?*, ABOUT.COM, http://useconomy.about.com/od/worldconomy/p/Iceland_economy.htm (last updated Jan. 26, 2009).

²⁷² Gonzalo Vina, *RBS Should Be Fully Nationalized to Boost Lending, Unions Urge*, BLOOMBERG (Sept. 7, 2012, 7:01 PM), <http://www.bloomberg.com/news/2012-09-07/rbs-should-be-fully-nationalized-to-boost-lending-unions-urge.html>.

²⁷³ *UK banks receive £37bn bail-out*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/7666570.stm> (last updated Oct. 13, 2008).

²⁷⁴ Axel Bugge, *Portugal unable to find buyers for nationalised bank-daily*, REUTERS (Nov. 29, 2012 4:05 AM), <http://www.reuters.com/article/2010/11/29/portugal-bpn-idUSLDE6AS0HS20101129>.

²⁷⁵ Andrew Higgins, *Latvia to Take 51% Stake in Local Bank*, WALL ST. J., Nov. 10, 2008, at A12.

²⁷⁶ *Commerzbank is part nationalized*, BBC NEWS, http://news.bbc.co.uk/2/hi/in_depth/7818531.stm (last updated Jan. 8, 2009).

company in return for a capital injection of €10 billion.²⁷⁷ Approximately one week later, Ireland followed the example set by many other members of the EU and nationalized the Anglo Irish Bank amid slipping confidence the bank could stave off the crisis.²⁷⁸ In February, the nationalization of Commerzbank had stabilized German markets but there were still fears that further nationalizations may be necessary to avert a disaster.²⁷⁹ The government responded by passing a draft bill that would allow the government to forcibly nationalize any failing financial institution if all other measures of stabilization have failed.²⁸⁰

In March, Iceland's Financial Supervisory Authority (FME) took control of Straumur-Burdaras Investment Bank, the last investment bank in Iceland that had managed to stay out of government hands.²⁸¹ The FME also assumed control of the Icelandic savings bank Reykjavik Savings Bank (SPRON).²⁸² In December, Venezuela acted to stem the growing financial crisis in its country by taking control of seven banks, amounting to approximately twenty percent (20%) of the country's banking system.²⁸³

As of April 2011, four of Ireland's six largest banks had already been mostly or fully nationalized, when the country began looking at taking a majority stake in each of the country's six largest lenders to prevent further decline.²⁸⁴ This trend continued in October 2011, when Greece, another country that was hit particularly hard due to the global financial crisis, nationalized Proton Bank due to its struggling loan portfolio.²⁸⁵ That same month, Belgium, France, and Luxembourg agreed to nationalize part of the Franco-Belgian banking group Dexia S.A. due to its exposure to Greek debt.²⁸⁶ In 2012, Spain moved to effectively nationalize the country's fourth largest bank, Bankia, by taking a forty-five percent (45%)

²⁷⁷ *Id.*

²⁷⁸ Sean Farrell, *Anglo Irish Bank nationalized*, THE INDEPENDENT (Jan. 16, 2009), <http://www.independent.co.uk/news/business/news/anglo-irish-bank-nationalised-1380495.html#>.

²⁷⁹ *Germany passes draft bank nationalization bill*, CNN (Feb. 18, 2009), <http://edition.cnn.com/2009/BUSINESS/02/18/germany.banks.nationlization/index.html>.

²⁸⁰ *Id.* The forced nationalization is accomplished by the government taking over the shares of the bank at "a reasonable price." *Id.*

²⁸¹ Polya Lesova, *Icelandic authorities take over Straumur-Burdaras Bank*, MARKETWATCH (Mar. 9, 2009), http://articles.marketwatch.com/2009-03-09/news/30999001_1_icelandic-authorities-liquidity-position.

²⁸² *About SPRON*, SPRON, <http://www.spron.is/en/AboutSpron/> (last visited Dec. 18, 2012).

²⁸³ Simon Romero, *Venezuela Detains Banker With Ties to Government*, N.Y. TIMES, Dec. 7, 2009, at A8.

²⁸⁴ David Enrich, *Ireland's Banks Get Failing Grades*, WALL ST. J. (April 1, 2011) <http://online.wsj.com/article/SB10001424052748703806304576234180828120692.html>. The four banks already nationalized were Allied Irish Banks PLC, Anglo Irish Bank Corp., Irish Nationwide Building Society, and EBS Building Society. Quentin Fottrell, *Ireland Takes Over Another of Its Banks*, WALL ST. J. (Dec. 24, 2010), <http://online.wsj.com/article/SB10001424052748704278404576037060729502914.html>.

²⁸⁵ Andy Dabilis, *Scandalized Proton Bank Gets Nationalized*, GREEK REPORTER (Oct. 10, 2011), <http://greece.greekreporter.com/2011/10/10/scandalized-proton-bank-gets-nationalized/>.

²⁸⁶ Laurence Norman & Alessandro Torello, *Dexia's Belgian Bank Nationalized*, WALL ST. J. (Oct. 20, 2011, 4:27 AM), <http://online.wsj.com/article/SB10001424052970204618704576642391280271086.html>; Liz Alderman & Judy Dempsey, *Germany and France Say Deal on Banks is Near*, N.Y. TIMES, Oct. 9, 2011, at B1. This was the second time Dexia was bailed out by the French and Belgian governments, the first coming in 2008. *Id.*

BITING THE HAND THAT FEEDS

stake in the bank and exercising control.²⁸⁷ This move came in response to fears that Spain would need a bailout similar to those recently taken by Greece, Portugal, and Ireland.²⁸⁸

Overall, a significant number of banks were either nationalized or failed. Venezuela was the most active when it came to nationalizing banks, as it nationalized seven over the course of the financial crisis. Two of the countries hit the hardest by the financial crisis were Iceland and Ireland. Iceland nationalized its three largest investment banks and its largest commercial bank. By the time Ireland was done, it had nationalized five of its six largest lenders.²⁸⁹ The only bank that was not fully nationalized was the Bank of Ireland PLC, despite the Irish government's thirty-six percent (36%) stake in the bank.²⁹⁰ Great Britain nationalized four banks, while Belgium and Luxembourg joined forces to nationalize two banks. Germany, Greece, Spain, Portugal, and Latvia each nationalized one bank. The history of nationalization, before and after 2008, shows that while often an option of last resort, nationalization tends to be an effective method of stabilizing an economy.

V. CONSTITUTIONAL AMENDMENT VS. EXPANDING EMERGENCY EXCEPTION

Ensuring the government's ability to act freely in the face of an economic emergency is essential to the well-being of the American economy. If the financial crisis of 2008 taught us anything, it is that government action is often needed to protect investors and the public.

During the recent economic downturn the government adopted a variety of methods aimed at protecting the economy. One was capital injections to struggling companies through the form of a government bailout. These bailouts resulted in billions of taxpayer dollars going to the banks. While the government is well on the way to being fully reimbursed for the costs of the bailouts, it was widely unpopular at the time.²⁹¹ When the problems were too widespread, the government resorted to temporary nationalization. In return for a capital injection, the company receiving the bailout had to provide an equity stake in the company. As a result, the government has not only recouped its money, but it has made a substantial profit on its investment.²⁹² Despite being very successful, the government now finds itself as the defendant in a civil lawsuit over those actions. If the government's ability to protect the economy in times of dire circumstances is to be continued in the future, some changes will have to be made. There are two ways to ensure the government's ability to act in the future: a constitutional amendment or an expansion of the Emergency Exception.

²⁸⁷ Alan Clendenning, *Spain nationalizes fourth-largest bank as crisis deepens*, USA TODAY <http://www.usatoday.com/money/economy/story/2012-05-09/spain-nationalizes-bankia-bank/54865632/1> (last updated May 9, 2012 8:32 PM).

²⁸⁸ *Id.*

²⁸⁹ Martinuzzi, Petrakis & Stoukas, *supra* note 248.

²⁹⁰ Eamon Quinn, *Ireland Bank Nationalization Moves Ahead*, WALL ST. J. (July 26, 2011, 2:19 PM), <http://online.wsj.com/article/SB10001424053111903999904576470264248494884.html>.

²⁹¹ See generally Matthew Ericson, Elaine He & Amy Schoenfeld, *Tracking the \$700 Billion Bailout*, N.Y. TIMES, http://www.nytimes.com/packages/html/national/200904_CREDITCRISIS/recipients.html (last visited Jan. 26, 2013).

²⁹² The Government made over \$22 billion in profit through its investment in AIG. Guerrero, *supra* note 170.

A. Constitutional Amendment

Nationalization of a privately traded corporation involves a potential violation of the Takings Clause. As the Takings Clause is currently written, there is no doubt that the government's actions constituted a taking with regard to AIG. However, this puts a substantial limitation on the government's ability to take immediate action to prevent a further decline in the economy. One way to resolve this is a constitutional amendment to the Takings Clause, not to change the content, but to add some more guidelines providing for government action in times of emergency.²⁹³ A proper amendment would read:

The forced nationalization of an institution is permitted provided other solutions were sought first and failed. In the event that other measures have failed, prior assurance of full compensation shall not be required if in an emergency immediate expropriation is necessary. The amount of just compensation shall be determined by a government appointed panel consisting of bankers from the private sector and officials from the Federal Reserve and Treasury Department. When the institution has been stabilized, it should be reprivatized.

This amendment would not only provide the flexibility the government needs to protect the public in the event of a financial disaster, but it also would establish a proper and fairer method for determining just compensation.

The first section of the proposed amendment is based on the draft bill approved by the German government in 2009.²⁹⁴ The clause would permit the government to nationalize a struggling institution once other measures have been attempted and failed.²⁹⁵ The addition of this clause would provide for the acceptance of nationalization as an appropriate remedy in times of distress, while also limiting its use. The measures that must be undertaken before nationalization is available include, but are not limited to, a capital reduction followed by a capital increase without subscription rights to existing shareholders, acquiring a majority stake in a corporation, or orchestrating a takeover by a private company.²⁹⁶ By requiring that

²⁹³ Amending the constitution to provide for the nationalization of a struggling company has been successfully implemented in other countries during an economic crisis. For example, in Mexico during the financial crisis in the 1980s, the government amended its constitution to allow for the nationalization of struggling banks. Hernandez-Murillo, *supra* note 241, at 417. The amendment paved the way for the government to nationalize 58 of its 60 banks. *Id.* The German government also amended its constitution to allow for the nationalization of failing institutions. *Germany passes draft bank nationalization bill*, *supra* note 279. Based on the fear that further nationalizations would be necessary, Germany passed an amendment allowing the government to take over a private institution if all other measures had proven unsuccessful. *Id.*

²⁹⁴ Andrea Thomas, *Germany Approves Law for Hypo Nationalization*, WALL ST. J. (Feb. 19, 2009), <http://online.wsj.com/article/SB123494838647509021.html>.

²⁹⁵ *Id.*

²⁹⁶ When passing the German draft bill, the German cabinet had considered other actions would include capital reduction, capital increase, acquiring a majority stake, and presenting a takeover option to shareholders. *Id.* A capital reduction is when the number of shares outstanding is reduced by the company repurchasing its shares. *Capital Reduction*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/capitalreduction.asp#axzz2JOln3z8Y> (last visited Jan. 29, 2013). A capital increase occurs when new shares are issued by giving current investors the option "to subscribe to new shares for cash." *Capital Increase*, INVESTORWORDS.COM, http://www.investorwords.com/15282/capital_increase.html (last visited Jan. 29, 2013). By excluding subscription rights, the company is permitting the government to acquire a stake in the company. See Thomas, *supra* note 294.

BITING THE HAND THAT FEEDS

other measures be taken before nationalizing a private company, the people are guaranteed their private property would not be expropriated except in cases of emergency.

The second clause of the amendment is based on a provision in the Dutch constitution.²⁹⁷ It would allow the government to take whatever actions it deems necessary, within reasonable bounds, when action is required.²⁹⁸ If this amendment had been in place during the financial crisis, the government would not have had to spend time considering the legality of its measures and the political issues accompanied with a measure as bold as the nationalization of a private company. Instead, the government would have been able to act and deal with the issue of just compensation for the shareholders when the economy stabilized. This clause would not prevent an individual from recovering just compensation; it would merely delay the determination of just compensation until after the emergency has subsided.

The third clause of the amendment would protect the interests of the private individual whose property has been expropriated against his or her will. This clause would provide a more lenient determination of what constitutes just compensation. The panel would be composed of bankers from the private sector and government officials from the Federal Reserve and Treasury Department. As a result, the private company would have private sector bankers arguing on its behalf, ideally supplying a more balanced and impartial determination of value.²⁹⁹

A government-appointed panel of private bankers and government officials would prove successful in the United States because it has proven successful in the past. In France, following the series of bank nationalizations in the 1980s, compensation for shareholders was determined by a panel composed of representatives from the private and public sectors.³⁰⁰ Similarly, in England during the temporary nationalization of Northern Rock in 2008, a government appointed panel was created to determine the amount of just compensation for the shareholders' interest in the failing bank.³⁰¹

The final clause would provide for the timely reprivatization of the company. This clause would protect the owner of the company by ensuring the nationalization would only be a temporary measure. By reprivatizing the company, the government would be able to recoup the cost of nationalizing the institution and realize any gain associated with stabilizing the company, as in the case of AIG.³⁰²

Unfortunately, it is highly unlikely this amendment would be passed. A constitutional amendment requires a two-thirds vote by both the House of Representatives and the Senate, or a constitutional convention requested by two-thirds of the state legislatures.³⁰³ The current environment in Washington D.C. is more divided and partisan

²⁹⁷ Grondwet voor het Koninkrijk der Nederlanden (Constitution of the Kingdom of the Netherlands) [GW.], art. 14, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

²⁹⁸ *Id.*

²⁹⁹ See, e.g., Dumontier & Laurin, *supra* note 235, at 8; *Northern Rock to be nationalised*, *supra* note 265.

³⁰⁰ Dumontier & Laurin, *supra* note 235, at 8.

³⁰¹ *Northern Rock to be nationalised*, *supra* note 265.

³⁰² See Guerrero, *supra* note 170.

³⁰³ *The Constitutional Amendment Process*, NAT'L ARCHIVES, <http://www.archives.gov/federal-register/constitution/> (last visited Jan. 26, 2013).

than it has been in decades.³⁰⁴ The 112th Congress just concluded its term at the end of 2012 as the least productive Congress in over sixty years.³⁰⁵ In this environment, when the majority of bills passed are simple housekeeping measures not aimed at changing the country, it is unlikely an amendment to expand the government's power would garner enough support.³⁰⁶ There is even a slimmer chance a constitutional convention would bring forth this amendment.³⁰⁷

B. Emergency Exception

The other way to protect the government's ability to act in times of an emergency would be by expanding the Emergency Exception of the Takings Clause. The Emergency Exception provides that the government does not need to pay just compensation when acting in the face of an emergency.³⁰⁸

Throughout the history of the Supreme Court there have been several situations in which the Court has determined there was not a taking despite the fact that the government action met the other elements.³⁰⁹ While inconsistent, this practice represents an Emergency Exception, in which the Court may decline to find a taking based on the circumstances surrounding the alleged taking.³¹⁰ This exception has been applied at the federal level and at the state level in a number of different scenarios.³¹¹ While this doctrine has predominately applied in times of war or enacting a police purpose, it could easily be expanded to cover the current situation.

In times of war, the Supreme Court has ruled that just compensation is not required when there has been a taking if the government was acting in the best interests of the public.

³⁰⁴ Jennifer Steinhauer, *Congress Nearing End of Session Where Partisan Input Impeded Output*, N.Y. TIMES, Sept. 19, 2012, at A21.

³⁰⁵ *Id.*

³⁰⁶ "Of the bills the 112th Congress did pass, the majority were housekeeping measures, such as naming post office buildings or extending existing laws." Stephen Dinan, *Congress logs most futile legislative year on record*, THE WASH. TIMES (Jan. 15, 2012), <http://www.washingtontimes.com/news/2012/jan/15/congress-logs-most-futile-legislative-year-on-reco/#ixzz2lu9na16E>.

³⁰⁷ Combine the fact that "[n]one of the 27 amendments to the Constitution have been proposed by constitutional convention" with the widely criticized move to bailout out the banks with taxpayer money, a constitutional amendment allowing the government to save banks during a future economic crisis is unlikely to gain enough support. *The Constitutional Amendment Process*, *supra* note 303; see also TOO BIG TO FAIL, *supra* note 93, at 389.

³⁰⁸ CHEMERINSKY, *supra* note 6, at 661.

³⁰⁹ *Id.*

³¹⁰ *Id.*; see, e.g., *United States v. Caltex*, 344 U.S. 149, 155 (1952) (holding that the destruction of a private company's oil facility in the Philippines was not a taking because it was done to prevent the Japanese from taking it over during World War II); *United States v. Pac. R.R.*, 120 U.S. 227 (1887) (holding the necessities of war justified the government destroying bridges to prevent the Confederate army from advancing north during the Civil War). But see *United States v. Pewee Coal Co. Inc.*, 341 U.S. 114 (1951) (requiring the government to pay just compensation for seizing a striking coal mine to prevent it from being shutdown during wartime); *United States v. Russell*, 80 U.S. 623, 623-24 (1871) (holding the U.S. had to pay just compensation for the appropriation of a private citizen's steamers during wartime); *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851) (requiring the U.S. to pay the plaintiff just compensation for the seizure of his wagons during war).

³¹¹ See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 n.6 (1964). While the police power has traditionally included actions to protect the community through fire prevention, garbage disposal, and liquor control, it is not limited to these circumstances. *Id.*

In recent years, courts have consistently held that the government is not liable to private persons for destruction of property during times of war.³¹² In *United States v. Caltex*, the Court rationalized the Army's decision to destroy private property with the aim of winning the war.³¹³ The Court states that the language of the Fifth Amendment does not explicitly state the United States will compensate those who suffer from "every ravage and burden of war."³¹⁴

The Emergency Exception is often applied in cases where the government is being sued for a taking based on the police power.³¹⁵ It has been observed that "where the government is engaged in zoning, nuisance abatement, conservation, business regulation, or a host of other functions, courts will usually decide that the economic loss suffered by the private citizen was a mere incident of the lawful exercise of the 'police power,' and thus not compensable."³¹⁶ Several states have held that when the state government acts within the scope of its police power, it is not required to pay just compensation.³¹⁷ One of the most common exercises of police power is when the government acts to prevent the spread of a fire that threatens a whole community.³¹⁸ However, there are many scenarios beyond the situation where a house is destroyed to prevent the spread of a fire in which personal or real property can be destroyed without being compensated. The court determines on a case by case basis whether private property should be compensated when the government acted in an emergency.³¹⁹

Due to the relatively infrequent occurrence of a severe economic emergency, the courts have never explicitly ruled on whether a taking during the time of an economic emergency would fall under this exception. When examining the case law surrounding the Emergency Exception, it would not be a stretch to include situations involving actions taken

³¹² See, e.g., *United States v. Caltex*, 344 U.S. at 153-54; *Doe v. United States*, 95 Fed. Cl. 546, 555 (Fed. Cl. 2010); *Nat'l Bd. of Young Men's Christian Ass'n v. United States*, 396 F.2d 467, 470 (Ct. Cl. 1968) *aff'd sub nom.* *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85 (1969).

³¹³ *United States v. Caltex*, 344 U.S. at 155. "The short of the matter is that this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use. It was destroyed that the United States might better and sooner destroy the enemy." *Id.*

³¹⁴ *Id.*

³¹⁵ See generally ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 546-47 (1904).

³¹⁶ Sax, *supra* note 311, at 36. Police power has been defined as "those state and local governmental restrictions and prohibitions which are valid and which may be invoked without payment of compensation." *Id.* at 36 n.6.

³¹⁷ See, e.g., *Kelley v. Story Cnty. Sheriff*, 611 N.W.2d 475, 477 (Iowa 2000); *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla. 1997); *Parham v. Justices of Inferior Court of Decatur Cnty.*, 9 Ga. 341 (Ga. 1851); *Respublica v. Sparhawk*, 1 Dall. 357, 363 (Pa. 1788); see also *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 419 (Cal. 1995) quoting *House v. L.A. Cnty. Flood Control Dist.*, 25 Cal.2d 384, 391 (Cal. 1944) ("[U]nder the pressure of public necessity and to avert impending peril, the legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation.... In such cases calling for immediate action the emergency constitutes full justification for the measures taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety.").

³¹⁸ *United States v. Caltex*, 344 U.S. at 154 ("the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"); see also *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923); *Ralli v. Troop*, 157 U.S. 386, 405 (1895); *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879).

³¹⁹ See *United States v. Caltex*, 344 U.S. at 156.

to avert an economic disaster. The Emergency Exception exists to protect the government's ability to act in times of an emergency, when immediate action is required.³²⁰ The primary use has been the protection of the government's actions in times of war.³²¹ During wartime, the government is permitted to take necessary action to prevent the enemy from gaining ground because it is in the public's best interest that the country win the war.³²² The other principal use is stopping a fire from destroying an entire town or village by destroying one house.³²³ The idea common to these two scenarios is the protection of the public from danger. It is arguable that the harm caused by the failure of the financial system in the United States would have caused substantially more damage than allowing the enemy to use a factory in the Philippines or allowing a single village to burn down.³²⁴

Critics may argue that the Emergency Exception is unconstitutional because it directly contradicts the Fifth Amendment by preventing a person from receiving just compensation for the taking of their property. However, the taking is not as egregious a violation as argued. Nationalization of a private company would only occur in the event that there was no other viable option to save the company. Therefore, nationalization would only occur in the event that the company is failing, in which case the shareholders would lose their entire investment anyway. Common shareholders, as investors in a corporation, are not entitled to earn a profit; they are knowingly taking a risk.³²⁵ By investing in a stock, the investors are spending money in the hope of a future expectation of profit.

³²⁰ *Id.* at 154.

³²¹ *Id.* at 155.

³²² *See id.*

³²³ *See, e.g.,* *Omnia Commercial Co. v. United States*, 261 U.S. at 508; *Ralli v. Troop*, 157 U.S. at 405; *Bowditch v. City of Boston*, 101 U.S. at 18.

³²⁴ Due to the size and global reach of AIG, the failure of AIG would have directly impacted over 30 million people in the U.S. alone. *Actions Related to AIG*, FED. RESERVE BANK OF N.Y., <http://www.newyorkfed.org/aboutthefed/aig/index.html> (last visited Feb. 16, 2013). The tangible and intangible effects of the failure are simply astonishing; it likely would have been an event that would have plunged the U.S. into another "Great Depression." The bankruptcy of AIG would have "posed a direct threat to millions of policyholders, state and local government agencies, 401(k) participants, banks and other financial institutions in the United States and abroad, and would have shattered confidence in already fragile financial markets." *Id.* As one of the largest insurers in the U.S., an AIG bankruptcy would have caused solvency issues at AIG's subsidiaries, causing state and federal regulators to seize those institutions, leaving many policyholders without coverage. *Id.* There would be a run on the institution, similar to a run on the bank. *Id.* Policyholders would withdraw their funds from the company, impairing its ability to meet future obligations. *Id.* State and city governments would recognize huge losses on the failure of AIG and strain their budgets at a time when they were already cutting back significantly. *Id.* Pension and 401(k) plans would experience losses, devastating the millions whose retirement benefits were tied to AIG. *Id.* The economy would have been devastated by the bankruptcy of AIG. *Id.* AIG FP was counterparty to the majority of the CDS contracts outstanding. *Id.* An AIG failure would have prevented other financial institutions from collecting income on the contracts. The reach of the harm would not have been limited to the U.S., as banks around the world had entered into contracts with AIG. *Id.* The already tightening credit market would have been strained further, discouraging the banks from lending and preventing individuals and small businesses from obtaining financing. *Id.* Most devastatingly, an AIG bankruptcy would have eroded any confidence remaining in the financial sector and government, leading to a run on the remaining banks and the collapse of the financial sector.

³²⁵ Little, *supra* note 14. Even though shareholders are normally wiped out in the event of nationalization, this is part of the risk of investing. *Id.* The financial system would not work if taking a risk is rewarded when the company is successful and when it fails. *Id.*

VI. CONCLUSION

In 2012, the tide of the global recession began to recede, revealing a changed economic climate. While the full impacts of the global recession have yet to be fully determined, one thing is clear: the crisis could have been much worse. The world saw a number of its largest and most prestigious financial institutions fail, while even more barely escaped intact. Long the shining example of power and influence in the world, the financial sector was brought to its knees and for a time it looked like there was no bottom in sight. Fortunately, the U.S. government and governments around the world took action. Countries began nationalizing their ailing banks, putting an end to the freefall and restoring confidence in the banks. It was a measure of last resort as everything else had failed to halt the decline. Without these actions, it is likely that the world would still be in the midst of an economic crisis and the financial sector would be unrecognizable as the largest and most well known financial establishments continued to fail.

However, the bold rescue was not without its downfalls. For one, the United States now finds itself the defendant in a civil action over an alleged violation of the Takings Clause. Starr alleged that it and AIG's other shareholders did not receive just compensation in return for the rescue of AIG. Based on an analysis of this issue, it is plausible that Starr is correct, but whether it should be awarded just compensation is a separate and less important issue. Instead, the Court should look at whether the benefits outweigh the burdens. On the one hand, the shareholders of AIG, who knowingly accepted the risk of investing, were harmed by the taking. On the other hand, millions of people around the world would have been negatively impacted by an AIG failure and the AIG shareholders would only be slightly better off. It is evident that government intervention is the best scenario and if it can be done properly, it will cost the taxpayers nothing, as it did in Sweden in the 1990s.³²⁶

The most recent recession will not be the last economic downturn the United States will face. The country can learn from each crisis and be better prepared to act in the face of the next emergency. The lesson from the Great Depression was that government intervention is necessary. The lesson from this recession is that nationalization is often necessary. Therefore, either a constitutional amendment should be passed updating the Takings Clause to better reflect the government's ability to act while also protecting private property, or the Emergency Exception should be expanded to include actions during an economic emergency. By implementing these protections, the government will be able to temporarily nationalize struggling institutions to keep them afloat and protect the country from another Great Depression. If the government fails to learn from this downturn, history is doomed to repeat itself. As George Santayana wrote, "[t]hose who cannot remember the past, are condemned to repeat it."³²⁷

³²⁶ Dougherty, *How Sweden Handled a Financial Crisis Without Burdening Taxpayers*, *supra* note 246.

³²⁷ GEORGE SANTAYANA, *THE LIFE OF REASON*: VOL. 1, 312 (2009).

