

# AN ANALYTICAL APPRAISAL OF PUBLIC CHOICE VALUE SHIFTS FOR ENVIRONMENTAL PROTECTION IN THE UNITED STATES & MEXICO

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## I. INTRODUCTION

This Article portrays the evolution of environmental protection institutions as symptomatic of value shifts in countries<sup>1</sup>—a position that incorporates the two dominant values that encompass the debate concerning *sustainable development*,<sup>2</sup> depicts the balancing of fundamental populace desires, and explains why attaining a higher level of environmental protection in many countries has been and still remains so difficult. The theme assumes that domestic populace value shifts regarding the desired balance between economic development and environmental protection in democracies persuade politicians' preferences and concomitantly precipitate domestic environmental regulatory changes. This causal correlation is compelling when appraising the political dynamics of environmental movements in countries but acknowledges that this domestic level political analysis has a vital interaction with international regimes.<sup>3</sup>

The United States, until the last three decades, and Mexico, until the last few years, were two countries that placed burgeoning industrial development above competing societal desires, including a clean environment, despite a rather long-term and substantiated recognition by the governments of both countries that intense industrialization was increasingly deteriorating natural

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1. See RONALD INGLEHART, *MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC AND POLITICAL CHANGE IN 43 COUNTRIES* 180-88 (1997). Inglehart's analysis says that the level of economic development in a country is the primary variable that causes structural/institutional and cultural/value changes. See *id.*

2. Sustainable development assumes that environmental protection and industrialization that can deteriorate natural resources must be adequately balanced and is normally grounded on scientific evidence that supports preservation and/or the ability to regenerate natural resources so that long-term and permanent destruction of the environment will not occur. This term has a different connotative meaning for developing and highly industrialized countries since developing countries seek to attain a higher standard of living and often will sacrifice more on the environmental side to attain a higher level of economic development. Thus, to some degree it is a subjective term defined differently by values dominant in respective countries.

3. The importance of the interaction between domestic and international political relations has been described in terms of game theory. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 INT'L ORG. 427 (Summer 1988). For particular domestic-international level interaction of concern in this paper, between Mexico and the United States, and the effects of NAFTA on environmental protection in Mexico in the arena of dispute settlement, see David Lopez, *Dispute Resolution Under NAFTA: Lessons From the Early Experience*, 32 TEX. INT'L L. J. 163, 185-86 (1997).

resources and compromising air quality. The internal institutional responses to environmental concerns in these two countries have been dissimilar and will be analyzed by considering temporal environmental protection shifts consistent with levels of economic progress in the United States and by utilizing a hypothetical demographic, regional, and segmented interest public response toward environmental institutions in Mexico. The North American Free Trade Agreement (NAFTA), on the other hand, will demonstrate how an exogenous international influence provided the catalyst to impel the Mexican government to recast its environmental protection position and modify internal environmental protection institutions.

As the United States markedly increased its standard of living during the decades after World War II, society questioned the prudence of unrestrained industrial development so to better protect *quality of life* interests by enacting a fairly rigid environmental regulatory regime. While this preferred value of protecting the environment has remained earnest with elites, politicians, and the populace in the United States, a second value shift that challenged expansive and rigid regulatory structures materialized to question the effectiveness of austere environmental regulations and examine their consistency with due process protections. This perspective and period have been termed the *Deregulatory Era*, which for the environment, matured into a more moderate, cooperative, and market-oriented approach to environmental regulation in the United States.

By comparison, Mexico, a developing country, has been more concerned with attaining economic prosperity and a higher standard of living, even though economic progress has necessarily come at the expense of the environment. Mexico has had moderately high environmental protection standards for over a decade<sup>4</sup> but neglected to consistently and effectively enforce those standards. Mexico has only recently undergone a fairly impressive environmental regulatory restructuring in anticipation of and at the behest of an international agreement — the North American Free Trade Agreement<sup>5</sup> and its side agreement, the North American Agreement on Environmental Cooperation (NAAEC)<sup>6</sup> — because of the realization that future economic benefits derived from NAFTA would be greater than projected levels of economic development without the agreement, despite that the accord contained terms that could potentially limit unbridled industrialization.

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4. See Paulette L. Stenzel, *Can NAFTA's Environmental Provisions Promote Sustainable Development*, 59 ALB. L. REV. 423, 459 (1995).

5. North American Free Trade Agreement, Dec. 17, 1992, Canada-Mexico-U.S., 32 I.L.M. 289.

6. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 8, 1993, Canada-Mexico-U.S., 32 I.L.M. 1480.

## II. VALUE SHIFTS, THE ADMINISTRATIVE STATE, AND ENVIRONMENTAL PROTECTION

### A. *Values Most Pressing to the Populace*

The public choice argument employed herein assumes that the primary desires of a populace can shift over time based on what is currently most pressing in citizens' lives and that those wants can incite regulatory changes in democracies because representatives should be expected to act at the behest of constituents to implement those values into legislation. The theoretical framework employed dichotomizes competing values encompassing environmental regulation into two designations—modernization and postmodernization. The modernization/postmodernization value shift thesis is based on a *scarcity hypothesis*, which says that society will focus on desires that are in shortest supply<sup>7</sup> and are most pressing to people's lives.<sup>8</sup> In countries in early stages of economic development, where life is more exacting for the population and survival is not always completely certain, predominant values are characteristic of the *modernization* period, a time when people emphasize economic prosperity and stability over a higher quality of life<sup>9</sup> since these desires can either conflict with each other or necessitate trade-offs because of resource limitations.

All countries have progressed through, or are currently progressing through, similar economic and sociological stages, which makes temporal and comparative conflicts between social and industrial interests amenable to generalization. While assessing hypothetical value traits of the earliest forms of societal organization is not particularly apropos for themes intricately related to this article, the transition just beyond agrarian social orders is consequential since it is at this period in a country's history, when industrialization brings urbanization, new centers of power, and a tax base to finance government and administrative growth to provide stability to society, that social turbulence can ensue. Without government involvement, including the adoption of new regulations and social programs that might lessen disequilibriums among sectors of society that rapid growth often foment, societal and economic stability can be threatened. Some form of heightened

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7. See INGLEHART, *supra* note 1, at 33.

8. This ideal can be represented in psychology by Maslow's hierarchy of needs. At lower levels in Maslow's hierarchy, people *require* fulfillment of survival needs, which, in terms of this article, are more fully provided by economic development. At higher levels of the hierarchy of needs, people seek self-esteem and self-actualization, but only after survival needs are met. See ABRAHAM MASLOW, *MOTIVATION AND PERSONALITY* 80-106 (1954). The concerns at higher levels are suggestive of desires that improve one's quality of life and individual liberty (i.e. representative of "postmodernization"), whereby one would be apt to place more emphasis on attaining a cleaner environment as well as seeking more freedom from paternalistic authority forms. See *id.*

9. See INGLEHART, *supra* note 1, at 8-19.

public interest within the populace commonly develops during this period of industrialization, often manifesting into government regulations to protect society and labor interests, but enactments generally do not enhance environmental protection even though detriments to nature and/or society could be readily recognized.

With consequent higher standards of living and a diminished concern over uncertainties of economic survival, industrial triumphs become relatively less imperative and other values are emphasized by the populace. The *postmodern* value shift befalls when the vast majority of the population attains a sufficiently high per capita GNP such that it no longer anguishes over economic stability and growth.<sup>10</sup> A postmodern value shift begets a society to become more concerned with greater participation in societal affairs, more individuality, quality of life, and enhanced freedom from bureaucratic authority.<sup>11</sup> While this quality of life attraction engenders a desire for a cleaner environment, declining respect for authority and increased emphasis on individual liberties<sup>12</sup> challenges encompassing government authority and its increased level of expenditures, and pervasive regulation.<sup>13</sup>

The assumptions underlying this relationship between value shifts and administrative state environmental protections are dependent on whether the prominence of new societal demand shifts actually do influence the functioning of and/or challenge agency functions.<sup>14</sup> On the one hand, there is a relatively clear nexus between the desires of constituents and their respective political representatives in consolidated democracies since politicians compete in electoral markets to remain as representatives<sup>15</sup> and would lose their elected positions if they indulged themselves at constituent expense<sup>16</sup> or otherwise maintained ideological perspectives that were

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10. Higher per capita GNP through economic development is a good general indicator to signify a higher level of economic development and population standard of living, while a government providing assistance through the welfare state likely also diminishes the importance of values characteristic during the modernization period because the populace is no longer as concerned with subsistence.

11. See INGLEHART, *supra* note 1, at 11.

12. See *id.* at 39.

13. Interestingly, in a study of forty countries, those that fall distinctly into the category of *postmodernist* have been said to favor economically conservative and socially liberal policies. See INGLEHART, *supra* note 1, at 315-20. This is consistent with both environmental protection (socially liberal) and increased freedom from pervasive government authority and spending (socially liberal and economically conservative). See *id.* This same value-based phenomenon has been described qualitatively as an emergence of "left-libertarian parties" in Western Europe. See Herbert P. Kitschelt, *Left Libertarian Parties: Explaining Innovation in Competitive Party Systems*, 40(2) WORLD POLITICS 194 (1988).

14. This public choice influence assumes that primary desires in the population are eventually acted upon by government officials that will modify government institutions accordingly, which is a plausible assumption for a democracy.

15. See J. Mark Ramseyer, *Public Choice*, in CHICAGO LECTURES IN LAW AND ECONOMICS 101 (Eric A. Posner ed., 2000).

16. See Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking: A Critical*

inconsistent with the majority of voters in their respective districts. Of course, this assumes that environmentalism becomes at least a moderately decisive platform issue on which politicians can be elected, or as incumbents are concerned, that public outcry favoring or opposing given environmental positions can erode the support of the incumbent politician and/or his/her party during a legislative session. If this public choice assumption about constituents influencing their respective representatives on environmental policy is more attenuated, probably because the issue of environmentalism is not significantly definitive to swing citizen voting habits, interest groups will presumably have influence to a degree out of proportion to the general populace,<sup>17</sup> meaning that politicians will support positions that are either pro-environment or pro-industry based on the influence of interest groups rather than constituent concern. This does not mean that public choice preferences will not be consistent with representative positions, but that the short-term impetus fundamentally causing political action is the advocacy of interest groups.

Since it is generally assumed that constituents do eventually influence policy positions in democracies, there is still a separation of powers hurdle to surmount when contending that environmental positions and the functioning of environmental protection institutions are the product of public choice initiatives since, comparatively speaking across countries, all three branches of government can to some degree be involved in environmental protection and enforcement. The public choice assumption is normally acceptable as legislators are concerned, but it can also be contended that there will be a derivative impact of citizen desires on administrative agencies and the judiciary, even though the officials of executive agencies are not directly accountable to the populace, and judiciaries are normally expected to remain free from political influences. Populace pressure can be placed on administrative agencies since such institutions are normally governed by the executive, which is an elected position, and because legislative authority can often influence administrative activities. This populace-based value might also be recognized in the judiciary whereas it too might have decision-making authority to rectify environmental disputes since it operates by interpreting legislation, enacted by constituent-influenced politicians and administrative regulations, and establishes precedent that evolves to some degree in a fashion consistent with needs and values in society.<sup>18</sup>

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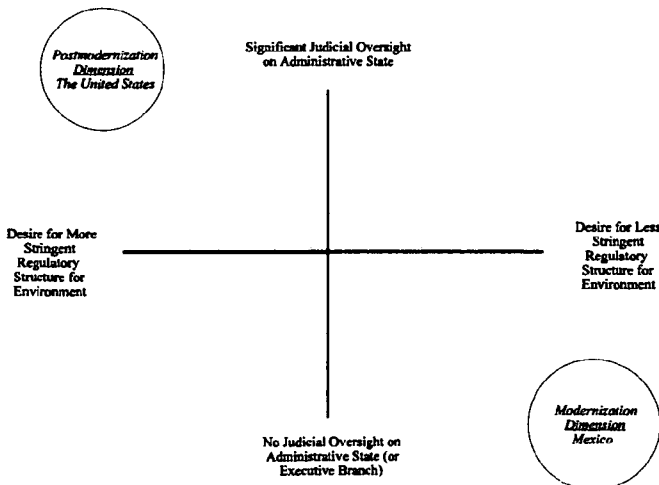
*Review of the Literature*, 87 PUBLIC CHOICE 67 (1996).

17. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION AND THE THEORY OF GROUPS* (1965).

18. The extent to which this independent court prerogative is apparent will depend on the separation of powers institutionally established in the country and the relationship between lawmaking and judicial independence, or in other words, whether the judiciary has a right to make law and hold other branches of government accountable, which has been one of the general distinctions between common law (e.g. United States) and civil law (e.g. Mexico)

The postmodern value dynamic is also important because, when compared across countries, there is a nexus between it and government institutional separation of powers dispositions related to the executive and the judiciary since another key postmodern value is that of desiring more individuality and freedom from bureaucratic authority. While administrative agencies normally implement and enforce environmental protection emissions standards, the extent to which the judiciary is involved, by perhaps having the jurisdictional prerogative to provide due process protections to individuals regarding administrative agency actions or enforcing or balancing rights related to environmental protections, illustrates a degree of judicial oversight over the executive and that it can be the genuine defender of individual or social rights and values<sup>19</sup> vis-à-vis the executive. The extent to which the judiciary is active and has a jurisdictional competence or propensity to decide issues associated with the environment when balancing opposing rights in society is consistent with cultural influences and the relationship between the executive branch and judiciary. Enhanced judicial oversight of agency activities has been most conspicuous in postmodern societies (e.g. the United States), while lacking judicial power is more likely to be found in developing countries (e.g. Mexico), or those otherwise concerned with industrial modernization.<sup>20</sup> These institutional and cultural dimensions are illustrated below:

Figure 1



courts.

19. The proposition that the judiciary is the defender of individual rights and liberties is articulated soundly in: ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE SEPARATION OF POWERS* (1996).

20. This conclusion is being drawn by the commonalities of key countries cited in two well-grounded theoretical studies. See INGLEHART, *supra* note 1; see also TATE & VALLINDER, *infra* note 25.

Employing this framework while returning to the substantive dynamics of the modernization-postmodernization classification, this quality of life public choice value dynamic may make a clean environment appear like a *luxury good*<sup>21</sup> that is demanded more by society in countries at higher levels of economic development because of the relative trade-off between an economically higher standard of living and heightened restrictions on pollutants. When aggregating citizen preferences in countries, it is logical to assume that in countries with higher levels of development, a cleaner environment will be valued over unrestrained industrialization. While countries still in stages of industrial modernization would be expected to rationally favor an uninhibited industrialization process and sacrifice a cleaner environment. Assuming that rigorous and stringent regulations can best restrict the discharge of pollutants and that countries have their own respective desired balance between economic development and environmental protection, the United States would naturally be anticipated to enact and enforce demanding environmental regulations, while Mexico, having a much lower standard of living, would be less apt to sanction and/or enforce stringent environmental regulations on industrial interests. In the case of the United States, the inauspicious trade-off propagates an ostensibly irreconcilable clash between competing postmodern values since increased government regulation can stymie individual liberties,<sup>22</sup> place more narrow parameters on individual action, and resonate into more encompassing bureaucratic control over society.

On the one hand, environmental regulation, and more stringent environmental regulation through rigorous control, has evolved only recently in the last three decades and has expectantly been strongest and deepest in industrialized countries of the world,<sup>23</sup> and if more stringent regulations ordinarily means significant interference with individual rights, and it normally does, then the postmodern cultural dynamic that desires greater freedom and supports individualism is undermined. As depicted in Figure 1, it has been the judicial branch that has accommodated the conflict between more assertive governments and individual rights.<sup>24</sup> This has been the institutional corollary to evidently remedy the backlash against intrusive

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21. Classifying a clean environment as a *luxury good* is somewhat irrational since the environment in its unsullied and natural state should probably be considered the norm of amenity from which to compare. However, somewhere in this historical process of industrialization, or the stages of modernization, higher standards of living and an easier lifestyle have, in some cases, become more valued than the environment.

22. This could have the reverse effect in developing countries that have not previously had strong liberal individual rights, democratic institutions, and higher levels of economic development. Regulations providing these rights could be enacted and provide more individual liberties than previously existed.

23. See U.N. ENVTL. PROGRAM, 1992 ANNUAL REPORT OF THE EXECUTIVE DIRECTOR—TWENTY YEARS SINCE STOCKHOLM I (1992).

24. See TATE & VALLINDER, *infra* note 25.

government during the postmodern transition—a strengthening of the judiciary as a check on executive branch action to enforce individual rights and liberties from what has been perceived as overly rigid regulatory functions of government agencies.<sup>25</sup> While the populace in postmodern countries desires less government control over society,<sup>26</sup> it also wants strong environmental protections, meaning that the natural evolution might be for the judiciary<sup>27</sup> to inherit a more prominent role in balancing individual and public rights in the environment. The legislative and structural framework from which the judiciary or an administrative tribunal evaluates these rights will be dependent on democratic public choice positions, as enacted into legislation, although rapidly evolving public choice positions may be somewhat stagnated by the way long-existing legal, political, and economic institutions interact with environmental protection.

### B. *A Closer Look at the Value—Institutional Conflict*

This cultural-institutional dilemma, the degree to which environmental protection is emphasized, and balancing of individual versus public rights in a legal system, can be further expounded upon by a model conceived by the economists Mercurio and Ryan.<sup>28</sup> The model explains the emergence of an environmental consciousness and the implementation of institutions to support that consciousness. At the quintessence of the model is the issue of whether a societal decision has been made to protect the environment through an embodiment in a foundational source of law, like a constitution, which would structure the most essential principles of societal conduct to which the country is dedicated, and from which later legal enactments related to the environment would ensue. If environmental concerns became deeply embedded in a country's social, legal, and administrative institutions, the environment would more aptly take precedent over conflicting legal norms and interests,<sup>29</sup> like

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25. This power transfer to the judiciary has been described as the *judicialization of politics*. See generally: C. NEAL TATE & TORBJÖRN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER 2* (1995). One aspect of this phenomenon has been that judges have more authority to make public policy that was previously only enacted by the executive and legislative branches. See *id.* While this book describes many possible causal factors for this expansion of judicial authority, the author of this article believes that the most important factor is that of value shifts in the population placing pressure on government institutions, which is logical given that the only countries that have undergone any tangible expansion of judicial power are postmodern countries, and while instilling such institutional changes have been attempted in developing countries, successful results have been negligible. See *id.*

26. See INGLEHART, *supra* note 1, at 11.

27. This has also included the use of judicial dispute settlement mechanisms in administrative agencies so to foster due process protections.

28. See NICHOLAS MERCURIO, FRANKLIN A. LÓPEZ & KRISTIAN P. PRESTON, *ECOLOGY, LAW AND ECONOMICS: THE SIMPLE ANALYTICS OF NATURAL RESOURCES AND ENVIRONMENTAL ECONOMICS* 80 (1994).

29. See Ernst Brandl & Hartwin Brungert, *Constitutional Entrenchment of Environmental*



private property rights, since cultural and institutional variables tend to interact with and influence each other—meaning that long-lived and embedded institutions may influence the way culture evolves and interacts with environmental protection institutions. While not all industrialized countries, such as the United States, have incorporated principles that more aptly protect the environment into their constitutions, many countries have interpreted private property rights more leniently in foundational legal sources to compensate for and fortify societal regulatory structures for such public concerns.<sup>30</sup>

Failure to incorporate environmental protection into a foundational legal source from which all other norms will flow might occasion vacillation in the level of protection over time<sup>31</sup> and beget uncertainty in the structure, management, and functional rules by which the environment will be protected,<sup>32</sup> particularly if ideological political shifts ensue or there is an economic reassessment of environmental regulations that balance rights in the environment.<sup>33</sup> In very basic economic terms, the reevaluation of rights in legal institutions can be observed by considering germane shifts among the three primary systems of classifying resource allocations and property right controls—the market, the public sector, and the communal sector. The theoretical essence of any environmental protection regime should reflect some combination of these three property right controls.

In a perfect market sector, each individual owns goods and resources

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*Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 4 (1992).

30. In the United States, more fully incorporating public rights into the legal system has arguably required a redefinition of fundamental rights in real property for environmental causes to be more fully legally accepted. Even if this has been the case, one should note that some say there has been a crusade back to protecting individual rights in property against government intrusions. See Nancie G. Marzulla, *The Property Rights Movement: How it Began and Where it is Headed*, in *LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION* 24 (Bruce Handle ed., 1995). If this means that a moderate move is occurring to more fully protect individual property rights vis-à-vis public uses of those rights, then there could also be a tempered shift in how environmental protection is defined in relation to private property and public uses. It is believed that this property rights movement began back in the 1980s and was "designed to protect private property interests from what property rights advocates view as the unbridled rampages of regulatory excess," which sallied forth attempts in the 1990s to legislate property rights at the national level. Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L. J. 527, 527 (Spring 2000).

31. As will be discussed in the U.S. section, one will notice a pivotal temporal change in the degree to which the judiciary has had authority for balancing property rights and/or protecting the environment when an environmental dispute arises. Lessening judicial authority for environmental dispute settlement gave way to a more efficient and stable source of law handled by administrative agencies, but the lack of a bedrock legal source on which to elevate the environmental protection cause may be another reason why there was an eventual re-empowerment in the courts since a court is the primary organ that balances individual rights, and individual rights are hailed in the U.S. Constitution.

32. See MERCURO, ET AL., *supra* note 28, at 80.

33. See *id.*

and may transfer or enforce rights in these goods.<sup>34</sup> In a perfect public sector, resources are allocated by the state and are not transferrable.<sup>35</sup> In the communal sector, individuals decide collectively what resources will be owned by and will be available to all equally, and thus the resources are not legally transferrable.<sup>36</sup> Before more rigid environmental protections can be enacted and justified when societal interests and private property rights clash, environmental resource rights must at least partially be construed as falling within the public or communal classification, while elevating the first classification, the market, would be more apt to engender a balancing of rights in favor of private interests over public rights in the environment. Likewise, if a country has had a foundational institutional structure more supportive of individual property rights and an economy defined by a dedicated adherence to market mechanisms and such foundational political and economic institutions have not lost appeal over time, and are still the bases from which most other social regulatory regimes flow, including that of environmental protection, temporal legal enactments consistent with public choice value shifts will likely interact with and be influenced by these long-lived institutional market structures, and perhaps occasion a regulatory result that will require compromise with historical institutions.

From these classifications, the economic approach to environmental regulation, the persona of legal institutions, and even the branches of government responsible for settling disputes or regulating environmental protection, would be expected to shift over time with evolutions in societal values given premises about public choice in democracies, but could be influenced or even circumscribed by long-lived and embedded institutions and even exogenous international influences.

To illustrate this point and to provide a preface to the next Section, after the United States traversed through heavy industrial periods and regulation became rigid and public-sector dominant, the system later reverted back into an approach more consistent with the cardinal and long-lived ideology of capitalism and economic freedom in the private sector, making regulation more market-based.<sup>37</sup> Now there is more of a reliance in the United States on individual self-interested actors yielding citizen suits to enforce environmental regulations relative to the former primary approach of *government acting as*

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34. This is most characteristic of countries with stronger market economies and higher levels of private property rights protections.

35. Because there is a balance between public and private sector activities in any country, a larger, deeper, and more expansive public sector might undermine the principle of freely distributable private property rights since government has an enhanced control over private sector actions.

36. If the environment and property are classified entirely within the communal sector, there should be no conflict in property ownership rights and environmental regulation because no individual societal rights are being disturbed.

37. See *infra* section III(D)—*The Environmental Deregulatory Era*.

*plaintiff*,<sup>38</sup> which is a transition that is consistent with market mechanisms, a historical institutional dominance of the private sector, and a legal framework that balances individual property rights, rather than a framework that permits government to wield inordinate public sector ultimatums that decisively trump private sector rights. By comparison, Mexico is a country that has had (and still has) an economic and political institutional system of governance that is executive branch dominant, based not necessarily on *complete* government monopolization of resource rights in society,<sup>39</sup> but certainly on relegating individual property rights to government agendas. These institutional differences would expectantly lead to dissimilar outcomes for public choice environmental policies.

If society presses for more substantial environmental regulation and mass demands are placed on government to modify foundational sources of law, then more sound environmental protection should flow from this source. While it is possible that such a change could be elite driven, even without mass support or values consistent with such a shift, especially if international influences place demands on government leaders, the efficacy of regulations or enforcement of those regulations may vacillate over time with regime changes and value shifts. It is this dynamic relationship between values, domestic institutions, and international influences that will be described by considering the history of environmental protection in the United States and Mexico, and the institutional framework tying these two countries together.

### III. THE UNITED STATES

#### A. *Introduction*

Because the United States was one of the first industrial powers to attain unprecedented levels of economic development and provide a higher standard of living to the populace, it was also one of the first countries to enact fairly rigid environmental protection regulations. However, the way in which environmental protection, the assertion of rights related to property and the environment, and administrative environmental institutions have evolved is highly correlated to and consistent with shifting values during particular periods in American history. Essentially, primary societal desires at any given time either emphasized combating economic scarcity or enhancing quality of life, which correlates with government policies designed to stimulate

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38. See Mark Spaulding, *Transparency of Environmental Regulation and Public Participation In the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127, 1134 (1992).

39. See John Bailey, *Centralism and Political Change in Mexico: The Case of National Solidarity*, in *TRANSFORMING STATE-SOCIETY RELATIONS IN MEXICO: THE NATIONAL SOLIDARITY STRATEGY* 97-119 (Wayne Cornelius, Ann Craig & Jonathan Fox eds., 1994).

economic development or at least moderately curb unrestricted burgeoning industrialization with environmental institutional structures.

Environmental protection in the United States can be placed into three distinct categories. First, *local or non-centralized* environmental protection extended from the time industrialization dawned in the United States until the end of the 1960s. This period emphasized economic development, even if it deteriorated the environment or diminished the quality of life of citizens. While there were some strong local regulatory enactments, rigidity in regulation did not exist because there was no central or administrative agency at the federal level even though the size of the American regulatory state had grown intermittently for nearly a century in other areas of social concern, particularly during the Progressive and New Deal Eras.

The second stage is the *Rights Revolution*, which for the environment, began in the 1970s with the formation of the Environmental Protection Agency (EPA).<sup>40</sup> The EPA was endowed with strict enforcement powers to ensure environmental protection, even if that enforcement might be perceived as unduly harsh on the private sector or did not adequately evaluate benefits of the private sector use being restricted.<sup>41</sup> Societal values during this period tipped permanently in favor of long-term quality of life desires over unrestricted economic development.<sup>42</sup>

Third, the existence of new and rigid environmental legislation<sup>43</sup> and an overly-uncompromising EPA in relation to individual rights was arguably the impetus that caused the environmental *Deregulatory Era*, which downsized the EPA bureaucracy, lessened the rigidity of regulations, and eventually established market incentives in environmental regulation. This era demonstrates that there was a continuation of postmodern values in the populace emphasizing environmental protection to ensure that quality of life values were held above unyielding industrial development, but that a second postmodern shift emerged to augment private sector freedom from unquestioned bureaucratic authority and to remain consistent with historical economic and political institutional realities. The following chart, and the rest of this section, depict these shifts:

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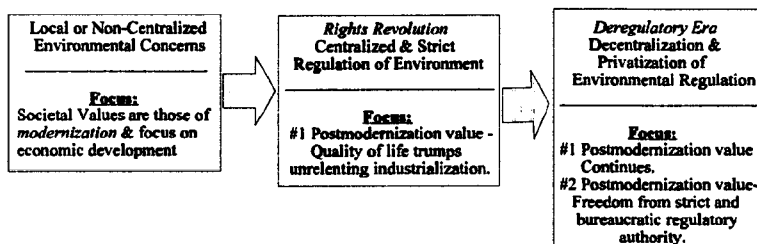
40. See REORGANIZATION PLAN No. 3 of 1970, 35 Fed. Reg. 15623, 42 U.S.C. 4321 (1970). The Environmental Protection Agency was created by President Nixon's Executive Order. See *id*

41. The public and market value of different industrial interests do vary and have dissimilar costs to the environment. The weighing of environmental costs at different pollution levels can be calculated into the market value of industrial products and services.

42. One of the chief opposing positions to this regulatory structure was that it undermined the competitiveness of American companies in the international arena. See Stanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231, 234 (1997).

43. See RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 225 (1996).

Figure 2



### B. *Local/Non-Centralized Environmental Authority*

As populace value shifts are connoted as the primary variable that pressures domestic institutions to augment environmental protection and enforcement mechanisms and the assumption is that populace desires impact policy positions of politicians in a democracy, it is rational to first ponder the American cultural values that existed at the formation of the United States of America. It is this characteristic that is seemingly also intricately related to foundational legal principles in the United States. Samuel P. Huntington<sup>44</sup> describes American culture at the time of the formation of the Constitution as an *American Creed* consisting of liberal, individualistic, and democratic values instilled culturally and institutionally<sup>45</sup> as a backlash against the colonial experience of British rule. *American Creed* values of individual liberty, desire for less government, and distrust of government, challenge the legitimacy of hierarchy and consolidation of power and authority and explain why there has never been any mass appeal for government authority that is as extensive as that which typically exists in a socialist state.<sup>46</sup> Those values are a credible justification characterizing why the U.S. government was modeled with a decentralized and strong federalism institutional structure, and with a judicial branch dedicated and empowered to protect individual rights against overweening government authority.<sup>47</sup> Those values also support the notion that

44. See SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 14 (1981).

45. The Founding Fathers' fear of encroaching big government can be seen in the institutional structures of federalism and separation of powers depicted in the text of the Constitution.

46. See HUNTINGTON, *supra* note 44, at 14-23, 33-41.

47. It was not until 1803 that this institution was legitimately empowered to question law-

cultural prerogatives shape government institutions in a democracy. The United States emerged with a *foundational* institutional governance structure and culture that emphasized the paramount importance of individual property rights and restrictions on government power from interfering with those property rights.

Consistent with such a cultural and institutional foundation of limited government, the early common law period dealt with pollution concerns and disputes entirely on a case-by-case basis through the nuisance doctrine<sup>48</sup> and property law claims. Courts had the prerogative to resolve pollution disputes<sup>49</sup> by interpreting property rights since there was not yet an adequate societal demand (and perhaps even "ability") to establish an institutionalized enforcement regime at the national, state, or local level, that would provide environmental protection. This is predominately because environmental pollution was not as extensive as it is today, society was not cognizant of any future potential problem, localized pollution was not perceived as a problem affecting the nation at large, and emphasis was primarily placed on attaining a higher economic standard of living.

Local courts would prefer certain land uses over others, specifically those of greater utility to society,<sup>50</sup> and only grant injunctive relief to abate a factory's use when pollution was sufficiently serious. Except for local zoning ordinances and emissions standards in industrial centers<sup>51</sup> that controlled *where* certain industries could locate so to avoid an undue burden on others' use of their property, very few proactive mechanisms were employed by government to control pollution. During this modernization period, the populace favored economic development and increasing standards of living, and courts incorporated these societal preferences when balancing property uses and normally elevated economic benefits provided by factories over pollution costs to society and *less-productive* uses of real property.<sup>52</sup>

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making prerogatives and authority of government. See *Marbury v. Madison*, 5 U.S. 137 (1803).

48. See generally H. Marlow Green, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT'L L.J. 541 (1997).

49. A typical dispute during this period would consist of property owners complaining that an adjacent polluting company is spewing odors, dust, or otherwise interfering with the rights of property owners to constitutionally use and enjoy their property. Courts would weigh the utility of the company's use of its property against the gravity of injury to local property owners and balance costs and benefits to society, while taking into consideration doctrines that might give one side an advantage over the other, such as: "moving to the nuisance" which would favor the pollutant, or "unreasonableness of defendant's conduct" which might give the complainant an edge.

50. See Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, in *LAW AND THE ENVIRONMENT* 140 (Robert V. Percival & Dorthy C. Alevizatos eds., 1997).

51. See GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990* 81(1993).

52. With the migration of people from rural areas to cities in search of employment and a higher standard of living came rapid shifts from agricultural economic bases to industry.

From 1877 to 1920, the *Progressive Era*, there was the first noteworthy expansion in national administrative capacities and growth in the administrative state to regulate industries and the economy.<sup>53</sup> Advocates of this federal government expansion sought extensive social, political, and economic reforms to off-set problems bred by rapid industrialization, urbanization, and immigration.<sup>54</sup> It was an institutional change criticized by many because government administration and regulatory control was taken from the political process and placed into the hands of individuals arguably independent of democratic influences<sup>55</sup> and somewhat usurped ad hoc common law approaches emphasized by courts to resolve certain societal problems. It was justified on the supposition that greater efficiency in government policy-making could be provided by an administration. Even though this new form of administrative control over society was encompassing in many arenas, there was no such growth in environmental protection and no regulatory authority for environmental protection because of the fear that strict regulations would hamper industrialization and economic prosperity.

The New Deal Era represents a period of further expansion in the size of the American administrative state and executive branch. The global depression in the late 1920s and early 1930s caused a twenty-five percent unemployment rate and resulted in the federal government undertaking a more expansive role in the nation's economy since laissez-faire market mechanisms were perceived to be failing. Once again, in holding devout to the nexus between constituent desires and policy-making by self-interested politicians,<sup>56</sup>

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Facing local pressures that relied on industrialization, courts were hesitant to grant injunctions and people were required to endure increasing levels of pollution. This does not mean that economic interests *always* prevailed over environmental concerns throughout this period, since during the nineteenth century, there were times when courts abated a factory's use when air or water pollution was sufficiently serious and the source of the pollution could be readily identified. In such cases, courts did appear more proactive in protecting the environment, but their decisions were still primarily premised on a violation of the rights of adjacent property owners to use and enjoy property, even though sometimes such injunctions might have even appeared to be based on a larger societal right. While extensive pollution and grave harm to property rights could lead a court to grant an injunction, court analyses of "reasonableness of property use" varied profoundly in different areas and regions, but injunctions on factories were still relatively rare as courts and legislatures favored industrialization and economic development over environmental and quality of life concerns.

53. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF ADMINISTRATIVE CAPABILITIES, 1877-1920* (1982).

54. This can also be perceived as an introduction into what could be considered a more active state that attempts to proactively shape society, rather than a government that relies primarily on markets and the private sector as a means of providing stability, growth, and protection to society. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 71-96 (1986).

55. See David H. Rosenbloom, *The Evolution of the Administrative State and the Transformation of Administrative Law*, in *HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW* 6 (David H. Rosenbloom & Richard D. Schwartz eds., 1994).

56. See Ramseyer, *supra* note 15, at 101.

in such a time of economic scarcity, a majority of the populace might be said to have *desired* more government involvement in the economy if it was perceived that involvement would rectify the economic hardship plaguing the country, even though doing so might have been inconsistent with American values hesitant to rely on big government solutions to redress problems.<sup>57</sup> Congress and the President expanded federal regulation and the size of the bureaucracy by creating nearly sixty new administrative agencies in 1933-1934.<sup>58</sup> As in the Progressive Era, there was more growth in the federal government and an expansion of its regulatory authority, but there still was no federal environmental regulation because of the consternation that rigid environmental regulation would hinder economic recovery during a crisis period, and thus the common law/judicial property law approach to resolving ad hoc environmental disputes continued during this era.<sup>59</sup>

The precipitous rise of the administrative state and emergence of new arenas of regulation during this period is not surprising. Regulating economic activities and the market because of the expectation that it would provide economic stability would be very acceptable to a population if well articulated by political representatives given that such stability is the primary center of attention in societies dominated by aspirations to attain a higher standard of living and ensure against economic scarcity concerns.<sup>60</sup> However, the federal government's nearly unqualified promotion of economic development while neglecting the environment as industrialization increased eventually led to considerable dissent over environmental pollution as society evolved.

After over a century of reliance on the common law judicial approach to controlling *unreasonable* pollution, which was only supplemented by some localized zoning regulations,<sup>61</sup> and arrival of a high level of economic development in the United States, the federal government and society acquired an increased cognizance that environmental pollution was not solely a localized problem but instead had adverse societal effects well beyond individual complaints of private property owners. Even though between 1955 and 1970 the federal government recognized that environmental pollution was a problem and became increasingly involved in funding state efforts to control pollution,<sup>62</sup> the need to attain uniformity in regulatory standards across the country did not meet requisite levels of acceptance until after the 1960s.

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57. See HUNTINGTON, *supra* note 44, at 14-23, 33-41.

58. See PAUL VANRIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 320 (1958).

59. See *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 PITTSBURGH LEGAL J. 379 (Pitt. Co. Ct. 1935).

60. Countries more concerned with sustenance, or even materialism, would be expected to have populations willing to place more confidence in their governments. See INGLEHART, *supra* note 1, at 299.

61. There were some comprehensive localized zoning laws that protected the environment. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600 n. 94 (1996).

62. See BRYNER, *supra* note 51, at 81.



### C. *The 1970s Environmental Rights Revolution*

The federal government became comprehensively involved in environmental regulation and protection shortly after the 1960s *Rights Revolution* since this was not only a period of additional government expansion but was also known for extending new substantive and procedural rights.<sup>63</sup> Rights that were formerly considered private and out of the reach of federal prerogatives and mandates now fell within the regulatory power of the federal government, and for the environment, this meant reclassifying property rights in a way that considered the spill-over public impact of one's use of individual property so that industrial uses of property could be more deeply regulated. It was a period that sought to foster social equality by not only enforcing new rights against given sectors in society but also against right infringements by the federal government.<sup>64</sup>

Through a decade of redefining rights in the 1960s, environmental pollution control was soon to be taken out of the private dispute settlement sphere of the judiciary and placed in the public sector. With significant post-World War II growth rates begetting a higher standard of living and economic stability, institutional characteristics more consistent with the postmodernization process began to manifest. Society began to assert new social rights, and for the environment, this meant slightly modifying legislatively how individual property rights were to be defined in relation to the environment so that pollution concerns could more readily be decreed a public matter that was a concern for all and not solely for holders of private property rights. While courts slowly began to recognize this large-scale public concern in the environment, there was also an acknowledged need to more effectively control air pollution to promote those public rights in the environment.<sup>65</sup>

Through public demands to increase environmental protection, and a President and Congress prepared to act on those demands, the Environmental Protection Agency (EPA) was born,<sup>66</sup> and the Clean Air Act was further amended in 1970.<sup>67</sup> Certainly other important environmental regulations were

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63. A good example of expanding rights during this period is the emergence of public law litigation claims in the court system. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

64. See generally Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964).

65. See generally *Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870 (N.Y. 1970).

66. See Jeffrey T. Renz, *The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?*, 43 MONT. L. REV. 197, 202 (1982).

67. The legal history is as follows. See Air Pollution Control Act of 1955, No. Pub. L. 84-145, 69 Stat. 322; Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392; Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272 Stat. 992; Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

enacted in the following three decades, but because the deterioration of air quality transcended regional boundaries and consisted of intangible forms of pollution,<sup>68</sup> the Clean Air Act Amendment and the emergence of the EPA, as a pseudo-police enforcement institution, were probably the most instrumental undertakings.<sup>69</sup> The Act's purpose was "to protect and enhance the quality of the Nation's air resources so to promote the public health and welfare and productive capacity of its population,"<sup>70</sup> while the EPA employed its extensive authority to set and enforce those standards.<sup>71</sup> These enactments and undertakings were wholly consistent with postmodern societal demands to enhance quality of life standards in the environment, particularly since it arguably meant sacrificing a marginally higher growth rate by limiting industry because it required that a public choice be made between balancing competing desires.

What is claimed herein as debate consistent with issues involved in the second postmodern value shift began with central conflicts in segments of society in the mid-1970s, as defined by the advocacy of interest groups. One example is when Congress enacted a series of amendments to the Clean Air Act<sup>72</sup> to accommodate conflicting interest groups. On the one hand, there were advocates, such as the American auto industry that sought to delay implementation of higher air quality standards to avoid penalties from rigid regulations that were alleged to stifle economic growth and decrease competitiveness with foreign counterparts.<sup>73</sup> Of any of the new social programs, stringent environmental quality regulations imposed the highest costs of compliance on the private sector.<sup>74</sup> The opposing side was composed of environmental lobby groups advocating even higher levels of environmental pollution protection standards by framing their arguments around the general premise that the environment is a public good and that quality of life should not be sacrificed regardless of economic competition with foreign interests. Some form of accommodation was needed because even though there were strong values in society demanding high environmental quality, the regulatory structure was clearly not working to the satisfaction of both interest groups.

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68. To eventually define environmental concerns regarding intangible air pollutants as a public interest in the United States, when the early dispute settlement process of courts primarily emphasized the importance of property rights and generally excluded intangible harms without sufficiently weighing harm to larger societal needs, is a significant legal departure.

69. While many other statutes could prove illustrative for purposes of this article, the Clean Air Act will be employed because of its precedential value, impact on society in general, and important contribution to environmental protection.

70. 42 U.S.C. §7401(b)(1).

71. See The Clean Air Act §109.

72. Clean Air Act Amendments of 1977, Pub.L.No. 94-95, 91 Stat. 686; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

73. See Gaines, *supra* note 42.

74. See ARTHUR ANDERSEN CO., BUSINESS ROUNDTABLE: THE INCREMENTAL COSTS OF REGULATION (1979).

While the position of politicians and the EPA were primarily influenced by these two interest group polarities, opinion polls indicated that populace value concerns would eventually<sup>75</sup> hold the political system responsible if high environment standards were not kept.<sup>76</sup> Of course, there were those in the public that would identify themselves more with either the pro-environment or pro-business polarities depending on the felt sense of urgency to protect the environment, as portrayed through the media and other sources and the extent that this portion of the population perceived that an economic slowdown could occur or that it would otherwise personally lose financially<sup>77</sup> as a consequence of more stringent environmental regulations,<sup>78</sup> but the vast majority of the population was already content with its high standard of living and would be expected to willingly sacrifice *some* financial security<sup>79</sup> for a higher quality of life and a cleaner environment. An increasing per capita GNP led a higher percentage of the population into the postmodern categorization.<sup>80</sup>

The second postmodern value shift—desiring more freedom from rigid government regulation and individual liberties—can also be identified as an important consideration in these intermittent disputes in the context of the EPA agenda, and to some degree the administrative state generally, since segments of society and interest groups placed considerable pressure on policy-makers and bureaucrats to reform the institutional structure and procedural mechanisms of the EPA. Some of the more important considerations over the EPA's functioning, which are also issues that are at

75. If citizens were very dissatisfied with the results of environmental regulatory reform, it would be expected that the importance of this issue would then be elevated at the next national election and that candidates advocating a position more consistent with constituent desires would have an advantage over their opponents. If the electoral body overwhelming supported one general environmental policy, e.g. "more protection," then both Democratic and Republican candidates would advocate the same position, which would mean that if environmental regimes, legislation, or policies, were not previously consistent with populace desires, they would almost surely have to become consistent during the next Congressional session given democratic assumptions about public choice influences.

76. In a poll taken in 1991, eight out of ten Americans considered themselves "environmentalists." See Rose Gutfield, *Shades of Green: Eight of 10 Americans Are Environmentalists, At Least So They Say*, WALL ST. J., Aug. 2, 1991, at A1.

77. For instance, in the automobile industry, both management and unions had a self-interest in lessening the rigidity of environmental regulations since it would mean preserving a stronger position vis-à-vis foreign competition and jobs in the United States, particularly since this was a period characterized by intense American automobile competition with imports and was prior to large-scale localized multinational investment in factories into the United States.

78. Within these two opposing concerns, one might consider the identification of modernization and postmodernization segments of society.

79. This assumes people identify a personal financial loss with more stringent regulatory standards, however, this may not be the ultimate consequence since one of the proposed characteristics of postmodernists is their decreased emphasis on monetary accumulation when there is already an adequately high standard of living. See INGLEHART, *supra* note 1, at 42-44.

80. This is an expected result based on the correlation between higher economic living standards and cultural traits characteristic of postmodern values. See *id.* at 180-87.

the essence of American culture,<sup>81</sup> were the level of participation permitted and due process protections in agency decisions. Adherence to democratic principles within the agency was a concern when the EPA was formed in 1970 as an executive agency with a mandate to ensure maximum control and expeditious action for environmental quality infringements through regulations and enforcement, which on their face, incorporated a process that might not be expected to provide the types of due process protections and participation requirements that a strong democracy demands. Early on, this was the case since many typical EPA actions did not conform to requisite participation and procedural mechanisms characteristic of democracy in the United States.<sup>82</sup> This compelled Congress to implement new participatory and due process protections<sup>83</sup> and endowed courts with the authority to become more involved in the review of EPA decisions. The ability to question EPA authority indicates that values in the United States and notions of individualism that have always questioned authority were resurrected to gradually support ever-increasing levels of postmodern values.

#### D. *The Environmental Deregulatory Era*

Into what have these purported postmodern shifts in populace desires regarding the environment—(1) strong protections for the environment and (2) assurances that individual liberties are adequately protected from government intrusions—climaxed? Environmental regulation, and more generally, the functioning of the administrative state, has dramatically evolved in recent years as postmodernization preferences of individualism and freedom from unduly involved government regulatory authority<sup>84</sup> have resulted in public choice assaults on government bureaucracy, deregulation, and delegation of regulatory and administrative authority to lower levels of government.<sup>85</sup> Public perceptions of the benefits provided by and confidence in the federal bureaucracy diminished from 1958 into the 1980s.<sup>86</sup> Two decades of rampant Congressional legislating and extensive authority granting to the EPA<sup>87</sup> did

81. See HUNTINGTON, *supra* note 44.

82. See D. HENNING, *ENVIRONMENTAL POLICY AND ADMINISTRATION* (1978).

83. A clash between Fifth Amendment due process rights and EPA enforcement mechanisms has been a regular occurrence. See Elizabeth Ann Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 444 (1988).

84. See INGLEHART, *supra* note 1, at 11-12.

85. While this has typically been a Republican led issue, politicians with both right and left-wing persuasions, including Democratic Vice President Al Gore, have advocated for extensive government reform. See Thomas J. Duesterberg, *Reforming the Welfare State*, 35 SOC'Y 44, 44 (1998); see also AL GORE, *CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS* (1993).

86. See generally SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* (1983).

87. See HARRIS & MILKIS, *supra* note 43, at 225.

not bode well with a society desiring greater freedom from what had become overly stringent regulatory oversight. With a conflict between values that emphasized a cleaner environment and those that favored greater liberal freedoms from deep and encompassing government authority,<sup>88</sup> a compromise was needed to sustain both preferences without frustrating the other. All interests would be appeased if a methodology could be devised to stimulate more individual rights in the environmental dispute settlement, regulatory, and enforcement process in a manner that was consistent with postmodernization values and long-lived and consolidated market economy institutions in the United States.<sup>89</sup> This previously unreconcilable clash between regulatory methods and policies and free market mechanisms and capitalism has been mentioned as one of the most inherent tensions in the rise of environmental regulation since the 1970s.<sup>90</sup>

The regulatory pendulum shifted with such demands on government.<sup>91</sup> The most abrupt change to environmental regulation emanated from the Reagan administration, which curbed the EPA's growth, reduced the level of and delayed implementation of further stringent standards, and to some extent undermined the goals of particular regulatory structures, such as those of the Clean Air Act.<sup>92</sup> The changes seemingly went too far, such that a few years later the Bush administration and Congress had to compensate and take environmental regulation in a new direction. The 1990 Amendments to the Clean Air Act delegated responsibility for pollution control by expanding public rights claims, placed blame on certain regions of the country for heightened pollution levels and held them responsible. In addition, the Amendments set forth more detailed regulation specifications, goal-related

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88. This again assumes that more rigid environmental protections would beget a cleaner environment, even if the means of regulation are exceedingly austere on the private sector.

89. The recent move to increase market freedoms and the triumph of capitalism around the world might also be symptomatic of a postmodern backlash against big government interference in economies since a primary characteristic of postmodern values is desire for greater freedom from government authority. The stronger the private sector in a country is, the more power that is outside the prerogative of government.

90. See HARRIS & MILKIS, *supra* note 43, at 246.

91. The assumption is that this movement is consistent with populace value shifts since democratically elected representatives are acting on behalf of the constituents that elected them.

92. Because of the pervasiveness of EPA authority and because the political climate at the time was antagonistic toward social regulation, President Reagan undertook an extensive program that would deregulate environmental protection and reduce burdens on business. States were delegated more responsibility to protect the environment, more objective standards of "reliable scientific criteria" were enacted, agency costs were decreased, and there was a new ability to review overly-burdensome regulations. While the intended goal did appear initially to decimate the EPA and undermine its credibility, the most extensive of these changes did not have a lasting impact, and may have even had a greater reverse effect since it infuriated environmental groups and united their cause. See *id.* at 259. During this period, while there was deregulation, it was seemingly too extensive and abrupt, and thus a new approach was needed.

targets and review processes for the future.<sup>93</sup> States were endowed with the prerogative and flexibility to devise the means of implementing whatever mix of controls they deemed appropriate to meet EPA established National Ambient Air Quality Standards for individual pollutants.<sup>94</sup> While these were all attributes that lessened the rigidity of the Clean Air Act by delegating authority, this era's most novel and important innovation was the move toward a deregulated market approach to curb pollution levels. This was said to further remedy the overly stringent and under-implemented framework of the law<sup>95</sup> and decentralize court-based means of enforcement by permitting individual and organization complaints.<sup>96</sup> Specifically, market mechanisms were employed by providing pollution vouchers to the private sector, allowing the private sector to essentially regulate itself within parameters<sup>97</sup> and make government institutions and the economic impact of regulation more consistent with societal values.

#### IV. MEXICO

##### A. Introduction

While environmental conservation in Mexico is essential as it is one of the most biologically diverse countries on the planet, the protection of Mexico's natural resources has been lax because throughout its history priority has been placed on cultivating industrial development to combat poverty. Lacking a strong internal impetus to fortify environmental protection

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93. Clean Air Act Amendments of 1990, Pub.L.No. 101-549, 104 Stat. 2399. Ironically, President Bush, a conservative Republican amenable to capitalist interests, was also an environmentalist. Through political savvy, he gave both sides what they wanted. Business received meaningful freedom from rigid governmental control, and environmentalists received enhanced environmental protection. President Bush and the EPA were able to mesh a "love of the environment" and a "commitment to growth." HARRIS & MILKIS, *supra* note 43, at 337.

94. See Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 230-33 (1999).

95. See BRYNER, *supra* note 51, at 151.

96. See Thomas O. McGarity, *Regulating Commuters to Clean the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L. J. 1521, 1521-23 (1996).

97. President Bush's approach was supported by a litany of scientific studies and assessed the level of environmental protection needed by employing methodologies from economics that appeased business. A cooperative model for environmental policy-making was created that was predicated on strong performance standards with a flexible regulatory process. Probably the most important result from this period was the establishment of pollution permits so that individual industries and companies could determine *how much* the right to pollute was worth by permitting private sector entities to buy and sell pollution rights that were allocated within emissions levels set by the federal government. Such a program is more consistent with postmodern values since control is placed within the prerogative of the private sector, with the *right to pollute* costing a premium but within the independent decision-making authority of firms such that environmental protection could now more easily be seen as a cost of doing business instead of a penalty imposed stringently by government.

efforts, an international dynamic, NAFTA has been fostering change within Mexico's environmental protection regime by annexing environmental concerns to Mexico's economic dependence on foreign trade and financial investment. Mexico ratified NAFTA to enjoy greater economic prosperity, but it is clear that its impact on environmental regulation in Mexico is becoming significant, even though many have opined that Mexico's environmental problem would be compounded by the treaty's incentives for United States factories to cross the border and relocate in Mexico where companies could obtain cheap labor and lax environmental enforcement.<sup>98</sup> However, this position was largely a relative and subjective conception as NAFTA has had an important impact on positively influencing environmental institutions in Mexico, particularly when assessing Mexico's historical record on environmental protection.

Based on the theme of this article and because Mexico is a democratic country, ideological competition on the posture of environmental regulations should be expected. But because it is considerably less developed than the United States with most of the population concerned with economic prosperity, those postures more readily favor less restricted industrialization. The position of these environmental institutions and the gumption to enforce them can, once again, be broadly characterized as a reflection of public choice considerations that appraise the relative trade-off between economic scarcity and quality of life proclivities within the Mexican population. Without a substantial increase in economic well-being begetting an emergence of quality of life preferences, it is not surprising that Mexico has had much less effective environmental protection institutions than those of the United States, although marginal shifts toward more effectual environmental protection regimes have been and are continuing to materialize.

Based on these premises and the assumption that Mexico has historically had and continues to have a long-term emphasis on economic modernization, a theoretical scenario will be contrived to illustrate probable sectoral public choice stances within the populace. Thus, the method of analyzing the cultural-institutional dynamics of Mexico in this section is structured differently than the temporal and stage-based assessment utilized for the United States Section. The appraisal assumes that modernization values still exist today in Mexico because sufficiently substantial shifts in economic well-being have not manifested for a majority of the population that would influence politicians and bureaucrats that would otherwise reform environmental protection institutions. This section will first hypothetically assess Mexico's public choice features in terms of value dynamics<sup>99</sup> and then

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98. See Keith Schneider, *Environment Groups Are Split on Support for Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1.

99. Note that while this analysis is hypothetical, it is based on attributes consistent with Inglehart's "quality of life" indicators and need not solely be seen as being specific to Mexico but is amenable to generalizations across developing countries. See generally INGLEHART, *supra*

historically analyze relevant institutional structures and how these institutions have been changing in Mexico, evidently not by internal encouragement of public choice initiatives, but by NAFTA.

### B. *Cultural/Value Dynamics*

The Mexican government has historically reacted to its environmental crisis in a way that is consistent with expectations based on populace desires at its particular level of economic development. In an extensive investigation of Mexico's pollution crisis, environmentalists found that when visiting industrial parks and shantytowns and talking to mayors, business people, factory workers, and academics across the country, there was one universal opinion regarding why improving Mexico's environmental crisis has been so difficult—Mexico's economic crisis and need to develop *required* unrestricted industrialization.<sup>100</sup> Only by rapid economic development could Mexico counter its financial crisis and poverty, making the troublesome trade-off with environmental deterioration unfortunately inevitable. Mexican politicians, bureaucrats, and citizens have been fully cognizant of the environmental imbrolios that have plagued the country, but with democratic policy-making, whereby citizen desires penetrate political positions, the balance between a higher standard of living and more rigorous environmental protection expectantly tips more heavily toward a higher economic standard of living.

While one can legitimately debate the magnitude that mass desires truly influence politicians, given that Mexico's democracy has only recently functioned as such and that holding politicians responsible for actions not consistent with constituent positions arguably might not have genuinely existed. In any event, the functioning of Mexican environmental institutions has been consistent with the theme of this article. Those with policy or regulation making authority realized that for Mexico to progress economically, less rigorous environmental regulation and more industrialization would provide a larger tax base, more jobs, and an economic rippling effect to other sectors and regions of the economy—a position that best supports basic attributes of life that have been most important to constituents' lives. If a politician's region has economically benefitted by having lax environmental standards or not ensuring that standards are enforced, that politician would not likely advocate stringent standards or increased enforcement measures if constituents emphasized a higher economic standard of living over quality of life.<sup>101</sup> This differs from the national level, because regulations have been driven by the economic prosperity of industrial

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note 1.

100. See JOEL SIMON, *ENDANGERED MEXICO: AN ENVIRONMENT ON THE EDGE* 3 (1997).

101. Because of the centralized nature of Mexican politics, regional locales and politicians may have limited say in this matter but can still advocate at the national level.



centers, policy-makers have not historically goaded agency regulators to employ their discretionary powers in a manner that more fully ensures that environmental standards were upheld.

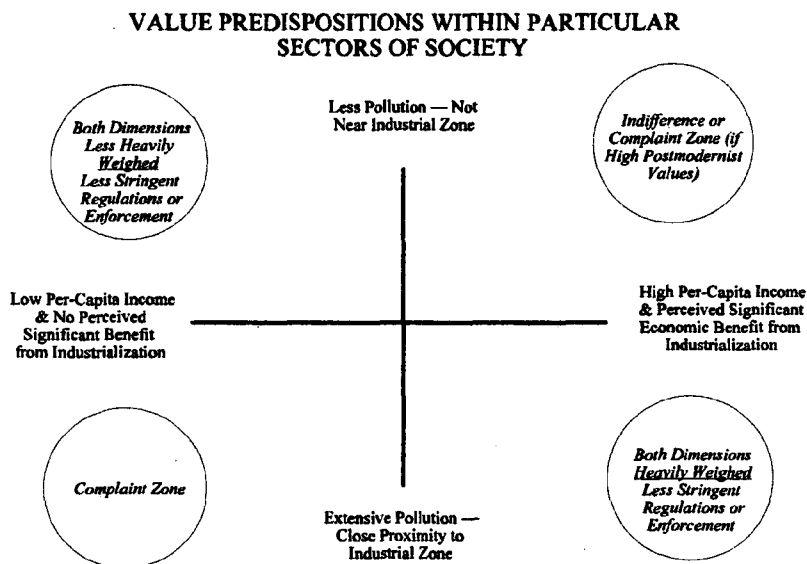
Assuming that there is at least a recognizable connection between constituent desires and political policy-making in Mexico, one can presume that citizens employed by polluting factories perceive their pecuniary benefit and do not wish to risk that benefit by supporting stringent environmental regulations that might close factories. Citizens that do not work in factories may even support this position because they realize that the local and national economies prosper from added income from more industrialization.<sup>102</sup> Those sectors of the population in closest proximity to factories are composed of citizens that must endure the most extensive environmental degeneration and suffer the most harm to their quality of life, but would also be expected to be those that are best able to identify with and are foremost connected to the economic benefits of the factory's production. On the other hand, those who are not in close proximity to the industrialization locale may not be benefitted as much by, or at least do not perceive that they are benefitted as much by, intensive industrialization but may also not be as impacted by environmental degradation, which would make them relatively less apt to complain about pollution.

This analysis can be represented by a hypothetical model that utilizes four mass categories based on cost-benefit analysis of dominant desires. For instance, in the categories of: (1) higher economic standard of living (logically attributable to industrialization) and a higher level of environmental deterioration, and (2) poverty stricken areas that are relatively free from environmental degeneration, there should be less mass support for enforcement of stringent regulatory standards. The sectors and regions more apt to complain of pollution and support elevated levels of environmental protection would include: (3) those areas that are less polluted but have higher income levels,<sup>103</sup> and (4) those areas that are more polluted but still have low incomes or do not perceive significant economic benefits eventuating from a higher level of industrialization. These four categorizations are represented graphically as follows:

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102. The trade-off and propensity to favor economic concerns would likely be most prominent in those Mexican sectors and regions that more readily identify that they are benefitting from increased industry.

103. These are sectors of society that probably have postmodern values and would willingly sacrifice some economic development for a cleaner environment.

**Figure 3**

However, even in those sectors of the public choice model where the population is more likely to complain of environmental deterioration, such complaints are unlikely to manifest for two reasons. First, Mexico as a whole still falls into a “developing country” category and has a level of economic development most apt to produce modernization preferences within the populace. Thus, the extent to which the theoretical categories (3) and (4) actually exist or have a populace size sufficiently appreciable to impact public choice alternatives that demand environmental protection regimes be fortified is questionable. For example, those in category (3) are those that are wealthiest and live in locales less affected by pollution, but they are also still likely to be capital owners or are otherwise pecuniarily benefitting most from higher levels of industrialization. Even if quality of life concerns are dominant within this segment, it is a small sector of the population that must have the self-interest and power to influence and advocate for higher levels of environmental regulation and enforcement.

Category (4) is also unlikely to advocate for or be successful in advocating for more stringent regulations and enforcement of those regulations for several reasons. People would be expected to recognize the correlation between increased economic development through lax environmental enforcement, and even if they may not currently perceive themselves as benefitting from increased industrialization, they may expect to

so benefit in the future. Also, regions of relatively lower per capita income and higher levels of economic deterioration are not likely to exist because wages would expectantly be higher where there is more industry. In a region with extensive industrialization, the populace will probably identify that it is benefitting through economic rippling effects even if a large percentage of the community is not directly working for a factory, while the poorest sectors of this population are unlikely to have the resources or knowledge to advocate for increased environmental regulation.

The second reason why the existence of hypothetical segments (3) and (4) of the population are not apt to result in public choice policy shifts in environmental protection is due to federalism and separation of powers in Mexico. Because Mexico has such a centralized and executive-dominant governance structure, with a weak judiciary, legislature, and lower levels of government, the public choice values that emerge into political positions (that influence enforcement) should be those most consistent with favoring industrial modernization. If this centralization did not exist in Mexico, regional interests might create schisms that could goad local politicians to enact new regulations and/or ensure enforcement of existing regulations based on preferences of the populace/constituent sectors established in the aforementioned chart or even permit another branch of government to challenge the federal-level executive position. However, with a centralized and executive-dominant government, one should not expect that localized interests would be satisfactorily addressed<sup>104</sup> if those desires are outside of the predominant aggregate modernization public choice values existent in Mexico.<sup>105</sup> Furthermore, even assuming that public choice values of constituents favoring modernization do not fully influence the political system, those in power may not have the self-interest to ensure that modernization policies incorporate environmental concerns when the political system is so centralized<sup>106</sup> and so much deference is granted to power-centers that manage and promote industrial interests.<sup>107</sup> The result of this hypothetical analysis is consistent with the foundational sources of law and the historical positions and actions of environmental institutions in Mexico.

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104. This was also cited as a problem in the NAFTA environmental side agreement, which has been said by some to provide almost no ability for local citizens or groups to complain of, intervene in, or even provide meaningful input in regional environmental enforcement. See Lynn Stanton, *A Comparative Analysis of the NAFTA's Environmental Side Agreement*, 2 HASTINGS W.—N.W. J. ENVTL. L. & POL'Y 71, 76-77 (1994).

105. Making strong assumptions about public choice analysis and populace desires fully affecting politicians in Mexico might be somewhat of a stretch. For an excellent article describing the weak state of democracy in Mexico and the concomitant difficulty of obtaining environmental protection, see Alberto Székely, *Democracy, Judicial Reform, the Rule of Law, and Environmental Justice in Mexico*, 21 HOUS. J. INT'L L. 385 (1999).

106. See RICHARD R. FAGEN & WILLIAM S. TUOHY, *POLITICS AND PRIVILEGE IN A MEXICAN CITY* (1972).

107. See VICTORIA E. RODRIGUEZ, *DECENTRALIZATION IN MEXICO* 62 (1997).

### C. *Actions of the Mexican Government and Its Institutional Structure*

For over a decade, Mexico has had relatively stringent environmental regulations, which have been posited by some to be even as demanding as those of the United States.<sup>108</sup> However, those regulatory standards have not been systematically enforced.<sup>109</sup> Only in recent years have progressive transformations in systematic enforcement of environmental violations occurred, and this was at the behest of an international source—NAFTA. Ostensibly, NAFTA placed pressure on Mexican government institutions to more fully respect the trade-off between economic development and environmental protection. While the notion of individual property rights during industrialization has been a factor in balancing the right to use one's property against societal/public environmental harm, as was the experience in the United States, the regulatory result has been dissimilar from that of the United States since monopolization and centralization of authority and property has been the approximate foundational legal norm in Mexico. A brief discussion of the history of this property law influence within the context of monopolization in power will demonstrate this point.

During the industrialization process in Mexico from the 1870s to the early 1900s, the national economy grew, with those in power seeking and attaining more land and resources to expand production. Those connected to and in government had the power to exercise legal property appropriations from individual property owners with little compensation. While some questioned these government supported actions by seeking local court remedies against the perpetrators, who were often seen as analogous with the government, such actions were to no avail as courts and the government apparatus supported those with power and resources.<sup>110</sup> Even at the impetus of Mexico's industrialization period, there was a clear monopolization of power in government to control land and resources.

It was not until the resolution of a clash between rural and city areas and a civil war that the 1917 Mexican Constitution was ratified. It professed to incorporate the foundation for major land and rights reform. The policy of the reform was to support a more equitable society where resources were more evenly distributed,<sup>111</sup> but even after this move most of the real property grants

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108. See Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC, as a model for Future Accords*, 25 ENVTL. L. 31, 35-40 (1995).

109. See Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U.J. INT'L L. & POL'Y 719, 729 (1993).

110. See SIMON, *supra* note 100, at 30.

111. "A more equitable distribution of wealth" was provided for in Article 27 of the 1917 Mexican Constitution. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 27.

were bestowed through corruptive influences since the central government normally used the promise of land reform to gain political and economic allegiance from potential land recipients. Because all political and legal authority was aggregated in the central government, it was able to control resources under the guise of holding it for the common good and maintain a political and economic monopoly for the next several decades because of the high level of societal reliance on government. Unlike in the United States during this period, where individual property rights were haled but still moderately balanced against social utilities and government policymaking sometimes undermined individual rights, a balancing of public versus private rights was normally absent in Mexico. Instead individual liberties were dominated by government agendas.

Even though Mexico has formally been called a *democracy* since the 1917 Constitution was ratified,<sup>112</sup> centralization of power permitted the government to operate like an authoritarian regime because extensive government control bred dependencies from society. For the past seven decades Mexico has been run by one party,<sup>113</sup> the PRI (Partido Revolucionario Institucional), which through a complete hold on all political and economic power, has dominated the executive branch, so much so that no other agency of government or societal actor was empowered to question its authority on public regulatory concerns, including on issues related to the environment. Because of this institutionalized centralization of power, the PRI has been able to neglect environmental concerns by emphasizing the benefit to the aggregate of Mexican society by promoting rapid economic development via higher levels of industrialization, which also assisted the PRI in winning elections, promoting its monopoly on resources, keeping various critical groups loyal, and preventing dissent on the dilemma of an increasingly deteriorating environment.

Similarly, the judiciary, the branch of government that in most countries protects individual liberties and limits government action, was then and still is a weak actor in Mexico<sup>114</sup> not only because of the central government's dominance and intolerance for challenges to its decision-making authority but also because there has not been a substantive move to expunge the judiciary from its traditional civil law origins.<sup>115</sup> When issues have been raised before

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112. See Jorge A. Vargas, *NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT'L L. J. 1, 12 (1995).

113. In an historic election that ended seventy-one years of PRI rule, Vicente Fox, of the right-leaning PAN party, won the presidential election on July 2, 2000 over the PRI candidate. See Peter Fritsch, Jose de Cordoba, & Joel Millman, *Can Mexican Victor Prove That 'Change' Is More Than a Slogan?* WALL ST. J., July 5, 2000, at A1, A8.

114. For a discussion of Mexico's historically weak judiciary, but within the context of its new constitutional reforms, see Hector Fix-Fierro, *Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years*, 6 U.S.-MEX. L.J. 1 (1998).

115. Mexico has a traditional civil law legal system and an executive dominant government, an active state. See DAMASKA, *supra* note 54, at 71-96.

a court of law that dealt with social concerns, such as the environment, the likelihood that an independent and equitable decision would be made based on the individual rights of those involved, or whether a court would even be permitted to hold jurisdiction over any given case, has been dependent on whether that decision or grant of jurisdiction would be consistent with the desires and policies established by the central government.

An example of this central government dominance, inability of other institutions to provide any measurable degree of countervailing dissent domestically on a controversial environmental issue, and preference for industrialization over environmental concerns, can be illustrated by a factual instance related to the enactment of the 1965 Border Industrialization Plan (Plan), which permitted United States companies to establish "maquiladoras" (assembly plants) on the Mexican border.<sup>116</sup> The central government enacted the Plan to provide jobs and increase Mexico's economic development and standard of living. With over 2,000 maquiladors along the U.S.—Mexican border, profound economic benefits have been provided to Mexican society, but the program has also been said to produce some of the most considerable pollution problems and poor living conditions in the region.<sup>117</sup> One maquiladora region was said to have toxic waste dumped into wastewater drains (likely contaminating the ground-water) that streamed down the street. It was also comprised of unsanitary shanty "shacks" for worker living conditions and had companies systematically and flagrantly violating environmental regulations, perhaps by dumping pollutants locally as opposed to returning them to the United States, as required by treaty.<sup>118</sup> The region also suffered from smoke and pollution that caused serious respiratory problems and infections among the population.<sup>119</sup>

These facts would give rise to an actionable claim, perhaps by an administrative action or judicial intervention for brazen harm to public health under the law of most countries.<sup>120</sup> Such public harms were also in violation of Mexican law, but enforcement actions under such facts were normally not forthcoming. If enforcement or injunctive actions were more regularly brought, what would be the probable result? With a recognized trade-off between a higher standard of living provided by industrialization and more rigid environmental protections, society and government typically tolerated

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116. See Lawrence J. Rowe, *NAFTA, the Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development?*, 18 SUFFOLK TRANSNAT'L L. REV. 197, 198 (1995).

117. See Diego Ribadeneira, *SIDEBAR On Mexico's Border, 'Prosperity' Has an Ugly Side*, BOSTON GLOBE, July 12, 1994, at 10.

118. See Aimee L. Weiss, *An Analysis of the North American Agreement on Environmental Cooperation*, 5 ILSA J. INT'L & COMP. L. 185, 186 (1998/1999).

119. See SIMON, *supra* note 100, at 207-09.

120. It would be very unlikely that these harms would even manifest in countries with high levels of economic development and stronger environmental protections since preventive mechanisms would exist.

such pollution because the alternative, not having the factories, would foster higher unemployment levels and perhaps societal unrest since multinational companies might be less likely to invest in Mexico if environmental protections were more rigidly enforced.

The domestic regulatory structure for environmental protection and institutions in Mexico has taken an interesting twist since NAFTA was enacted even though the agreement does not usurp sovereignty on environmental issues<sup>121</sup> but instead permits the three Party governments to formulate their own environmental laws<sup>122</sup> and only penalizes Parties financially with trade concessions for persistent violations of their own laws.<sup>123</sup> Thus, since 1993, NAFTA,<sup>124</sup> its Commission on Environmental Cooperation (CEC),<sup>125</sup> and the Border Environmental Cooperation Commission (BECC),<sup>126</sup> injected an important international dimension into Mexico's environmental regulatory structure. The CEC not only provides information about NAFTA's potential environmental effects,<sup>127</sup> but also is NAFTA's investigative<sup>128</sup> and environmental enforcement body.<sup>129</sup> It is

121. NAFTA does not impose environmental standards on the three Parties, but seeks to impel greater certainty and transparency in the functioning of domestic law.

122. See North American Agreement on Environmental Cooperation, *supra* note 6, art. 3.

123. See *id.* art. 36.

124. Specifically, it is the NAFTA environmental side agreement that is the institution that can be said to balance between economic development and environmental protection. See generally Angela Da Silva, *NAFTA and the Environmental Side Agreement: Dispute Resolution in the Cozumel Port Terminal Controversy*, 21 ENVIRONS ENVTL. L. & POL'Y J. 43 (1998).

125. See Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories*, 91 AM. J. INT'L L. 231, 247 (1997).

126. Agreement Concerning the Establishment of a Border Environmental Cooperation Commission and a North American Development Bank, Nov. 16-18, 1993, U.S.-Mex., 32 I.L.M. 1545. The BECC works with effected state and local governments to devise projects and implement solutions to environmental problems and is partially financed by the North American Development Bank. The BECC had certified twenty-four projects by mid-July 1998, costing an estimated \$600 million. Ignacio S. Moreno, James W. Rubin, Russell F. Smith III & Tseming Yang, *Free Trade and the Environment: The NAFTA, and the NAAEC, and Implications for the Future*, 12 TUL. ENV'T L. J. 405, 448-49 (1999).

127. COMM'N FOR ENVTL. COOPERATION, ASSESSING ENVIRONMENTAL EFFECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA): AN ANALYTIC FRAMEWORK (PHASE II) AND ISSUE STUDIES 6, 27-36 (1999).

128. Some have complained about internal weaknesses in the CEC's investigative authority. See Sandra Le Priol-Vrejan, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483 (1994). For compelling arguments describing why the CEC should not be more fully empowered, see Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31 (1995); see also Richard A. Johnson, *Commentary: Trade Sanctions and Environmental Objectives in the NAFTA*, 5 GEO. INT'L ENVTL. L. REV. 577 (1993).

129. Consultations over potential violations and enforcement matters are specifically authorized. See North American Agreement on Environmental Cooperation, *supra* note 6, arts. 14 & 22.

empowered to react if one of the three signatory countries is engaged in a "persistent and sustained pattern" of non-enforcement of its environmental laws<sup>130</sup> and will only make recommendations for concerns that are not technically violations of environmental laws.<sup>131</sup> While this agency has not yet had unparalleled impact on enforcement measures, and the environmental side agreement has been criticized for its ineffectiveness,<sup>132</sup> the agreement and related institutions have still introduced a form of *hard* international law whereby the Mexican government has an external obligation to abide by treaty terms. This is an important influence considering that an environmental agreement as an annex to trade was not something Mexico wanted because imposing such a requirement was perceived as an exercise of cultural and developmental dominance.<sup>133</sup> The offer of considerable financial incentives however dispensed a leveraging force to attain Mexico's acceptance of the total package.<sup>134</sup> This demonstrates how the political debate in the United States, requiring a *green agreement* before NAFTA would be ratified in the Senate, influenced domestic Mexican politics and institutional structures. One might even claim that the values dominant in the citizenry in the United States,<sup>135</sup> through domestic treaty ratification procedures that required participation by United States politicians (as influenced by constituents and interest groups),<sup>136</sup> were the impetus for the Mexican government's domestic environmental regulatory restructuring and fortification.

The environmental institutional changes at the behest of NAFTA have been impressive and will likely be profound in the long-term, particularly when considering the relative position from which Mexico began.<sup>137</sup> Even though Mexico did not enact a comprehensive federal environmental law until

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130. See Steinberg, *supra* note 125, at 247.

131. See North American Agreement on Environmental Cooperation, *supra* note 6, art. 13.

132. See RALPH H. FOLSOM, MICHAEL WALLACE GORDON & DAVID LOPEZ, NAFTA: A PROBLEM ORIENTED COURSEBOOK 683 (2000).

133. See Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment* 15 STAN. ENVTL. L. J. 61, 87 (1996). Mexico has also voiced resentment against the CEC: "The Perception that the CEC was designed mainly to watch over Mexico has not faded. . . . A perception of institutional imbalance persists and is difficult to shake. INDEP. REVIEW COMM., FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE, ¶ 3.1 (June 1998), available at <http://www.cec.org/>.

134. See Robert Housman, *The North American Free Trade Agreement's Lesson for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 421 (1994).

135. The values dominant in the United States are postmodern values, as described in the previous section.

136. See Raustiala, *supra* note 108.

137. For the environment, the enactment of new administrative agencies normally signifies a movement from a focus on individual property rights to an identification of the issue in a manner more amenable to elevate social concerns, but if an agency is created but is not empowered or is not aggressive in its enforcement activities, then environmental social issues often are not truly dealt with in a satisfactory manner.



1988,<sup>138</sup> domestic environmental regulatory agencies in Mexico have long existed but have been weak because power was diversified across the jurisdiction of several different agencies. For instance, the first environmental agency, the Subsecretariat of Environmental Improvement (SMA), was created in 1972 as part of the Secretariat of Health. Environmental protection responsibility was later transferred to the Housing Secretariat, then to Urban Development, and finally to Social Development (Sedesol).<sup>139</sup> With a systematic transferring of environmental authority as a subsidiary function in what were arguably unrelated institutions, no truly fortified environmental protection regime existed until after the enactment of NAFTA.

President Ernesto Zedillo took Sedesol, the environmental prosecutor's office (PROFEPA), and the National Ecology Institute (INE), and created one superministry that would have ultimate responsibility for the environment—the Secretariat of Environment, Natural Resources, and Fisheries. This agency has utilized new procedures and safeguards, including implementing advanced scientific techniques such as that of conducting "Environmental Risk Assessment,"<sup>140</sup> something that had not previously been employed in Mexico. It is clear that the institutional progression toward and the empowerment of an agency solely responsible for environmental protection has primarily been caused by NAFTA,<sup>141</sup> but the question then becomes to what degree this institutional framework will lead to a higher level of environmental protection enforcement in the future. While even the head of this environmental organization, Julia Carabias, previously expressed skepticism over the extent of expected improvement in the near future as she acknowledged that Mexico's primary concern is still one of economic development,<sup>142</sup> others more recently have been relatively more positive and have cited evidence of significant improvements in inspection and enforcement activities.<sup>143</sup>

138. *The General Law of Ecological Balance and Environmental Protection*, LEXIS, Environ Library, MXENV File (1996).

139. See SIMON, *supra* note 100, at 236.

140. Hector Herrera, *Mexican Environmental Legal Framework*, 2 SAN DIEGO JUST. J. 31, 33 (1994).

141. See Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 159 (1994).

142. See SIMON, *supra* note 100, at 238-89. Others have also been critical of the NAFTA framework and have been quick to point out its weaknesses. For a description of the procedure that influences NAFTA governments, see David Lopez, *Dispute Resolution Under the NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L. J. 163, 185-87 (1997).

143. See Ignacia S. Moreno, James W. Rubin, Russell F. Smith III & Tseming Yang, *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L. J. 405, 433 (1999); Beatriz Bugada, *Is NAFTA Up to its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591 (1999); David Schiller, *Great Expectations: The North American Commission on Environmental Cooperation in Review of the Cozumel Pier*

Thus, even if new environmental thresholds are established, the key is to ensure that enforcement is forthcoming by an objective and independent entity.<sup>144</sup> Likewise, with a new awareness of legal rights and protections related to the environment in Mexico, there is still the issue of the extent that dominant values favoring industrialization will permeate enforcement mechanisms. Mexico's legal system has not been prone to litigate environmental pollution disputes,<sup>145</sup> and when they have occurred, they have always been rectified through internal negotiations within the agency, with enforcement actions being left to the discretion of the agency.<sup>146</sup> Since economic development is the primary concern in Mexico, there may still be a propensity for inspectors to favor industry and development<sup>147</sup> to the detriment of quality of life.

## V. SUMMARY & CONCLUSION

The environmental regulatory framework in the United States, or lack thereof in its early history, has undergone far-reaching shifts temporally coinciding with levels of economic development and concomitant societal values. With courts pursuant to the early common law approach only providing relief for environmental concerns that unreasonably interfered with the right to own and enjoy private property, emphasis was placed on fostering economic development and haling private property rights with minimal concern for broader societal interests in a clean environment. Except for localized regulations applied by zoning requirements, an approach that predominated well beyond the Progressive and New Deal Eras, there was no centralized administrative source that regulated the environment. The lack of such a regime was largely the consequence of a populace, politicians, and elites concerned more with economic growth than the environment.

A higher standard of living provided by extensive economic growth after World War II induced postmodern value shifts in the populace, which, when combined with media exposure and scientific evidence of environmental harm, favored quality of life attributes over unrestricted industrial growth. By the

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*Submission*, 28 U. MIAMI INTER-AM. L. REV. 437 (1997).

144. Mexico's domestic institutions will certainly improve in this regard over time. Others have said that the CEC, as an international entity, should be providing a more extensive enforcement role, but that this institution does lack independence. See Christopher Bolinger, *Assessing the CEC on its Record to Date*, 28 LAW & POL'Y INT'L BUS. 1107 (1997).

145. See SIMON, *supra* note 100, at 239.

146. Between 1991 and 1993, the number of inspectors tripled and the number of factory shutdowns quadrupled. See Stenzel, *supra* note 4, at 452.

147. Closing down companies or severely fining them for environmental violations (which is in the prerogative of the agency) may lead other multinational companies to refrain from locating in Mexico, and thus fewer jobs would be available than otherwise would exist with more industry.

1970s, environmental pollution became nearly universally accepted as a societal concern that should no longer be defined only as a problem for private property owners. The next decade witnessed a substantial growth in environmental regulation and bureaucratic control to administer that regulation, and an eventual clash with another chief postmodern value — that of independence and freedom from rigid government regulation over the private sector and society. This was the value that Ronald Reagan espoused to its fullest but which ostensibly conflicted with societal desires because he did not give significant credence to the other postmodern concern of quality of life.

The deregulatory era of environmental protection eventually evolved into a market approach to environmental regulation so that both postmodern values were recognized—the need to protect the environment and also the desire for private sector freedom from rigid government control—by allowing industries and individual companies to determine how much the *right* to pollute was valued via permitting these individual actors to make cost-benefit decisions within the context of a given level of environmental standards. The market approach is a direct backlash against anti-capitalist arguments set forth by environmentalists in 1970. It is an approach that treats environmental pollution as it arguably should be treated in the private sector—a cost of doing business that can be logically and rationally calculated like any other market expense—but one that still upholds important environmental standards and mandates set forth by the federal government. It is an approach that makes environmental regulation more distant and seemingly less rigid by giving the private sector more freedom of choice at given production levels.<sup>148</sup>

This temporal shift in the United States is similar to environmental movements witnessed by other highly industrialized countries, but Mexico is a country that has not traversed high levels of economic development, such that its primary public choice desires have been most consistent with institutions that placed economic development and scarcity concerns above environmental protection. Even though a segmented proportion of the Mexican population should theoretically have stronger postmodern preferences, it is a very small proportion of the population, and with a centralized government that has made decisions for all in the aggregate without much consideration for regional concerns, the domestic democratic impetus for enacting more stringent regulatory standards and enforcing the standards has not previously existed.

International influences through the consummation of NAFTA have provided the incentive to restructure government institutions that enforce domestic standards for environmental protection even though modernization

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148. This approach has remedied the inherent clash between the two postmodern values of respect for the environment and greater freedom from government control to protect individual rights and liberties.

values in Mexico are still dominant. The Mexican government has recently established fairly empowered institutions at the behest of international influences, even though the enforcement mechanism may be partially hindered by the value dimension. This is interesting considering that international influences, such as trade agreements, have often been criticized for accomplishing nothing to strengthen environmental protection.<sup>149</sup> This is not the case with NAFTA, as Mexico's acceptance of NAFTA undoubtedly has led to a higher level of environmental protection than existed prior to its enactment, even though Mexican politicians and elites accepted the agreement by primarily considering the economic benefits that would accrue by consummating the total package.

The importance of public choice initiatives should not be underestimated. If citizens must make a choice between potentially conflicting wants—a higher economic standard of living versus a higher quality of life—they will expectantly choose what is most pressing to their lives.<sup>150</sup> The highly industrialized countries of the world should continue to recognize this trade-off and provide moderate leniency to developing countries when international economic integration agreements are negotiated. Certainly, there is an important interaction between value shifts and institutional responses to environmental protection, such that each can influence the other—values can influence institutions and institutions can influence values—which can mean that seeming ultimatums from more wealthy countries can reform environmental legal institutions in less wealthy countries, but as long as countries differ in their levels of economic development, or at least until substantially more environmentally friendly production technology emerges at a competitive cost, the international debate over the level of appropriate protection provided by any given country will remain.

Governments will continue to have incongruous environmental positions based on predominant societal values at the domestic level influencing those positions, as has been the case with the United States and Mexico, which requires a moderated contractual "meeting of the minds" at the international level when these two dimensions converge. NAFTA and its environmental protection provisions will provide a meaningful example to other regions of the world seeking to more fully unite domestic economic systems, despite the existing disparities between national positions<sup>151</sup> that might otherwise more

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149. See Jack I. Garvey, *AFTA After NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards*, 15 BERK. J. INT'L L. 245, 252 (1997).

150. In a world where more transparent media attention is placed on grave environmental harms, it is possible that when one considers the balancing of predominant values in a society, such value shifts will be more receptive to more heavily weighing the costs of higher levels of industrialization, even though economic scarcity is still a pressing concern.

151. As described in this article, the degree to which populace values do permeate policy positions of those in power in developing democracies is a relative and difficult question to

freely implement international economic integration agreements that hasten development without respect for environmentalism and those that soundly respect the needed balance that should be struck on environmental protection. Balancing predominant domestic preferences and somewhat compromising positions will be the expected result of future international economic integration agreements and their annexed environmental protection agendas.

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answer with certainty since often institutional characteristics to support this nexus may not seem to exist. For instance, one could take opinion polls over time within a population and measure value shifts in comparison to actual legislative changes. However numerous problems can arise in developing countries, such as whether truly informed decisions are being made within the populace when opinions are recorded, and whether samples are representative of a larger segment of the population.

