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Please visit Ecology Law Quarterly *online at http://www.ecologylaw quarterly.org. On our website, you will find information about past, current, and future issues of the journal, environmental events at the University of California, Berkeley, and more. You will also find* Ecology Law Currents, Ecology Law Quarterly's *online companion journal. Articles in* Ecology Law Currents *include notes on recent cases, current events, and new developments in the law; opinion commentary; responses to articles published in* Ecology Law Quarterly*; and other short-form research and writing. If you are interested in submitting to* Ecology Law Currents, *please contact cse.elq@law.berkeley.edu.*

Ecology Law Quarterly is printed on reclaimed paper.

Foreword

Ellie Rubinstein & Liam Chun Hong Gunn[*]

We are honored to introduce *Ecology Law Quarterly's* Annual Review for 2023–24 presented in this 51.2 edition. The Annual Review represents a unique opportunity to highlight the academic scholarship of Berkeley Law students. This year's Annual Review features five student Notes written during the Environmental Writing Seminar under the supervision of Professor Holly Doremus. For Student Notes, participants in the Seminar each craft a novel argument based around the holding of a recent environmental case or a major new law or regulation. They present their work in a full-length academic article.

The second portion of the Annual Review features short form "In Briefs" (or as we lovingly call them internally at *ELQ*, "Blurbs"). The In Briefs are written throughout the previous academic year under the editorial direction of *ELQ's* Books & Research Editor. In Brief's provide an invaluable opportunity to first year law students to publish academic scholarship, while bringing attention to significant recent cases implicating environmental, land use, energy, and natural resource law, as well as issues of environmental justice.

The Annual Review is vital to the work of *ELQ*. Not only does it provide a focused look at critical new developments in environmental law, but it also serves the unique purpose of expanding the voices heard in environmental legal scholarship. This year's selection of cases range from covering landmark decisions on our nation's foundational environmental statutes to the administrative law rulings which impact the reach of local government's environmental efforts. We encourage readers to work through each Note and In Brief, and as always, we welcome responses to any of *ELQ's* publications within our short-from online publication, *Ecology Law Currents*.

We would like to thank the publishing board for all of their work bringing this edition to light for our readers. Taking on the job of a student editor in addition to the baseline pressures of law school is a momentous task—one which our editors do with grace and enthusiasm. We are grateful for this team of authors and editors allowing for this presentation. The following provides introductions to the Student Notes as a preview of what you can expect throughout 51.2.

Megan Conner wrote her note *Establishing Incentives for Building Electrification through Congress: How to Strengthen and Accelerate Local Decarbonization Efforts* in the wake of the recent Ninth Circuit decision,

[*] Editors-in-Chief, 2024-2025, *Ecology Law Quarterly*.

California Restaurant Association v. City of Berkeley (2023). This policy analysis addresses how the federal government can help local governments to decarbonize buildings without risking local litigation over federal preemption. She analyzes construction companies' incentives and the challenges local governments face. Conner concludes that a cooperative federalism framework based on new federal building electrification legislation would best incentivize swift local electrification efforts.

Liam Gunn wrote *A Textualist's Guide to "Waters of the United States" and Federal Environmental Statutes* to explain how textualism suggests that federal environmental statutes like the Clean Water Act should be interpreted as providing stronger protections. Comparing Justice Alito's majority and Justice Kavanaugh's concurrence in *Sackett v. EPA* (2023), he notes that Congress enacted the Clean Water Act's official purposes into the law's text. This implies a textual outcome that, as Justice Kavanaugh notes, the majority ignored. This case shows how textualist justices' approaches have diverged into two different methodologies: flexible textualism and strict textualism. Gunn argues that strict textualism is more true to textualism's values because it defers to Congress's text under the "enacted purposes canon." Gunn argues that this case shows that a proper application of textualism should lead to more protective interpretations of federal environmental statutes.

Adam David presents his Note *Extraterritorial Toxics: Regulating California Hazardous Waste After National Pork Producers Council v. Ross*. In this piece, David explores the differences between the definition of "hazardous waste" as set by the Resource Conservation and Recovery Act (RCRA) and the more expansive definition set under California state law. David highlights how much of California's hazardous waste is moved across state borders where it is no longer processed under the stricter California standard. This practice effectively displaces the negative environmental impacts the California laws set out to reduce. This Note then provides readers with a history of past conflicts around interstate waste dumping and how the Supreme Court has largely struck down restrictions on the practice as violations under the Dormant Commerce Clause (DCC). However, in recent developments in the case of *National Pork Producers Council (NPPC) v. Ross* (2023), the Supreme Court upheld California state law in the context of selling out-of-state pork products when production practices did not meet California legal standards. The court found that California state law was not per se illegal interstate discrimination under the DCC. David goes on to apply the Court's reasoning in the opinion for *NPPC* to argue that the rules in the previous interstate waste cases may be overruled as the Court has arguably found the DCC's purpose as providing state protectionism. And second, that California should be able to exert control over its waste that crosses state lines without finding a violation of the DCC.

Grace Li's Student Note, *"Tó éí iiná"—Water is Life: Repairing the Indian Trust Doctrine With an Environmental Justice-"Plus" Agency Approach*, calls on federal administrative agencies to view the Indian trust responsibility under

an "environmental justice plus" lens. After providing a comprehensive background on the Indian trust doctrine as a moral and fiduciary duty, she notes that the Supreme Court's recent *Arizona v. Navajo Nation* (2023) decision casts doubt on federal courts' willingness to uphold the trust doctrine to provide Native Nations the water they need. However, Li forcefully argues that we should not give up on the trust doctrine—courts have simply failed to apply it correctly to provide the Navajo people with appropriate redress. Under an "environmental justice plus" lens, the Supreme Court should have found that the federal government was required to quantify the Navajo Nation's water rights.

Chloé Smith uses her Note *How Can a Mandatory Right-to-Repair Address the Global E-Waste Problem?* to offer solutions to the growing challenge of global electronic waste (e-waste) management. Smith provides a comprehensive overview of the human and environmental health hazards presented by e-waste disposal and recycling. She details the informal economies that exist around e-waste management, and how they can both present economic opportunity as well as negative environmental externalities for the communities in which they are located. The United States lacks a comprehensive federal e-waste management policy. Smith proposes two policy measures to reduce the negative externalities of e-waste in the United States: a right-to-repair policy and a mandated repairability index. She bases her argument off of the success of similar policies in various other countries in the European Union and beyond. Smith's note dives into the obstacles in front of adopting a federal policy and provides hope that better policy options are possible for addressing the e-waste challenge.

The second half of the 51.2 Annual Review contains the In Brief offerings from the 2023–24 academic year. This year we are exciting to bring you nine individual In Briefs featuring topics from interpretations of the Endangered Species Act and its impact on the future of North Atlantic right whales, the role of NEPA in restricting oil and gas development on Native land, and the inadequacy of current climate analysis in updating American Infrastructure. These pieces are short looks into fascinating legal topics. We highly encourage our readers to explore them and engage with the authors in responses.

Ecology Law Quarterly remains a leader in environmental law scholarship because of the work of the authors and editors presented in this edition. We are grateful for the long tradition of elevating the voices of students, practitioners, and academics in this field. For over fifty years *ELQ* has served as a community of thinkers who are passionate about using the law as a tool to address environmental issues. We proudly present to you this edition as a continuation of these efforts.

Ellie Rubinstein and Liam Chun Hong Gunn
Editors-in-Chief, 2024–2025, *Ecology Law Quarterly*

Establishing Incentives for Building Electrification through Congress: How to Strengthen and Accelerate Local Decarbonization Efforts

Megan Conner[*]

The commercial and residential building sector accounts for 37 percent of U.S. energy consumption, making sector-wide decarbonization a key priority for combating climate change. Yet new building construction continues to ensure the future of nonrenewable energy by placing natural gas infrastructure between building walls instead of all-electric wiring. While many city and municipal governments began crafting building electrification regulations in recent years, a confluence of challenges threatens their progress. Resource-constrained local governments ultimately struggle to compete when well-resourced natural gas interest groups lobby and litigate against building electrification measures, creating both state and federal preemption hurdles for local laws. One recent Ninth Circuit decision, California Restaurant Association v. City of Berkeley, *highlighted the complexity of these problems when the court federally preempted Berkeley's ban on natural gas piping in new buildings. The roadblocks faced by Berkeley and other localities raise the question: How can the United States alleviate local litigation burdens and bolster building decarbonization moving forward? This Note argues that Congress can and should pass new federal building electrification legislation to protect, incentivize, and accelerate local electrification efforts. First, this Note explores the potential to establish short-term electrification incentives targeting on-the-ground construction decisionmakers. Second, this Note demonstrates how a long-term incentive should dovetail into the regulatory scheme, leveraging a cooperative federalism framework for disseminating electrification incentives to local governments and preempting state prohibitions on progress. This Note concludes by calibrating this twofold policy against the strengths and weaknesses of tangential federal policies, particularly the recently enacted Inflation Reduction Act.*

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* J.D. Candidate, University of California, Berkeley, School of Law, 2025. Many thanks to Professor Holly Doremus, Grace Li, and the *Ecology Law Quarterly* editors for their invaluable feedback and support during the writing process.

INTRODUCTION

In an era when climate change is both pressing and politicized,[1] building electrification is a timely issue. In the United States, the residential and commercial building sector accounts for approximately 37 percent of total energy consumption.[2] Yet developers continue to dress new buildings with outdated natural gas piping systems and devices despite tremendous technological improvements in building appliances and infrastructure efficiency.[3]

An effective low-carbon economic transition will require a shift from natural gas to electric infrastructure in buildings. Electric infrastructure is critical to a low-carbon energy transition because various types of energy inputs can be electrified, including renewable, nuclear, and fossil fuel sources.[4] Although electric infrastructure does not guarantee clean and efficient electricity usage, it accelerates renewable energy adoption as renewable supplies expand.[5] The same cannot be said for natural gas infrastructure. Once a natural gas piping system is plastered into the walls of a new building, the costs and logistics of replacing this piping with electric wiring are immense barriers to decarbonization.[6]

Today, numerous cities, counties, and states are working meticulously to address this issue by instituting building electrification regulation through building codes, police powers, and air emission regulatory authority.[7]

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1. Research supports a strong causal link between anthropogenic greenhouse gas pollution since at least 1971 and global warming, leading to "[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere." CLIMATE CHANGE 2023 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 4-7 (Intergovernmental Panel on Climate Change, 2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf. Yet, over the last three decades, U.S. partisan politics and climate change political discourse ballooned in tandem, with partisan division eventually overwhelming the climate change conversation. Patrick Egan & Megan Mullin, *US Partisan Polarization on Climate Change: Can Stalemate Give Way to Opportunity?*, 57 POL'Y SCI. & POLITICS 30, 30-33 (Sept. 7, 2023).

2. This 37 percent estimate by the U.S. Energy Information Administration (EIA) includes electrical system energy losses in the building sector. If calculating only end-use energy consumption in the U.S., the residential and commercial building sector accounts for 28 percent of all such consumption. *Frequently Asked Questions (FAQs): How Much Energy Is Consumed in U.S. Buildings?*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.php?id=86&t=1#:~:text=In%202022%2C%20the%20combined%20end,British%20thermal%20units%20(Btu).&text=This%20was%20equal%20to%20about,use%20energy%20consumption%20in%202022 (last updated Apr. 30, 2024) [hereinafter *FAQs*].

3. *See generally* Heather Payne, *The Natural Gas Paradox: Shutting Down a System Designed to Operate Forever*, 80 MD. L. REV. 693 (2021).

4. *Electricity Explained: Electricity in the United States*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php (last updated Mar. 26, 2024) [hereinafter *Electricity Explained*]. The EIA further suggests that "[e]lectrification is one of the most important strategies for reducing CO_2 emissions from energy in the Net Zero Emissions by 2050 Scenario, where the majority of emissions reductions from electrification come from the shift towards electric transport and the installation of heat pumps." Mathilde Huismans, *Electrification*, INT'L ENERGY AGENCY, https://www.iea.org/energy-system/electricity/electrification (last updated July 11, 2023).

5. Courtney Lindwall, *Decarbonization: Why We Must Electrify Everything Even Before the Grid Is Fully Green*, NAT. RES. DEF. COUNCIL (Dec. 1, 2022), https://www.nrdc.org/stories/why-we-must-electrify-everything-even-grid-fully-green.

6. *Infra* Part I.

7. *Infra* Part II(a).

Jurisdictions successfully adopting such policies encompass more than thirty-six million people across ten states.[8] Local governments retain institutional knowledge of local laws and community policy priorities, making them advantageous propagators for such regulation.[9] Yet, many localities face near-inevitable preemption litigation against their decarbonization mandates, even when their authority to regulate appears legally robust.[10] When powerful fossil fuel lobbies back up plaintiffs opposing building electrification, local governments' limited resources struggle to compete.[11] So how can the United States combat these barriers to the energy transition?

To accelerate U.S. building electrification, local governments need support and guidance from the federal government. Federal intervention can counteract fossil fuel-backed preemption challenges and alleviate local government resource constraints. While the federal government took tangential steps to address local building decarbonization in recent decades, primarily focusing on building appliance efficiency,[12] electrification policies aimed at building infrastructure are notably absent.[13] Congress should act on building electrification.

To maximize the chance of success and reduce political resistance to building electrification, Congress should establish incentive-based policy instruments to accelerate and support local building decarbonization action. This Note argues for a twofold approach to building electrification incentives. First, Congress should establish short-term incentives to nudge builders to install more electric infrastructure. Congress can take inspiration from the Inflation Reduction Act and emerging incentive-based regulations promulgated by cities.[14] Second, Congress should establish long-term incentives to encourage localities to act on building electrification. This could entail adopting a federal-local relationship reminiscent of the Clean Air Act's National Ambient Air Quality Standards (NAAQS) and State Implementation Plan (SIP) mechanisms but focusing on voluntary incentives rather than penalizing mandates.[15]

I. THE ROLE OF BUILDING ELECTRIFICATION IN U.S. DECARBONIZATION

The building sector is a key contributor to greenhouse gas emissions in the United States. The emissions impact is not solely concentrated in industrial buildings either: offices, retailers, restaurants, residences, and other unassuming

8. This statistic reflects research from March 2023. Leah Louis-Prescott & Rachel Golden, *How Local Governments and Communities Are Taking Action to Get Fossil Fuels out of Buildings*, ROCKY MOUNTAIN INST., https://rmi.org/taking-action-to-get-fossil-fuels-out-of-buildings/ (last updated Oct. 2, 2023).

9. *Infra* Part II(a).

10. *Infra* Part II(b)(3).

11. *Id.*

12. *Infra* Part II(c)(1).

13. *Infra* Part II(c)(2).

14. *Infra* Part II(a); *See also* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

15. *Infra* Part III(a)(1)(b).

structures cumulatively generate significant emissions output.[16] According to the U.S. Energy Information Administration (EIA), the residential and commercial building sectors' energy consumption accounted for approximately 40 percent of the total U.S. energy consumption in 2023.[17] This amounts to a 20.6 quadrillion British thermal units (Btu) footprint.[18] In the face of climate change, decarbonizing the commercial and residential building sector is critical for an effective energy transition.

New building electrification is a priority for decarbonizing the building sector. Although electric infrastructure does not guarantee clean electricity usage, it facilitates renewable energy adoption as renewable supplies expand.[19] This is because electric infrastructure accepts inputs of nonrenewable energy (such as coal, natural gas, and petroleum), renewable energy (such as solar and wind), and nuclear energy.[20] Electric infrastructure's input flexibility significantly decreases physical and economic barriers to the building sector's low-carbon transition.[21] Then, as energy supply shifts over time, electrified buildings need not be renovated with new infrastructure to accommodate new energy source inputs.[22]

The same cannot be said for alternative infrastructure such as natural gas piping.[23] Natural gas systems installed in new buildings today threaten decarbonization in the building sector for decades ahead. For example, if a developer plans to place a gas stove in a new building's kitchen, the developer will install natural gas pipes during construction, before installing the kitchen walls. But the developer will not necessarily install electric wiring into that wall during construction since it is not needed for the gas stove hook-up. Consequently, future building users cannot swiftly switch to an electric stove without the electric hookup in the kitchen. Once natural gas pipes are sealed within a building's walls, changing that infrastructure presents an expensive headache.[24] Compounding this deterrent, natural gas infrastructure has an

16. *See Commercial Buildings Energy Consumption Survey*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/consumption/commercial/building-type-definitions.php (last accessed Sept. 18, 2024).

17. *See FAQs*, U.S. ENERGY INFO. ADMIN., *supra* note 2.

18. *Id.*

19. *See* CAITLIN MURPHY ET AL., ELECTRIFICATION FUTURES STUDY: SCENARIOS OF POWER SYSTEM EVOLUTION AND INFRASTRUCTURE DEVELOPMENT FOR THE UNITED STATES viii-xiii (Nat'l Renewable Energy Lab. 2021), https://www.nrel.gov/docs/fy21osti/72330.pdf.

20. *Electricity Explained*, U.S. ENERGY INFO. ADMIN., *supra* note 4.

21. *See* MURPHY, *supra* note 19, at xii.

22. *See id.* at 40.

23. For a renewable transition, only hydrogen power could potentially replace natural gas in current natural gas piping. However, research suggests that hydrogen blending in existing natural gas infrastructure would be economically infeasible and result in minimal emissions reductions. HERIB BLANCO, GLOBAL HYDROGEN TRADE TO MEET THE 1.5C CLIMATE GOAL, PART II: TECHNOLOGY REVIEW OF HYDROGEN CARRIERS 104-06 (Int'l Renewable Energy Agency 2022), https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2022/Apr/IRENA_Global_Trade_Hydrogen_2022.pdf?rev=3d707c37462842ac89246f48add670ba.

24. *Cf.* Payne, *supra* note 3, at 723-24.

average lifespan of approximately eighty years.[25] This means that natural gas pipes installed in a new building are likely to outlive the original residents of the building itself.[26]

Yet, natural gas appliances and infrastructure are still consistently installed in new U.S. buildings. In 2020, 61 percent of all U.S. households used natural gas for at least one energy end-use.[27] "Space heating, water heating, and cooking were the most common end uses" of natural gas for households in 2020.[28] Of these household end uses, 52 percent of space heating and 48 percent of water heating users used natural gas systems.[29] For perspective, only 26 percent of residences nationwide use all-electric energy,[30] so building decarbonization clearly lags behind the pace required for an efficient low-carbon energy transition. New natural gas appliances installed today pose long-term barriers to emissions reduction progress. However, these appliances will not be phased out until the connected natural gas infrastructure is replaced with electric plug-ins. Regulation needs to drive this shift.

II. BUILDING ELECTRIFICATION FROM THE BOTTOM-UP: WHY EMERGING LOCAL REGULATION NECESSITATES FEDERAL SUPPORT

Generally, localities appear to care about building electrification and decarbonization. Many local U.S. cities, municipalities, and even states are electrifying new buildings using various regulatory approaches.[31] Furthermore, localities are well-positioned to tackle building electrification. Local governments typically have a vested interest in urban planning and building codes, with prioritized power to regulate these topics.[32] Local citizens and officials also have a more nuanced understanding of local laws and typical

25. *Id.* at 705.

26. As of 2022, the average life expectancy of someone born in the U.S. is approximately 76.4 years. Yuki Noguchi, *American Life Expectancy Is Now at Its Lowest in Nearly Two Decades*, NPR (Dec. 22, 2022), https://www.npr.org/sections/health-shots/2022/12/22/1144864971/american-life-expectancy-is-now-at-its-lowest-in-nearly-two-decades.

27. Kaili Diamond & Matthew Sanders, *Today in Energy: The Majority of U.S. Households Used Natural Gas in 2020*, U.S. ENERGY INFO. ADMIN. (Mar. 23, 2023), https://www.eia.gov/todayinenergy/detail.php?id=55940.

28. *Id.*

29. *Id.*

30. *See* Kaili Diamond et al., *Over One-Quarter of U.S. Households Use Electricity as the Only Source of Energy*, U.S. ENERGY INFO. ADMIN. (July 12, 2022), https://www.eia.gov/todayinenergy/detail.php?id=52999&src=%E2%80%B9%20Consumption%20%20%20%20%20%20Residential%20Energy%20Consumption%20Survey%20(RECS)-b3. Alternatives to electricity typically include "natural gas, fuel oil, propane, or wood." *Id.* And notably, all-electric homes are most pervasive in Florida (77 percent), Hawaii (72 percent), and a few other states such as Washington, Louisiana, Tennessee, Alabama, North Carolina, and South Carolina. *Id.*

31. *See* Louis-Prescott & Golden, *supra* note 8.

32. *See* LINDA R. ROWAN ET AL., BUILDING CODES, STANDARDS, AND REGULATIONS: FREQUENTLY ASKED QUESTIONS 1-5 (Cong. Rsch. Serv. 2023), https://crsreports.congress.gov/product/pdf/R/R47665#. Local governments often negotiate and enter into agreements with land developers with land use planning and regional interests in mind. *See generally* DAVID L. CALLIES ET AL., DEVELOPMENT BY AGREEMENT: A TOOL KIT FOR LAND DEVELOPERS AND LOCAL GOVERNMENTS (Am. Bar Ass'n 2012).

developer activity. Localities are acutely sensitive to community health and safety, which can prove helpful when assessing the risks of different building systems and appliances.[33] Additionally, since local authorities are physically proximal to the citizens they regulate, they may be better positioned to integrate constructive community input when drafting regulations.

However, climate change is a global issue. Sometimes, regional action on climate change elicits strong responses from stakeholders outside the immediate community. Other times, regional governments have too little incentive to act because the global climate threat does not feel geographically proximal or imminent. Consequently, U.S. localities are confronting challenges to building electrification that hamper a low-carbon energy transition. As discussed further below, federal congressional action may be a lucrative pathway to confront these challenges.

A. Characterizing Emerging Local Regulation

A variety of local building electrification policies are emerging in the U.S., but they appear unevenly distributed across jurisdictions.[34] Predominantly progressive states and cities currently lead the charge in building electrification regulation. Over seventy cities and counties in California alone have emerging building decarbonization plans.[35] Washington, New York, and Massachusetts are crafting statewide initiatives.[36] Moreover, many cities within these states have supplemental building emissions mandates, incentives, or a mix of both.[37]

Those localities acting to decarbonize buildings promulgate their regulations using various legal mechanisms. Some invoke police powers, suggesting that natural gas alternatives to electric building infrastructure pose significant health and safety risks to building dwellers.[38] Many others root their

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33. *Cf.* ROWAN ET AL., *supra* note 32, at 2; *see generally* Patricia A. Collins & Michael V. Hayes, *The Role of Urban Municipal Governments in Reducing Health Inequities: A Meta-Narrative Mapping Analysis*, 9 INT'L J. EQUITY HEALTH 13 (2010).

34. *See* Sarah J. Fox, *Why Localizing Climate Federalism Matters (Even) During a Biden Administration*, 99 TEX. L. REV. 122, 132-35 (2021).

35. *Zero Emission Building Ordinances*, BLDG. DECARBONIZATION COAL., https://buildingdecarb.org/zeb-ordinances (last visited Sept. 18, 2024).

36. Daniel Markind, *New York State Pushes Ahead on Natural Gas Ban*, FORBES (May 8, 2023), https://www.forbes.com/sites/danielmarkind/2023/05/08/new-york-state-pushes-ahead-on-natural-gas-ban/?sh=71e317d36fe7; Tom DiChristopher, *Massachusetts favors building electrification in final energy code update*, S&P GLOBAL (Sept. 28, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/massachusetts-favors-building-electrification-in-final-energy-code-update-72296997. Of note, Washington state decided to revise a natural gas ban proposal to avoid Berkeley-style preemption concerns within the Ninth Circuit. David Iaconangelo, *Washington State Hits the Brakes on Landmark Gas Ban*, E & E NEWS (May 25, 2023), https://www.eenews.net/articles/washington-state-hits-the-brakes-on-landmark-gas-ban/.

37. Fox, *supra* note 34, at 133-34.

38. *See* Tom DiChristopher, *What Striking Down Berkeley's Gas Ban Means for US Building Electrification Push*, S&P GLOBAL (Apr. 19, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/what-striking-down-berkeley-s-gas-ban-means-for-us-building-electrification-push-75275004 (mentioning, after a circuit court invalidated a Berkeley restriction on gas

regulation in building code authority.[39] Still others like New York use more novel approaches, such as leveraging air emissions monitoring power to regulate building profiles.[40]

Importantly, regulatory instruments also differ widely across implementing localities. While some cities move to outlaw natural gas in new buildings altogether, others selectively ban natural gas infrastructure in certain building types or certain appliance hook-ups.[41] And some cities do not ban natural gas at all. Instead, they created rebates or expedited permitting benefits as incentives for developers to adopt electric infrastructure.[42] These incentives also include electric-preferred regulation, such as efficiency or renewable energy requirements for new construction that nudge local actors towards electric options.[43] State Public Utility Commissions (PUCs) additionally may supplement city regulation with equity-related building electrification incentives.[44]

However, regulatory progress on building electrification is not pervasive. Many states and localities have yet to act on building electrification. In fact, many politically conservative states have preempted building electrification regulation altogether, including Arizona, Georgia, Kentucky, Louisiana, Minnesota, Mississippi, Oklahoma, and Tennessee.[45] In total, about 50 percent of states are on pace to prohibit natural gas restrictions in buildings.[46] In states that lack cities acting to electrify buildings anyway, preemption may be symbolic.[47]

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piping, "plenty of pathways for local governments to still restrict gas in new construction and protect their residents and address the climate crisis").

39. *See id.*

40. *See* NEW YORK CITY, LOCAL LAW no. 154 (2021). New York State and New York City building electrification regulations represent compatible frameworks. *See* Markind, *supra* note 36.

41. *See generally* JIM MEYERS, BUILDING ELECTRIFICATION: HOW CITIES AND COUNTIES ARE IMPLEMENTING ELECTRIFICATION POLICIES (Sw. Energy Efficiency Project 2020), https://lpdd.org/resources/report-building-electrification-how-cities-and-counties-are-implementing-electrification-policies/.

42. *See, e.g.*, *id.* at 2, 5.

43. *Id.* at 10-12. Among California localities, Santa Monica, Marin County, San Mateo, and San Luis Obispo adopted such electric-preferred regulation. Boulder, Colorado likewise adopted an electric-preferred policy. *Id.* Maryland designed an aggressive electric-preferred performance standard designed to become electric-forcing over time. Maryland's law requires buildings exceeding 35,000 feet to incrementally decrease their GHG emissions to reach net-zero by 2040. *See* Jeff St. John, *Maryland Just Passed One of the Most Aggressive Climate Laws in the US*, CANARY MEDIA (Apr. 12, 2022), https://www.canarymedia.com/articles/policy-regulation/maryland-just-passed-one-of-the-most-aggressive-climate-laws-in-the-us; *see also* Climate Solutions Now Act of 2022, S.B. 528, Reg. Sess. (Md. 2022).

44. *See Cities & States Moving to All-Electric Buildings*, CLIMATENEXUS, https://gas.climatenexus.org/gas-free-buildings (last visited Dec. 14, 2023).

45. Fox, *supra* note 34, at 134.

46. Tom DiChristopher, *Half of US States Are on Pace to Prohibit Local Gas Bans*, S&P GLOBAL (June 21, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/half-of-us-states-are-on-pace-to-prohibit-local-gas-bans76245300#:~:text=On%20March%2017%2C%20North%20Dakota,preemption%20bill%20on%20May%204.

47. Fox, *supra* note 34, at 134.

But for a few progressive cities stranded within conservative states, preemption is a severe constraint on local efforts. In Austin, a draft Climate Equity Plan originally contained ambitious building electrification mechanisms to support the city's 2040 decarbonization goal.[48] Yet, aggressive industry lobbying and a Texas state preemption on natural gas bans undermined these electrification ambitions.[49] Other cities may be deterred from even initiating electrification proposals due to state legal barriers like those seen in Texas.[50] In sum, twenty-four states have adopted such preemption laws as of June 2022.[51]

Some localities also face uncertain progress due to federal preemption concerns. Like state preemptions, federal preemption concerns can diminish the strength of electrification efforts or prevent them entirely.[52] Federal preemption is a risk even when state legislatures and PUCs, like in California, support city-building electrification efforts through supplemental incentive programs. In *California Restaurant Association v. City of Berkeley*, a three-judge panel on the Ninth Circuit struck down Berkeley's natural gas infrastructure ban in April 2023.53 The Ninth Circuit held that under the Energy Policy and Conservation Act (EPCA), Congress expressly preempted the city's ban as regulating "energy use" under the statute.[54]

B. Hurdles to Local Building Electrification

Localities wishing to regulate building electrification face a set of hurdles that collectively threaten decarbonization progress. While the granularity of local regulation varies, city and municipal governments generally confront a high-level pattern of regulatory speed bumps that require additional policy support to alleviate.

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48. *Austin Climate Equity Plan*, THE CITY OF AUSTIN, https://www.austintexas.gov/page/austin-climate-equity-plan (last visited Sept. 25, 2024).

49. *Support Building Electrification in the Austin Climate Equity Plan*, ACTION NETWORK, https://actionnetwork.org/letters/support-building-electrification-in-austin-climate-plan (last visited Sept. 25, 2024); Erin Douglas, *Texas Gov. Greg Abbott Signs Law to Bar City Climate Plans from Banning Natural Gas as Fuel Source*, THE TEXAS TRIBUNE (May 18, 2021), https://www.texastribune.org/2021/05/18/texas-natural-gas-bans-climate-plans/; *A Texas Takedown of Natural Gas Bans*, TEXANS FOR NATURAL GAS (Feb. 2, 2023), https://www.texansfornaturalgas.com/a_texas_takedown_of_natural_gas_bans.

50. *See* Chris Marr, *Also Bigger in Texas: The State's Preemption of Local Ordinances*, BLOOMBERG LAW (May 30, 2023), https://news.bloomberglaw.com/daily-labor-report/also-bigger-in-texas-the-states-preemption-of-local-ordinances.

51. Alejandra Mejia Cunningham, *Gas Interests Threaten Local Authority*, NATURAL RESOURCES DEFENSE COUNCIL (Jan. 19, 2021), https://www.nrdc.org/bio/alejandra-mejia-cunningham/gas-interests-threaten-local-authority.

52. *See e.g.*, Iaconangelo, *supra* note 36.

53. Cal. Rest. Ass'n v. City of Berkeley, 65 F.4th 1045, 1056 (9th Cir. 2023).

54. *Id.* at 1049-51; *see also* Energy Policy and Conservation Act, 42 U.S.C. § 6201 (1975).

1. A Case Study: California Restaurant Association v. City of Berkeley

Berkeley's building electrification regulation and its resulting opposition is an illustrative study for analyzing challenges faced by local governments. In *California Restaurant Association v. City of Berkeley*, plaintiff California Restaurant Association (CRA) successfully appealed a federal preemption declaratory judgment against defendant Berkeley. The court found that CRA alleged sufficient Article III standing, in contrast to the City of Berkeley's challenge that the prospective harm alleged by CRA was not sufficient to establish an injury-in-fact.[55] Federal preemption prevailed, despite opposition by the federal agency tasked with promulgating the preempting statute.[56]

Berkeley was a first mover for building electrification,[57] and the outcome of *California Restaurant Association* was highly publicized. Overturning building electrification laws in a notably liberal city situated within an environmentally progressive state stirred unease.[58] The case flipped the district court's EPCA interpretation on its head. It shrunk the traditional scope of local government power, where "states and localities expressly maintain control over the local distribution of natural gas."[59] A Berkeley City Council member who authored the natural gas ban, Kate Harrison, called the ruling "a movement that can't be stopped."[60] She believed the court "conflated a 1970s regulation about the efficiency of appliances with what kind of materials can come into our house," arguing that Berkeley's ordinance "did not change appliances, [it] changed the source of fuel that can come into new buildings."[61]

In response to the Ninth Circuit's ruling, Berkeley petitioned for a rehearing en banc, a request which received formal support from other interested parties.[62] Berkeley's petition alleged that the three-judge panel misinterpreted EPCA's preemption provision, particularly the definition of "energy use" under the provision.63 The Ninth Circuit justified preemption by pointing to a primary aim of EPCA, "the end-user's ability to use installed covered products at their

55. *Cal. Rest. Ass'n*, 65 F.4th at 1,049.

56. *See generally* Brief for the U.S. as Amicus Curiae in Support of Petition for Rehearing, *Cal. Rest. Ass'n*, 65 F.4th at 1056 (Case No. 21-16278, Docket No. 33). The administrative agency tasked with enforcing EPCA, the U.S. Department of Energy, along with the Department of Justice, ultimately supported Berkeley's argument by way of an amicus brief from the Biden Administration. *See generally id.*

57. Bob Egelko, *Court strikes down Berkeley's first-in-the-nation ban on natural gas in new construction*, SAN FRANCISCO CHRONICLE (Apr. 17, 2023), https://www.sfchronicle.com/politics/article/ninth-circuit-berkeley-natural-gas-ban-17902110.php.

58. *See* Janie Har, *Court tosses Berkeley gas ban, but wider impact is unclear*, AP NEWS (Apr. 18, 2023), https://apnews.com/article/berkeley-california-natural-gas-ban-overturned-court3546acbaec5db011c89a610baa42cebc.

59. *See* Cal. Rest. Ass'n v. City of Berkeley, 547 F.Supp.3d 878, 892 (N.D. Cal. 2021), *abrogated by Cal Res. Ass'n*, 65 F.4th 1,045.

60. Har, *supra* note 58.

61. *Id.*

62. *See generally* Defendant-Appellee City of Berkeley's Petition for Rehearing en banc, Cal. Rest. Ass'n, 65 F.4th (4:19-cv-07668-YGR).

63. *Id.* at 13-14.

intended final destinations." But Berkeley argued that its ordinance did not directly concern the topic of "energy use" in the limited preemption provision (defined as "the quantity of energy directly consumed by a consumer product at point of use, determined in accordance with test procedures").[64] Instead, Berkeley alleged that its ordinance regulated the placement of natural gas piping to protect residents from the adverse health impacts of natural gas exposure in confined spaces. Such a public health measure is not synonymous with regulating consumer appliance design.[65]

While the court's holding in *California Restaurant Association* is contentious, the attention given to the case is often misdirected. The specific EPCA preemption upheld here is unlikely to resurface in most other U.S. localities instituting natural gas limitations in buildings.[66] However, the case exemplifies broader concerns for local governments looking to electrify and decarbonize the residential and commercial building sector. This Note elaborates upon these concerns, occasionally drawing details from *California Restaurant Association* to exemplify risks that future regulatory solutions should aim to address.

2. Federal and State Preemption Barriers

First, localities struggle to implement and uphold building electrification regulations because federal preemption law is unclear and litigation is likely. Legal standards around federal preemption are not bright-line rules with easy-to-predict outcomes. When Congress does not clearly spell out a federally preempted topic in a statute, determining preemption can be complex. [67]

The federal preemption doctrine derives from the Supremacy Clause of the U.S. Constitution, which holds that federal law is "the supreme Law of the

64. *Id.*; *see also* 42 U.S.C. § 6291(4).

65. Defendant-Appellee City of Berkeley's Petition for Rehearing en banc, *supra* note 62, at 11-13.

66. *Cf.* DiChristopher, *What striking down Berkeley's gas ban means*, *supra* note 38. Most local regulation does not root its authority in police powers and/or lies outside the Ninth Circuit's purview. *See id.* Additionally, local building electrification regulations that root their authority in building codes can try to qualify for the building code savings clause to preemption in EPCA. *See* Amy Turner, *Inflation Reduction Act: Implementation Gaps for Local Governments & How to Close Them*, SABIN CENTER FOR CLIMATE CHANGE LAW (May 25, 2023), https://blogs.law.columbia.edu/climatechange/2023/05/25/inflation-reduction-act-implementation-gaps-for-local-governments-how-to-close-them/.

67. If a statute does not expressly preempt an issue, then determining preemption becomes less straightforward. There are two types of non-express preemption that might apply: conflict preemption and field preemption. Conflict preemption occurs when a state regulation conflicts with a federal law, such that "compliance with both federal and state regulations is a physical impossibility." Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Scott Hempling, REGULATING PUBLIC UTILITY PERFORMANCE: THE LAW OF MARKET STRUCTURE, PRICING, AND JURISDICTION 441-42 (Am. Bar Ass'n, 2nd ed. 2021). Courts also find conflict where state jurisdiction "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). On the other hand, field preemption occurs when a "scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Hempling, REGULATING PUBLIC UTILITY PERFORMANCE 436-437. Notably, even the line between express preemption and non-express preemption can be blurred by judges, like in *CRA v. City of Berkeley*. *See* Part II(B)(1).

Land."[68] When a local law conflicts with a federal law on the same topic, the federal law supersedes its local counterpart.[69] Determining whether federal preemption applies often requires a nuanced assessment to see if there is truly a conflict between federal and state laws.[70] Consequently, courts leverage various statutory interpretation techniques to analyze federal statutes for preemption scope.[71]

In theory, courts have a default presumption against federal preemption when statutory language is ambiguous.[72] But in practice, such a presumption is defunct because judges wield immense discretionary power when weighing preemption by picking and choosing how to use the tools of statutory construction.[73] Some take a purposive approach, leveraging the historical context at the time Congress drafted a statute—and similar clues on the law's purpose—to arrive at a determination.[74] Other judges use a textualist approach, focusing on the plain meaning of a statute's text.[75]

This variety of judicial strategies on statutory construction makes federal preemption outcomes hard to predict. Local government officials cannot accurately assess preemption litigation risks when judges themselves often differ in assessing preemption. Therefore, local governments face immense challenges when crafting electrification policies compatible with federal regulation.

The same concerns can arise with state preemptions. Statutory construction similarly allows state court judges broad discretion, and research suggests that state courts tend to hold "anti-city disposition[s]."[76] However, in the case of building electrification, many state preemptions are reactive to local regulatory attempts. For example, Texas passed HB 884, which prohibits building permit regulations that can "deny a permit application based on the type of utility service provided to the project."[77] HB 884's text specifically notes that the statute "[relates] to local government regulations based on utility service type" and therefore clearly admits its purpose of restricting building electrification attempts like those in Austin.[78] State courts are likely to find state statutory language like this unambiguous because such statutes clearly aim to prevent natural gas bans

68. U.S. CONST., art. VI; *see also* BRYAN L. ADKINS ET AL., FEDERAL PREEMPTION: A LEGAL PRIMER 1 (Cong. Rsch. Serv., updated 2023), https://sgp.fas.org/crs/misc/R45825.pdf.

69. ADKINS ET AL., *supra* note 68, at 2-3.

70. *Id.* at 3-4.

71. *Id.*

72. *Id.* at 4-6.

73. Josh Zaharoff, *The Efficiency of Energy Efficiency: Improving Preemption of Local Energy Conservation Programs*, 37 N.Y.U. Rev. L. & Soc. Change 783, 792-93 (2013); *see generally* George Horvath, *Avoiding the Preemption Muddle: Reading Professor Bickel and Judge Garland* (Social Science Research Network, 2016), https://dx.doi.org/10.2139/ssrn.2838945.

74. *Statutory Interpretation: Theories, Tools, and Trends* 10-18 (Cong. Rsch. Serv., updated 2018), https://crsreports.congress.gov/product/pdf/R/R45153/2#:~:text=While%20purposivists%20argue%20that%20courts,gather%20evidence%20of%20statutory%20meaning.

75. *Id.*

76. *To Save a City: A Localist Canon of Construction*, 136 HARV. L. REV. 1200, 1207 (2023).

77. H.B. 884, 87th Leg., Reg. Sess. (Tx. 2021).

78. *Id*.

and similar efforts. Regardless, both state and federal preemption risks disadvantage localities trying to electrify buildings.

3. Industry Incentives to Litigate and Lobby

Beyond the complexities of preemption law, some parties have incentives to litigate and undermine localities' building electrification efforts. The fossil fuel industry is a critical opponent to building electrification, as its business model depends on nonrenewable energy reliance. While some fossil fuel companies are beginning to diversify their investments into the renewable space, their overarching business strategies still suggest that they are highly dependent on non-renewable investments.[79] Thus, fossil fuel players often seek to protect their profits by litigating against energy transition regulation.[80]

Additionally, fossil fuel corporations have a sizable wallet to fund legal preemption challenges against localities. In *California Restaurant Association*, the fossil fuel industry played a key role in financing the litigation to preempt Berkeley's natural gas ban.[81] SoCalGas, the largest natural gas utility in the United States, began paying immense sums to Reichman Jorgensen, the law firm representing CRA, around the onset of litigation.[82] The California Public Utilities Commission later forced SoCalGas to admit that it "funneled more than $1 million of customer money to pay for legal services by Reichman Jorgensen that included work on federal preemption of local laws to limit gas, the very issue at the heart of the CRA litigation."[83] Fossil fuel companies pushing such litigation costs onto customers indicates the lengths such companies are willing to go to oppose natural gas bans.[84]

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79. *See, e.g.*, Sam Meredith, *Big Oil rakes in record profit haul of nearly $200 billion, fueling calls for higher taxes*, CNBC, https://www.cnbc.com/2023/02/08/big-oil-rakes-in-record-annual-profit-fueling-calls-for-higher-taxes.html, (last updated Feb. 8, 2023).

80. *See, e.g.*, Chris McGreal, *How Exxon is using an unusual law to intimidate critics over its climate denial*, THE GUARDIAN (Jan. 18, 2022), https://www.theguardian.com/environment/2022/jan/18/exxon-texas-courts-critics-climate-crimes; Nydia Gutierrez, *Earthjustice Statement: Fossil Fuel Industry-led Lawsuit Aims to Dismantle New York's Nation-leading All-Electric New Buildings Law*, EARTHJUSTICE (Oct. 12, 2023), https://earthjustice.org/press/2023/earthjustice-statement-fossil-fuel-industry-led-lawsuit-aims-to-dismantle-new-yorks-nation-leading-all-electric-new-buildings-law; Tom DiChristopher, *SoCalGas sues California Energy Commission to block 'anti-natural gas policy'*, S&P Global (Aug. 5, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/socalgas-sues-california-energy-commission-to-block-anti-natural-gas-policy-59758122.

81. For background, *see supra* Part II(B)(1); *see generally Cal. Rest. Ass'n*, 65 F.4th.

82. *California should examine SoCalGas ties to lawsuit against Berkeley's natural gas ban*, CAL MATTERS (May 2, 2023), https://calmatters.org/commentary/2023/05/california-socalgas-berkeley-natural-gas/.

83. *Id.*; Administrative Law Judge's Ruling Granting California Environmental Justice Alliance's Motion to Compel at 1-4, Application of Southern California Gas Company (U904G) for Authority, Among Other Things, to Update its Gas Revenue Requirement and Base Rates Effective on January 1, 2024 (2023) (No. 22-05-015), Cal. Pub. Util. Comm'n. Apr. 11, 2023.

84. *SoCalGas ties to lawsuit*, *supra* note 82.

In the modern U.S. political climate, fossil fuel lobbies and conservative pundits frequently walk hand-in-hand.[85] Political polarization and lobbying efforts are obstacles for local government, spreading misinformation about emerging electrification regulation to strike fear into and mislead voters. Research suggests that fossil fuel-funded fronts spread key misconceptions about building electrification regulation.[86] Such groups falsely claim that electrification regulation will limit consumer choice, thus jeopardizing democratic and free market values.[87] But in fact, many building dwellers never have a choice for building hook-ups or appliances in the first place. Renters and building owners who do not construct their dwellings from scratch typically inherit the infrastructure choices of the original property developers. As previously noted, retrofitting to electrify an existing building is almost certainly cost-prohibitive.[88]

Misleading narratives propelled by fossil fuel funding also capitalize on stakeholder emotions. Building electrification is not an inherently evocative topic. It's quite the opposite. But the fossil fuel industry crafts false panic by focusing public relations campaigns on nostalgia for appliances like the gas stove.[89] Unlike, for example, a gas heater, the gas stove evokes memories of pan-fried food and cultural cooking traditions. Grabbing people's hearts by their stomachs, the fossil fuel industry misinforms consumers that local governments want to rip their beloved gas stoves from their kitchens.[90] Yet gas stoves are a

85. *See e.g.*, David Gelles, *How Republicans Are 'Weaponizing' Public Office Against Climate Action*, N.Y. TIMES (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/climate/republican-treasurers-climate-change.html.

86. *See Sasan Saadat et al., Rhetoric vs. Reality: The Myth of "Renewable Natural Gas" for Building* 17-24 (Earth Justice & Sierra Club 2020), https://earthjustice.org/wp-content/uploads/report_building-decarbonization-2020.pdf.

87. *See, e.g.*, *Court's Rejection of Berkeley Gas Ban a Resounding Consumer Victory*, CONSUMER ENERGY ALL. (Apr. 18, 2023), https://consumerenergyalliance.org/2023/04/courts-rejection-of-berkeley-gas-ban-a-resounding-consumer-victory/; Stephen Kent, *The 'Save Our Gas Stoves Act' Is About Protecting Your Consumer Choice in the Kitchen*, CONSUMER CHOICE CENTER (June 6, 2023), https://consumerchoicecenter.org/the-save-our-gas-stoves-act-is-about-protecting-your-consumer-choice-in-the-kitchen/; Kenneth W. Costello, *Why Kill Natural Gas?*, CATO INSTITUTE (2022), https://www.cato.org/regulation/spring-2022/why-kill-natural-gas; Sarah Montalbano, *Natural Gas Hookup Ban Restricts Consumer Choice*, REAL CLEAR ENERGY (May 14, 2023), https://www.realclearenergy.org/articles/2023/05/14/natural_gas_hookup_ban_restricts_consumer_choice_899352.html.

88. *Supra* Part I.

89. Payne, *supra* note 3, at 705.

90. *See* Rebecca Leber, *How the Fossil Fuel Industry Convinced Americans to Love Gas Stoves*, MOTHER JONES (June 17, 2021), https://www.motherjones.com/environment/2021/06/how-the-fossil-fuel-industry-convinced-americans-to-love-gas-stoves/. In early 2020, Californians for Balanced Energy Solutions—purportedly a front for SoCalGas, the U.S.'s largest gas utility—hired a public relations firm to create a NextDoor alias. *Id.* This alias, 'Wilson Truong' deceptively presented as a Fox Hills neighborhood member on NextDoor to voice resistance to Culver City's plans to integrate electric-preferred regulation into building codes. *Id.* The alias wrote a misleading NextDoor post titled "Culver City banning gas stoves?" and expressed that "I thought it was bogus, but I received a newsletter from the city about public hearings to discuss it…Will it pass???!!! I used an electric stove but it never cooked as well as a gas stove so I ended up switching back." *Id.* Note how the alias inaccurately conflates the proposed electric-preferred policy with a ban on gas stoves. *See id.*

key cause of indoor air pollution and research links gas stoves to adverse respiratory health risks.[91] Additionally, in practice, not all localities outright ban gas stoves.[92] And if they incentivize the adoption of electric stoves, it typically only applies to new building developments.[93] But many local stakeholders fall prey to emotion, buying into the industry's misleading narratives.[94] Ultimately, industry's influence can aggravate partisan politics and undercut local progress.[95]

Moreover, state preemptions of natural gas bans often originate from the powerful influence of fossil fuel lobbies. In Colorado, a fossil fuel advocacy group successfully revived a ballot measure to prohibit local natural gas bans in August 2023.[96] The advocacy group Protect Colorado received plentiful funding from the state's leading oil and gas producers, including Chevron, Occidental Petroleum, and PDC Energy.[97] Beyond Colorado, successful prohibitions appear to be guided by the American Gas Association (AGA) preemption strategy and funded by related AGA member lobbying. States with such prohibitions include Oklahoma, Louisiana, Texas, and Indiana, among others.[98] Effectively, fossil fuel players can overturn existing local regulations altogether using the power of their pockets.

4. Local Government Resource Scarcity Impedes Regulatory Outcomes

Conversely, although local governments have the most to gain from litigating against preemption challenges, they are usually too resource-scarce to do so. Unlike higher levels of government, local governments generally lack adequate financial and labor resources. They also cannot easily offset excess

91. *E.g.*, Hiroko Tabuchi, *Study Compares Gas Stove Pollution to Secondhand Cigarette Smoke*, N.Y. TIMES (June 17, 2023), https://www.nytimes.com/2023/06/17/climate/gas-stoves-benzene-cigarettes.html#:~:text=The%20News,according%20to%20a%20new%20study.

92. Louis-Prescott & Golden, *supra* note 8.

93. *Id.*

94. *Cf.* Leber, *supra* note 90. The history of gas industry persuasion and emotional appeal, particularly for gas stoves, dates back to the 1930s. *See id.* And the tactic appears to work: "The prevalence of gas stoves in new single-family American homes climbed from less than 30 percent during the 1970s to about 50 percent in 2019." *Id.*

95. *See id.*

96. Sam Brasch, *Fossil fuel advocates revive ballot measure to prohibit local gas bans in Colorado*, CPR NEWS (Aug. 30, 2023), https://www.cpr.org/2023/08/30/fossil-fuel-advocates-stop-natural-gas-ban-2024-ballot-measure/.

97. *Id.*

98. *See* THE U.S. POWER SECTOR AND CLIMATE POLICY 28 (InfluenceMap, 2022), https://influencemap.org/site/data/000/018/U.S._Power_Sector_Report_Final_April2022.pdf. To clarify, the AGA appears to only directly lobby for federal policy action, not state preemption challenges. *See id.* at 22. But AGA provides guidance for its members to lobby for state preemption. *Id.* at 21. Additionally, fossil fuel lobbies here include energy utilities reliant on fossil fuels and/or with fossil fuel assets. *See generally id.*; *see also* Ella Nilson, *Cities Tried to Cut Natural Gas from New Homes. The GOP and Gas Lobby Preemptively Quashed Their Effort*, CNN (Feb. 17, 2022), https://www.cnn.com/2022/02/17/politics/natural-gas-ban-preemptive-laws-gop-climate/index.html.

administrative costs onto their constituents.[99] Funding sources include property, sales, and income taxes; parking charges and other fines; interest; and state and federal government grants.[100] Funds subsequently allocated to civil litigation defense often compete against and are constrained by more pressing expenditure obligations and agency departmental financing.[101] Meanwhile, their opponents receive steadfast funding from fossil fuel corporations that tap into consumer wallets to cover litigation bills.[102] In this context, localities lack the means to fight a fair legal battle against powerful corporations.

a. Resource Scarcity Creates Litigation Overdeterrence

Local governments' litigation challenges for building electrification appear to mirror local conundrums in the Takings Clause literature. Takings Clause jurisprudence derives its authority from the Fifth Amendment of the U.S. Constitution, which holds that private property "[shall not] be taken for public use, without just compensation."[103] This provides the government authority to seize private property for public use, as long as the "taking" involves a payment of "just compensation" to the former property owner.[104] It also provides the basis for local governments to request exactions from local developers.[105] Essentially, when a local developer's project on private property negatively impacts the public in some form, the local government may demand a payment or public benefit to offset the impact.[106] Takings Clause disputes are therefore a tug-of-war between local government authority and private property rights.[107]

Early Supreme Court jurisprudence on the Takings Clause favored local government discretion, but by 1982, the Supreme Court adjusted its approach. Court outcomes began to favor private property rights when *Nollan v. California Coastal Commission* shifted the burden of proof to local governments to show an essential nexus between their demanded exaction and the development's impact.[108] Subsequent jurisprudence further required local governments to demonstrate exactions as "roughly proportional" to the corresponding

99. *See* Daniella Barrow, *Resource Shortage Is a Major Challenge to Net Zero*, LOC. GOVERNANCE CHRON. (Nov. 8, 2023), https://www.lgcplus.com/services/regeneration-and-planning/resource-shortage-is-a-major-challenge-to-net-zero-08-11-2023/.

100. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1,144, 1,161 (2016).

101. *Id.*; *See generally* Christopher J. Tyson, *The Impact of Municipal Fiscal Crisis on Equitable Development*, 48 FORDHAM URB. L.J. 883 (2021).

102. *See* Isabella Kaminski, *Fossil Fuel Companies Paying Top Law Firms Millions to 'Dodge Responsibility'*, THE GUARDIAN (Oct. 9, 2021), https://www.theguardian.com/environment/2021/oct/09/fossil-fuel-companies-law-firms.

103. U.S. CONST. amend. V.

104. *See* Ann Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 107-08 (2002).

105. *See id.* at 108-112.

106. *See id.*

107. *See id.* at 113.

108. *See id.* at 107, 113; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

development impact.[109] As a result, local government exactions have increasingly faced legal challenges by private property owners,[110] effectively deterring local governments from seeking exactions altogether.[111]

Takings Clause literature suggests that resource constraints drive local governments to be risk averse. Local governments with limited finances will try to avoid takings litigation because of difficult-to-prove proportionality and unpredictable outcomes.[112] Consequently, this risk aversion means that "the prospect of a large takings judgment may over-deter them from acting."[113]

Similarly, local governments seeking to electrify their buildings face strong deterrents due to litigation risks. Just as local governments shy away from exercising their constitutional takings right because litigation challenges are frequent and financially risky, local governments may shy away from building electrification policies if preemption litigation is near inevitable and costly. Risk-averse and financially constrained local governments feel they cannot afford the risk of an unclear litigation outcome, especially when their adversaries have deep pockets. Current preemption hurdles hurt local electrification regulation from the outset and may altogether deter certain localities from acting.

b. Unpredictable Article III Standing Compounds Litigation Overdeterrence

Compounding preemption litigation risks, local governments may be over-deterred by the unpredictable Article III standing doctrine. Article III standing—as articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*—creates a complex threshold for plaintiffs to plead an injury-in-fact, among other hurdles.[114] Plaintiffs must show an "actual or imminent" injury, which is purportedly not satisfied by indefinite future intentions.[115] Subsequent cases clarified the necessity for the harm to be both concrete and particularized.[116] But despite these seemingly specific requirements, Article III standing is largely up to the overseeing judge's interpretation and discretion.

While Article III standing requirements should theoretically filter out frivolous litigation claims, in practice, courts inconsistently apply this standard.[117] Building electrification litigation is no exception. For example, the

109. Carlson & Pollak, *supra* note 104, at 105.

110. *See id*. at 113; *see generally* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 NYU L. REV. 1624 (2006).

111. *See* Carlson & Pollak, *supra* note 104, at 113; Serkin, *supra* note 110, at 1625-33.

112. *See* Carlson & Pollak, *supra* note 104, at 113.

113. Serkin, *supra* note 110, at 1625.

114. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (holding that Article III standing requires a plaintiff to plead an actual or imminent injury-in-fact, as well as demonstrate causation and redressability).

115. *Id.* at 564.

116. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 334 (2016); *see also* TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021).

117. *See, e.g.*, Annefloor J. de Groot, *No [Concrete] Harm, No Foul? Article III Standing in the Context of Consumer Financial Protection Laws*, 56 GA. L. REV. 819, 854-55 (2022); Christina Behan,

Ninth Circuit in *California Restaurant Association* affirmed Article III standing, despite Berkeley's objection that CRA's alleged prospective economic harm was not sufficient to establish an injury-in-fact. CRA members failed to demonstrate any tangible impacts of the city's regulation on properties or building construction. Instead, they relied on abstract future business aspirations to build gas-powered restaurants in Berkeley. This contrasts with Article III standing jurisprudence as developed and applied in *Lujan*. In *Lujan*, the plaintiffs were denied Article III standing for an Endangered Species Act claim alleging an ecosystem or vocational nexus to injury for future travel to a geographic site.[118] Although vague future plans to travel did not allow for an injury-in-fact to Article III standing in *Lujan*, in *California Restaurant Association*, the court held that restaurant entrepreneurs' vague future development plans did allow for such injury-in-fact.[119]

Article III standing heightens the risk of costly litigation for local governments because they cannot accurately predict which lawsuits will be heard in court. This increases local governments' risk aversion and over-deters cities from instituting strong building electrification efforts altogether.

c. Regulatory Lobbying Faces Funding and Conflict Constraints

Local governments' resource limitations also constrain their lobbying power. When laying the groundwork for building electrification and other decarbonization goals, local governments can benefit from lobbying the state and federal governments to adopt complementary legislation. However, research suggests that municipalities frequently hire the same lobbying firms that service their fossil fuel opponents.[120] For example, when the City of Baltimore sued Exxon Mobil for climate change damages in 2018, both parties employed the same lobbying firm for contrasting energy lobbying objectives.[121]

Conflicts of interest are particularly concerning in this context because fossil fuel businesses have deep pockets to employ the same lobbying firm to a greater degree.[122] When lobbyists work for two clients with opposing aims and drastically different revenue outlooks, they may be tempted to favor the richer client's interests because it makes practical business sense. Although lobbyists do not usually represent opposing parties in the same specific piece of legislation, they lack strong regulatory oversight beyond baseline disclosure

Leaving Class Action Plaintiffs with Too Many Legs to Stand on: The Inconsistent Application of Article III Standing Requirements in Data Breach Cases, 46 FLA. ST. U. L. REV. 169, 174-77 (2018); Morgan Beirne, *The Injury in Receiving a Text Message*, 43 SETON HALL LEGIS. J. 315, 325-26 (2019); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 187-203 (2012).

118. *See Lujan*, 504 U.S. at 576-78.

119. *Id*. at 564.

120. Dharna Noor, *As Some US Cities Confront the Climate Crisis, Their Lobbyists Work for Big Oil*, GUARDIAN (July 6, 2023), https://www.theguardian.com/us-news/2023/jul/06/climate-fossil-fuel-lobbyist-baltimore-bay-area-charleston.

121. *Id*.

122. *Id*.

requirements.[123] Perhaps even more concerning, there are few legal safeguards to monitor and ensure that lobbyists do not share one client's private information with an opponent.[124]

d. Resource Scarcity Intrinsically Deters Regulation

Even devoid of litigation and lobbying challenges, resource scarcity alone could drive some local governments to forgo building electrification policies. Voluntary policy instruments like electrification subsidies and tax incentives are less likely to face preemption litigation allegations from industry opponents.[125] Yet, these voluntary measures require local funds to produce their financial incentive mechanisms. When localities are cash-strapped, voluntary measures to encourage building electrification may be financially infeasible.[126]

Given these constraints, local governments have limited means to create and defend their building electrification policy objectives.[127] Local governments cannot solve these issues on their own. So how can the United States alleviate local litigation burdens and bolster building decarbonization moving forward?

C. The Need for a New Federal Building Electrification Policy

The federal government is well-positioned to support and accelerate local electrification efforts. Congressional action could streamline the building electrification movement by creating a federal backstop for policy objectives. A federal approach could also alleviate local barriers by superseding state preemptions and other regional opposition to electrification.[128]

To date, the federal government has not taken sufficient action to electrify the commercial and residential building sectors. The federal government's past efforts to decarbonize buildings have been limited in scope, with varying degrees of success. Still, these limited federal efforts provide a starting point for understanding how the United States can develop a national building electrification policy.

123. *Id*.
124. *Id*.
125. *Infra* Part III(A).
126. *See* Barrow, *supra* note 99.
127. Currently, some localities are banding together to litigate against fossil fuel companies for climate change damages more broadly in state court. But generally, cities are not in the position to encourage litigation because they do not have the geographic reach or resources to make this a successful strategy. *See* Lawrence Hurley, *Supreme Court Deals Blow to Oil Companies by Turning Away Climate Cases*, NBC NEWS (Apr. 24, 2023), https://www.nbcnews.com/politics/supreme-court/supreme-court-rejects-oil-companies-appeals-climate-change-disputes-rcna49823.
128. Sarah J. Fox, *How the Biden Administration Can Empower Local Climate Action*, 51 URB. L. 203, 203-05 (2021).

1. Existing Federal Programs Lack Infrastructure Focus

Some federal government actions relate to educational efforts under the Environmental Protection Agency (EPA)'s State and Local Climate and Energy Program. This program provides state, local, and tribal governments with "free tools, data and technical expertise about energy strategies, including energy efficiency, renewable energy, and other emerging technologies."[129] Various localities' programs serve as case studies for building energy efficiency guidance resources.[130] These educational efforts from the federal government can be helpful resources for localities that often have few avenues to invest in research themselves.[131] But educational resources alone do not alleviate preemption litigation risks or substitute for an overarching federal approach to guide building electrification.

Most prominent federal actions in the building electrification space primarily focus on energy efficiency for building appliances. These include the EPA's Energy Star program, which provides voluntary, government-backed labeling options that educate consumers on energy-efficient appliances and related building systems.[132] These also include the Light Bulb Efficiency Standards of 2007, which Congress passed under President George W. Bush. The standards mandated a staged phase-out of inefficient incandescent lights, a policy that the Trump administration staunchly opposed and delayed until the Biden administration reversed course and completed the phase-out in 2023.[133]

Congress embedded another federal push for appliance efficiency into the Inflation Reduction Act of 2022. Among other climate-related incentives, the Inflation Reduction Act established a residential energy rebate program that incentivizes stakeholders to buy qualified high-efficiency appliances for residential dwellings.[134] Interestingly, the rebate program also funds contractor training grants, an educational nudge to try to sway decision-makers.[135]

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129. *Energy Resources for State, Local, and Tribal Governments*, EPA, https://www.epa.gov/statelocalenergy (last updated Mar. 26, 2024).

130. *Id.*

131. *Cf. How Much Funding do State and Local Governments Receive from the Federal Government?*, PETER G. PETERSON FOUND. (Apr. 11, 2024), https://www.pgpf.org/blog/2023/07/how-much-funding-do-state-and-local-governments-receive-from-the-federal-government#:~:text=Each%20year%2C%20the%20federal%20government,security%2C%20education%2C%20and%20infrastructure (estimating about 17 percent of local and state government revenues stem from federal grants); *see generally Policy Basics: Federal Aid to State and Local Governments*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 19, 2018), https://www.cbpp.org/research/federal-aid-to-state-and-local-governments; *see also* Megan Randall et al., *Federal Aid to Local Governments*, URBAN INST. (Sept. 2016), https://www.urban.org/sites/default/files/2016/09/07/2016.09.07_state_of_cities_fact_sheet.pdf.

132. *See Energy Star*, EPA, https://www.energystar.gov/ (last visited Dec. 14, 2023).

133. Hiroko Tabuchi, *It's Official: Stores Can No Longer Sell Most Incandescent Lights*, N.Y. TIMES (Aug. 1, 2023), https://www.nytimes.com/2023/08/01/climate/incandescent-light-bulb-ban-leds.html.

134. *Inflation Reduction Act Residential Energy Rebate Programs*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/programs-and-topics/programs/inflation-reduction-act-residential-energy-rebate-programs-california#:~:text=The%20federal%20Inflation%20Reduction%20Act,pumps%20for%20space%20heating%2Fcooling (last visited Dec. 14, 2023).

135. *See id.*

Like the Inflation Reduction Act, the Bipartisan Infrastructure Law of 2021, also known as the Infrastructure Investment and Jobs Act, supports energy efficiency development in buildings.[136] It financially supports state implementation of new building energy codes and provides additional funds for energy audits and retrofitting.[137] The law also facilitates related vocational training and academic educational programs on building decarbonization.[138] Primarily, the Department of Energy maintains implementation authority for these programs.[139]

But like the federal actions before them, the Inflation Reduction Act and the Bipartisan Infrastructure Law do not go far enough to incentivize electric infrastructure in new homes and buildings. Though appliance efficiency and energy code upgrades are critical in reducing the building sector's carbon footprint, efficient systems cannot be installed in buildings without the electric wiring to connect them to the energy grid. True progress toward efficient appliance adoption—and, in effect, sector-wide decarbonization—requires building incentives or mandates for installing electric hookups and deterrents for installing natural gas infrastructure.

2. Emerging Federal Initiatives Signal Electrification Opportunity

For the reasons stated above, the most recent government action on this issue is perhaps the most lucrative. In December 2022, the Biden Administration revived a decades-old attempt at electrifying federal government buildings. This culminated in the Climate Smart Buildings Initiative and the corresponding Federal Building Performance Standard. The initiative aims to modernize federal buildings and reduce their greenhouse gas footprint by leveraging public-private partnerships.[140] The performance standard—promulgated by the Biden Administration and provisions of the Inflation Reduction Act—requires government agencies occupying federal buildings "to cut energy use and electrify equipment and appliances to achieve zero Scope 1 emissions in 30 percent of the building space owned by the Federal government by square

136. *See generally* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2022).

137. Tom DiChristopher, *Gas Ban Monitor: Calif. Count Reaches 50 as West Coast Movement Grows*, S&P GLOBAL (Nov. 23, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/gas-ban-monitor-calif-count-reaches-50-as-west-coast-movement-grows-67732585.

138. *Id.*

139. *See* DOE Establishes Bipartisan Infrastructure Law's $225 Million for Improved Building Codes, U.S. DEP'T ENERGY (Apr. 12, 2022), https://www.energy.gov/articles/doe-establishes-bipartisan-infrastructure-laws-225-million-improved-building-codes.

140. *FACT SHEET: White House Takes Action on Climate by Accelerating Energy Efficiency Projects Across Federal Government*, WHITE HOUSE (Aug. 3, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/03/fact-sheet-white-house-takes-action-on-climate-by-accelerating-energy-efficiency-projects-across-federal-government/; *Climate Smart Buildings Initiative*, FED. ENERGY MGMT. PROGRAM, https://www.energy.gov/femp/climate-smart-buildings-initiative (last visited Sept. 27, 2024).

footage by 2030."[141] Concurrently, the Biden Administration launched an initiative to legally define a "zero emission" building, which will provide useful and much-needed clarity for developers, regulators, and consumers alike.[142]

Congress initially passed this electrification program into law more than fifteen years ago using command-and-control style objectives, but the law faced major delays in implementation after being held up in the Department of Energy (DOE) rulemaking process.[143] The program only applies to federally owned buildings and remains in the early stages of rollout. Nevertheless, it is the most promising federal effort to electrify buildings thus far. First, the program signals that the Biden Administration was open to prioritizing building electrification in its energy transition policy agenda. Second, some program elements can be repurposed to develop a comprehensive federal building electrification policy. Its methods for establishing the performance standard could be transposed to fit a federal policy scheme and other building electrification research by the DOE could be leveraged as useful institutional knowledge for a future federal program design.

Ultimately, current federal efforts to decarbonize the building sector hold promise but fail to address the root of the issue on a nationwide scale. There is a clear gap to be filled at the federal level to support widespread building electrification. In the wake of the bipartisan passage of the Inflation Reduction Act and rapid technological advances in clean energy systems, Congress should pass a building electrification policy.

III. STRATEGIES FOR REGULATING BUILDING ELECTRIFICATION THROUGH CONGRESS

To be politically feasible and practical for implementation, a federal building electrification policy should focus on establishing incentives instead of mandates or other means of authoritative control. Moreover, these federal incentives should encompass both short-term and long-term strategies for electrifying new buildings. The strategies suggested below leverage existing examples of successful local government regulatory mechanisms. They additionally aim to draw upon federal agency resources and institutional knowledge. Finally, these strategies reflect upon the legal challenges faced by

141. *Federal Building Performance Standard*, OFF. FED. CHIEF SUSTAINABILITY OFFICER, https://www.sustainability.gov/federalbuildingstandard.html (last visited Sept. 27, 2024). Scope 1 emissions are GHG emissions derived directly from point-sources "controlled or owned by an organization." *Scope 1 and Scope 2 Inventory Guidance*, EPA, https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventoryguidance#:~:text=Scope%201%20emissions%20are%20direct,boilers%2C%20furnaces%2C%20vehicles) (last updated Mar. 8, 2024).

142. Maxine Joselow, *White House Defines 'Zero-Emission' Buildings, Hoping More Get Built*, WASH. POST (Sept. 28, 2022), https://www.washingtonpost.com/climate-solutions/2023/09/28/zero-emission-buildings-biden/?nid=top_pb_signin&arcId=DUFJU2H2KVDGNO76X5LA66QISU.

143. *Cf.* Jeff Brady, *A 15-Year-Old Law Would End Fossil Fuels in Federal Buildings, But It's on Hold*, NPR (Apr. 16, 2023), https://www.npr.org/2023/04/10/1164652146/part-of-a-law-to-have-federal-buildings-stop-using-natural-gas-was-never-impleme.

local governments and hurdles experienced by tangential federal regulation, attempting to identify a path of least resistance for implementation.

A. Prioritize Incentive-Based Policy Instruments

For building electrification, incentive-based instruments, or economic "carrots," should be prioritized over command-and-control style policies, or economic "sticks." Research shows that incentive-based instruments usually prove more politically pragmatic than mandates or bans.[144] Particularly for matters of energy policy, "stick" mechanisms face staunch criticism for eliciting outsized consumer dissatisfaction and often leading to enforcement evasion issues.[145] From a behavioral economics lens, this makes logical sense.[146] People do not enjoy being told what to do. It's just not very palatable.[147]

In theory, electric-preferred and mandate-focused regulation should be fast-acting and efficient to implement. But in practice, such local building electrification regulations face more opposition and litigatory challenges than incentive-based policies, in effect delaying or thwarting implementation. Berkeley's natural gas ban exemplifies this.[148] For electric-preferred policies in particular, federal regulation reflecting these mechanisms may be counterproductive because many states already are instituting nuanced and region-specific systems for implementing electric-preferred provisions.[149] These include, for example, additional efficiency or renewable requirements for new construction with natural gas.150 Federal policies in this command-and-control vein also would not alleviate localities' challenges related to resource constraints because economic "sticks" tend to be more costly than their "carrot" counterparts.151

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144. *See* Brian Galle, *The Tragedy of the Carrots: Economics & Politics in the Choice of Price Instruments*, 64 STAN. L. REV. 797, 808-09 (2012).

145. Nathan Richardson, *Social License to Regulate: Consumer-Producer Collusion and Related Policy Risks for Consumer-Facing Regulation*, 86 U. CIN. L. REV. 153, 162-66 (2018).

146. *See generally* Gary E. Marchant, *Complexity and Anticipatory Socio-Behavioral Assessment of Government Attempts to Induce Clean Technologies*, 61 UCLA L. REV. 1858 (2014).

147. *See generally* CHRISTINA STEINDL, ET AL., UNDERSTANDING PSYCHOLOGICAL REACTANCE (National Library of Medicine, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4675534/ (demonstrating a negative reaction is common when people perceive threats to their sense of freedom).

148. *Supra* Part II(B)(1). Berkeley also failed to pass Measure GG on the November 2024 ballot, which called for a tax on both new and existing commercial buildings at or above 15,000 square feet that use natural gas. Despite various exemptions, this proposed tax, like the preceding natural gas ban, proved to be an unpalatable mandate. *See General Election - November 05, 2024: Measure GG - City of Berkeley*, ALAMEDA CITY. REGISTRAR OF VOTERS, https://alamedacountyca.gov/rovresults/252/ (last updated Nov. 20, 2024); Severin Borenstein, *Berkeley Makes Another Run at Natural Gas*, ENERGY INST. AT HAAS (Aug. 19, 2024), https://energyathaas.wordpress.com/2024/08/19/berkeley-makes-another-run-at-natural-gas/; Iris Kwok, *Measure GG: A new tax on natural gas use in big Berkeley buildings*, BERKELEYSIDE (Oct. 4, 2024), https://www.berkeleyside.org/2024/10/04/measure-gg-a-new-tax-on-natural-gas-use-in-big-berkeley-buildings.

149. *Supra* Part II(A).

150. *Id.*

151. *Supra* Part II(B)(4).

But people are likely less resistant to influences that preserve their freedom of choice while nudging them towards certain decisions through the promise of enticing co-benefits.[152] Typically, these co-benefits, or incentives, take the form of pecuniary gifts or discounts in federal legislation.[153] There are arguments to be made that incentives also serve as a fairer solution to drive societal change.[154]

Given the historical moment, there is additional reason to believe that an incentive-based approach to building electrification may be the only way forward. Congress is more politically polarized than any other moment over the past half-century.[155] The barrier to passing legislation is high, given a sharp divide in political party ideologies and the struggle of any one party to sustain a strong majority in both the House of Representatives and the Senate. In this politically polarized climate, unsavory command-and-control style propositions for electrification regulation would not survive a congressional vote. Considering state preemptions and the fossil fuel lobby's sway on many right-leaning politicians, such a bill would be unrealistic.

However, the Inflation Reduction Act is a testament that incentive-based instruments can be successful vessels for passing climate change-conscious federal legislation. The Inflation Reduction Act stands in contrast to regulatory attempts to control climate policy that have failed at the federal level.[156] The tax credits, rebates, grants, and other incentives proved palatable enough for a few swing votes in a perpetually divided political arena. Admittedly, the bill barely passed in the House of Representatives, with Vice President Kamala Harris breaking a 50-50 tie vote.[157] It also bargained away several contradictory

152. *Id.*

153. *See* STEINDL, ET AL., *supra* note 147; *see also* Marchant, *supra* note 146.

154. *Supra* Part II(b)(4)(C); *see also* Richardson, *supra* note 145, at 197; Marchant, *supra* note 146, at 1892-94. These tools may also have the added benefit of being (or, at least appearing) more fair or equitable compared to "stick" alternatives. This is particularly important in light of the gas stove nostalgia that the natural gas industry cultivated, as such nostalgia could shift people's economic "willingness to pay." *See* Richardson, *supra* note 145, at 197; Marchant, *supra* note 146, at 1892-94.

155. Stef W. Kight, *Polarization in Congress Hits Half-Century Peak*, AXIOS (Mar 16, 2022), https://www.axios.com/2022/03/17/polarization-congress-democrats-republicans-house-senate-data; Drew Desilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/#:~:text=House%20Democrats%2C%20for%20example%2C%20moved,increase%20in%20the%20conservative%20direction.

156. *See What Is the Clean Power Plan?*, UNION CONCERNED SCIENTISTS, https://www.ucsusa.org/resources/clean-power-plan (last updated Mar. 24, 2021); *see also* Jeff Turrentine, *The Supreme Court's EPA Ruling, Explained*, NAT. RES. DEF. COUNCIL (July 7, 2022), https://www.nrdc.org/stories/supreme-courts-epa-ruling-explained.

157. Leila Fadel & Deirdre Walsh, *The Senate Passes the Inflation Reduction Act and it Moves on to the House*, NPR (Aug. 8, 2022), https://www.npr.org/2022/08/08/1116264109/the-senate-passes-the-inflation-reduction-act-and-it-moves-on-to-the-house. Recognizably, the palatability of a new energy bill largely depends on legislative election outcomes from recent cycles. In light of the November 2024 election, the balance of viewpoints in Congress have changed from that seen in the Inflation Reduction Act's passage. Former-President Trump's reelection also impacts the viability of signing a building electrification bill into law. However, energy incentives like those seen in the Inflation Reduction Act may prove agreeable to many Republican politicians because the resulting incentives largely benefit their constituents. *Infra* Part III(B)(2)(c).

concessions, allowing new oil and gas lease provisions.[158] Nevertheless, in a country where climate change denial is a political weapon, the bill was an immense step forward.[159] The incentive structures proposed through the Act serve as a quick study for how to get energy transition policies off the table and into action.

B. Establish Short-Term Incentives for Builders to Install Electric Infrastructure

Today, short-term incentives aim to sway the building and development industry. If effectively implemented, short-term federal incentives could influence market decisions during the building construction process, even in localities that lack pro-electrification regulations.

1. Targeting and Educating Infrastructure Decision-Makers

Finding the right target for short-term incentives is crucial for creating a strong building electrification policy. U.S. incentives for electric vehicles (EVs) serve as a warning that even well-intentioned energy transition incentives can have a limited impact if they target the wrong players. For example, federal subsidies for the end-users target the purchase price of EVs, but do not necessarily induce EV manufacturers to ramp up EV production or reduce fossil fuel vehicle production.[160] Similarly, a federal building electrification incentive targeting building buyers would likely be ineffective because people do not typically buy a house based on the appliances within it. Homebuyers weigh complex trade-offs, and electric appliance preference can be overlooked when affordability, geographic location, or aesthetics loom foremost in a buyer's mind.[161]

Short-term incentives for building electrification should focus on targeting infrastructure installers and developers, since these are the decision-makers that choose what to install into a building's walls. The challenge is determining which pro-electric incentives are strong enough to persuade builders who might usually install natural gas infrastructure. If the incentives are too weak or misdirected, such federal regulation could prove ineffective.

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158. Fadel & Walsh, *supra* note 157; Broadwater, *supra* note 157.

159. *See, e.g.*, Gelles, *supra* note 85; *see also The Politics of Climate*, PEW RSCH. CTR. (Oct. 4, 2016), https://www.pewresearch.org/science/2016/10/04/the-politics-of-climate-2/.

160. Kate Morgan, *Three Big Reasons Americans Haven't Rapidly Adopted EVs*, BBC (Nov. 8, 2023), https://www.bbc.com/worklife/article/20231108-three-big-reasons-americans-havent-rapidly-adopted-evs.

161. *See* Interview by J.R. Whalen with Brad Klontz, Financial Psychologist, & Tracy McLaughlin, Real-Estate Professional, *The Psychology of Homebuying*, WALL ST. J. (Apr. 28, 2023), https://www.wsj.com/podcasts/your-money-matters/the-psychology-of-homebuying/b9d3bf5f-dbb1-4728-b2e9-f0416e496519. Buyers and renters also face difficulties ascertaining the energy efficiency of their prospective homes, and even when they do not, they tend to excessively discount the future expected value of efficiency investments. Zaharoff, *supra* note 73, at 790-91.

Beyond the mere magnitude of monetary benefit, incentives must be clearly marketed and logistically reasonable to request. For this reason, a short-term incentive should be coupled with educational efforts targeting these decision-makers. The Inflation Reduction Act provides helpful examples of incentive-education coupling that could be leveraged in the building space. As previously mentioned, one of the Inflation Reduction Act's provisions creates a residential energy rebate program with "carrots" to encourage localities to install reduced emission appliances in residential dwellings.[162] The program simultaneously funds related contractor training, addressing technical expertise challenges that might prevent a contractor from installing the reduced emission appliances.[163] Incentive-education coupling in this form can be integrated into an infrastructure-focused building electrification policy. Local government and industry organizations are likely best positioned to coordinate this outreach to local decision-makers.

Here, a federal building electrification policy could also leverage pre-existing educational and equity resources. These resources include the EPA's State and Local Climate and Equity Program, which could guide localities on the details of incentive options and advise them on how to successfully apply for such benefits.[164] The EPA's program already provides guidance for localities and tribal nations looking to establish energy efficiency programs, which could potentially be integrated into a more holistic toolkit.[165] A federal policy could also encourage state agency support as many state PUCs have taken action to address equity issues arising in the building energy efficiency space.[166]

2. Learning from Local and Federal Regulation

The current regulatory landscape unfolding through the Inflation Reduction Act and local electrification policies informs how these short-term incentives can look and what they should avoid.

a. Replicating Local Incentive Strategies

Local regulations provide great examples of incentive schemes for federal policy to emulate. Simply put, local governments usually know their developers and how to incentivize them.[167] When implemented at the local level, electrification rebates, expedited permitting perks, and reduced permit fee

162. *E.g.*, *Inflation Reduction Act Residential Energy Rebate Programs*, CAL. ENERGY COMM'N (last accessed Dec. 15, 2023), https://www.energy.ca.gov/programs-and-topics/programs/inflation-reduction-act-residential-energy-rebate-programs-california.

163. *Id.*

164. EPA, *supra* note 129.

165. *See id.*

166. *See, e.g.*, Angelina Lian, *Shedding Light: The Role of Public Utility Commissions in Encouraging Adoption of Energy Efficient Lighting by Low-Income Households*, 38 COLUM. J. ENV'T. L. 333, 364-374 (2013).

167. *See generally* Ki Eun Kang, *Local-Level Economic Development Conflicts: Factors that Influence Interactions with Private Land Developers*, 58 URB. AFFS. REV. 706 (2022).

incentives have comparatively limited pushback.[168] These can easily translate into federal incentives for builders that supplement other local government regulations, particularly when local governments have electric-preferred regulations. Layering local and federal nudges can help tip the scale to ensure that builders choose electric infrastructure.

For regions that lack electrification policies altogether, these federal incentives jump straight to addressing the source of market decision-making. Providing federal incentives in electrification regulatory "deserts" consequently bypasses any local or state governments influenced by fossil fuel lobbying or otherwise reluctant to act.[169] Such an incentive strategy could therefore be a beneficial starting point for federal action in such localities.

b. Leveraging Electric-Ready Regulation

A federal policy could also institute electric-ready strategies like those in cities. For example, electric pre-wiring and panel capacity provisions can be replicated at the federal level as builder incentives.[170] Congress also could pass such electric-ready policies as mandates, so that any new gas infrastructure necessitates electric infrastructure installation in tandem.

While this is a command-and-control style tool, it does not limit consumer choice like other mandates. An electric-ready policy does the opposite of limiting consumer choice; it provides building dwellers with more options for what appliances and energy sources they can use, proving more palatable than traditional mandates. For example, Menlo Park, California has a building code that requires electric stove prewiring when installing gas stoves.[171] Electric-ready regulation even holds up against the plaintiff's argument in *California Restaurant Association*, which claims federal ECPA preemption because Berkeley's natural gas ban limited consumer choice for energy use. Consequently, electric-ready regulation may serve as a middle ground for regulatory progress.

c. Mimicking the Inflation Reduction Act's Strengths

As previously discussed, the Inflation Reduction Act also provides useful examples for how to structure federal electrification incentives. The Inflation Reduction Act empowers localities in part by providing them with the financial resources to catalyze climate action, which is critical given local resource constraints.[172] Research suggests that "by 2035, the [Inflation Reduction Act]

168. San Mateo exemplifies successful implementation of such incentives. *See* Meyers, *supra* note 41.

169. *Supra* Part II(B)(3); *see, e.g.*, Gelles, *supra* note 85.

170. Brisbane, California is an example to leverage, where planned installation of gas cooking appliances in new buildings trigger electric pre-wiring with panel capacity (i.e., maximum power load capacity) and outlet installation requirements. Meyers, *supra* note 41, at 2, 8.

171. Payne, *supra* note 3, at 772.

172. *Supra* Part II(C)(1).

will be responsible for reducing greenhouse-gas emissions by 43–48 percent from 2005 levels."[173] This is a significant potential impact given that the Paris Agreement asks countries to "reduce greenhouse-gas emissions by 50–52 percent from 2005 levels by 2023."[174] Short-term incentives for building electrification could benefit from mimicking the Inflation Reduction Act's approach to embedding uncapped financial incentives into tax codes and providing direct funding to potential market actors.

Emulating this approach is particularly advantageous because there is hope that such funds will reach U.S. regions that traditionally lean conservative. A *Politico* report found that as of January 2023, "roughly two-thirds of the major projects are in districts whose Republican lawmakers opposed the Inflation Reduction Act."[175] Subsequent research confirms that the Inflation Reduction Act brings ample jobs and investment rewards into predominantly conservative congressional districts.[176] Implementing building electrification incentives to mimic Inflation Reduction Act incentives could similarly circumnavigate state or local government inaction in conservative areas, reaching building electrification decision-makers on the ground. By leveraging the Inflation Reduction Act's strategies, short-term federal incentives would help even out building electrification progress across U.S. geographies.

d. Confronting the Inflation Reduction Act's Weaknesses

However, the Inflation Reduction Act's ultimate success in reducing greenhouse gas emissions remains to be seen. Financial investment does not guarantee progress in decarbonization. Much of its success will depend on the long-term results of coordinating implementation. Some implementation challenges are already surfacing for the Inflation Reduction Act, which can inform parallel building electrification policies at the federal level.

First, federal agencies face challenges in communicating the complexities of the Inflation Reduction Act.[177] The Act has a laundry list of incentive

173. *What the Inflation Reduction Act has Achieved in its First Year*, THE ECONOMIST (Aug. 17, 2023), https://www.economist.com/the-economist-explains/2023/08/17/what-the-inflation-reduction-act-has-achieved-in-its-first-year.

174. *Id.*

175. Kelsey Tamborrino & Josh Siegel, *Big Winners from Biden's Climate Law: Republicans Who Voted Against It*, POLITICO (Jan. 23, 2023), https://www.politico.com/news/2023/01/23/red-states-are-winning-big-from-dems-climate-law-00078420.

176. H.J. Mai, *Biden's Climate Bill Brings Investments and Jobs to Many GOP Strongholds*, NPR (Aug. 18, 2023), https://www.npr.org/2023/08/18/1194562279/gop-lawmakers-opposed-bidens-climate-measure-but-its-helping-their-constituents; Saijel Kishan, *Red States to Reap the Biggest Reward from Biden's Climate Package*, BLOOMBERG (Apr. 23, 2023), https://www.bloomberg.com/graphics/2023-red-states-will-reap-the-biggest-rewards-from-biden-s-climate-package/; William S. Becker, *Red states win with Inflation Reduction Act — GOP wants to kill it anyway*, HILL (Apr. 11, 2023), https://thehill.com/opinion/campaign/3944108-red-states-win-with-inflation-reduction-act-gop-wants-to-kill-it-anyway/.

177. Turner, *supra* note 66.

provisions that overlap and contain many nuances.[178] This is a headache for those hoping to reap incentive benefits. Stakeholders will not take advantage of the Act's benefits if the agencies promulgating the programs are unclear about *how* to gain benefits.[179] Following the first year of the Inflation Reduction Act's implementation, research shows that the targets for incentive programs required more follow-up resources to support program uptake.[180] This wastes time when climate change is a time-sensitive issue.

Second, these communication issues can exacerbate equity challenges across localities.[181] Those individuals and groups with the least resources are least likely to devote time to understanding the Act's incentive acquisition process.[182] Historically disadvantaged communities appear to need more upfront funding and resources to help them assess which Inflation Reduction Act incentive provisions are most advantageous to them to pursue.[183]

A federal electrification policy that interacts with local laws and uses sophisticated incentives will likely face similar problems with communicating complex information and addressing equity concerns. For such a policy to be impactful in the implementation phase, it must rely on agencies that can quickly disseminate plain instructions for capitalizing on the incentive programs. The agencies tasked with electrification policy adoption must be meticulous about developing reference materials like guidebooks explaining programmatic details simply.[184]

Agencies also need an adequate budget to perform effective community outreach. Ideally, agency resources should be disseminated for free, with additional funding and a focus on outreach in socioeconomically disadvantaged and historically discriminated communities. For federal electrification incentives, agencies should also avoid catering their educational material to

178. Rebecca Leber, *Biden's Historic Climate Law Has a Problem*, VOX (Aug. 16, 2023), https://www.vox.com/climate/2023/8/16/23815837/inflation-reduction-act-joe-biden-impact-manufacturing-consumers.

179. *Id.*; Turner, *supra* note 66.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* Additionally, it is worth noting that negotiated compromises made to pass the bill into law likely disproportionately impact historically disadvantaged communities. Tony Sirna, et al., *Environmental Justice Concerns About the Inflation Reduction Act*, CITIZENS' CLIMATE LOBBY (Aug. 22, 2022), https://citizensclimatelobby.org/blog/policy/environmental-justice-concerns-about-the-inflation-reduction-act/.

184. For example, government agencies publish various guidelines for the residential Federal Solar Tax Credit, explaining the who, what, where, when, and how of the credit in layperson terms. Agency guidelines for this program also point people to additional, vetted resources for support and clearly indicate which government entities are also involved in the tax credit's implementation. *See Homeowner's Guide to the Federal Tax Credit for Solar Photovoltaics*, U.S. DEP'T ENERGY SOLAR ENERGY TECHS. OFF., https://www.energy.gov/eere/solar/homeowners-guide-federal-tax-credit-solar-photovoltaics (last updated March 2023); *see also Federal Solar Tax Credit Resources*, U.S. DEP'T ENERGY SOLAR ENERGY TECHS. OFF. (Sept. 8, 2022), https://www.energy.gov/eere/solar/articles/federal-solar-tax-credit-resources.

deep-pocketed developers. Small-scale contractors or local handymen should have an equal footing in understanding and accessing electrification incentives.

The DOE is likely the agency that would be most central for implementing a federal electrification policy.[185] While it has the scientific knowledge to promulgate the rules here, it is worth considering if the DOE has sufficient ties to local communities. The DOE could perhaps coordinate with the EPA to build those local relationships, leveraging the State and Local Climate and Energy Program.[186] Alternatively, the Inflation Reduction Act could help lay the groundwork for this type of climate-oriented local community outreach.

C. Establish Long-Term Incentives to Encourage Local Adoption of Robust Electrification Strategies

Short-term building electrification incentives for builders should dovetail with long-term electrification incentives for local governments, creating a rounded federal policy. Such long-term incentives are important to drive progress on building decarbonization over the coming decades. Long-term incentives also serve as a structural backbone for federal short-term incentives and local policies, drawing them into an overarching building decarbonization playbook. Additionally, long-term building electrification incentives could combat state preemption issues that currently stifle local progress. Once Congress acts to institute a long-term incentive program, it is possible that pro-electrification federal preemption could squash natural gas industry litigation challenges.

1. Inciting and Accelerating Action by Local Governments

The aim of a long-term incentive program is to incite and accelerate local government action on building electrification. Since local governments are at varying stages of regulating and deregulating electrification,[187] the United States will not benefit from a one-size-fits-all approach. It seems counterintuitive to upend some local progress with a superseding federal regulatory instrument that targets deregulating localities. But there is still a need to drive local governments to decarbonize buildings more quickly across the spectrum.

Therefore, this Note argues for a collaborative policy solution employing voluntary incentives, allowing local governments to design electrification regulations as they see fit. If localities implement effective regulations that help them attain federally established standards for electrification progress, they would be entitled to some sort of federal grant or other funding-oriented benefit.

185. The DOE is best positioned for this task given its central implementation role for the climate change provisions of the Inflation Reduction Act, the implementation of the Federal Building Initiative, and the calculation of the Federal Building Performance Standards. *Supra* Part II(C)(1)-(2).

186. EPA, *Energy Resources*, *supra* note 129.

187. *Supra* Part II(A).

a. Framing the Local-Federal Relationship

The structure of a federal building electrification program should reflect its institutional actors' relative strengths and weaknesses. So which actors are best positioned to take steps effectively, and how? As previously discussed, cities and municipalities have immense local expertise for building governance and best understand their citizens' health and economic pressure points.[188] However, local governments' resource constraints and power limitations are barriers to progress.[189] Conversely, the federal government has congressional spending power and a wide breadth and depth of authority, but it lacks the local expertise requisite for practical implementation.[190]

Cooperative federalism aligns regional and federal legal efforts by facilitating coordination between the different levels of government in their policy schemes.[191] The cooperative federalism framework can promote building electrification by leveraging both federal and local government strengths to negate their respective weaknesses.[192] Under a cooperative federalism framework for long-term incentives, localities would act as voluntary regulation creators and implementers. Meanwhile, the federal government would supply the wallet and goalposts to incite local action. Preserving and encouraging local government involvement could also foster self-determination while lessening the logistical policy roll-out burden on federal agencies.

b. Cooperative and Iterative Federalism Teachings from the Clean Air Act

Additionally, a policy modeled on cooperative federalism should be cautious to minimize regulatory tension between levels of government. Local governments have little desire to work with their federal counterparts if the relationship feels paternalistic or punitive. By learning from the shortcomings of the Clean Air Act's disciplinary compliance structure, the proposed incentive-based system may help reduce this tension.

In 1970, the Clean Air Act established a relatively successful cooperative federalism framework to address air pollution.[193] The Act sets federal standards for criteria air pollutants called NAAQS.[194] Then, states devise and implement SIPs that the federal government reviews for approval.[195] These SIPs aim to

188. *Id*.

189. *Supra* Part II(B).

190. *See* U.S. CONST. art. I, § 8, cl. 1; *see also* U.S. CONST., art. VI.

191. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 183-84 (2005).

192. *See generally*, *e.g.*, Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENV'T L.J. 397 (2008); Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REG. 233 (2018); Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON L. REV. 921 (1998).

193. *See* 42 U.S.C. §§ 7401-7671q (1970); *see also Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act (last updated Sept. 6, 2023).

194. EPA, *Summary of the Clean Air Act*, *supra* note 193.

195. *Id.*

reduce criteria pollutants and achieve NAAQS attainment throughout regional Air Quality Control Regions (AQCRs).[196] Although this collaborative framework capitalizes on regional and federal government strengths, NAAQS nonattainment remains a problem in many AQCRs.[197]

Part of the problem for a federal agency like the EPA is that punishing a state for nonattainment inherently breeds tension between that state and the federal government.[198] In practice, both Congress and the EPA are hesitant to enforce NAAQS nonattainment penalties onto states.[199] This appears fair in certain instances because some ACQRs struggle to reach NAAQS attainment when their unique geographic conditions attract and amplify pollutant impacts.[200] But lackluster enforcement also undermines the regulatory structure's effectiveness.[201]

The long-term building electrification policy proposed in this Note could avoid this issue by substituting penalties with funding rewards.[202] Such investment into financial incentives is well within the Congressional Spending Clause power.[203] And incentives could avoid sparking federal-regional tensions or enforcement failures of the kind seen in the Clean Air Act.[204] Although such incentives would be voluntary—rather than mandatory—properly quantified monetary bait would hopefully spur local governments to act. The system could reward and encourage localities already instituting regulation, while simultaneously tempting other localities to develop their own building electrification strategies.

There also may be opportunities to incorporate iterative federalism principles into the building electrification policy. An iterative federalism scheme allows certain regional governments to have special regulatory power under federal law, such as the Clean Air Act granting California authority to establish stricter manufacturing standards for tailpipe emissions than federal law requires.[205] Since car manufacturers benefit from economies of scale, California effectively influences the national vehicle standards that manufacturers voluntarily adopt and helps amplify air emissions reductions.[206] An iterative

196. *Id.*

197. *Id.*

198. Ronald H. Rosenberg, *Cooperative Failure: An Analysis of Intergovernmental Relationships and the Problem of Air Quality Non-Attainment*, 1990 ANN. SURV. AM. L. 13, 13-14 (1991).

199. *Id.* at 31-37.

200. *See, e.g.*, *BCCA Appeal Grp. v. U.S. EPA*, 355 F.3d 817, 822-24 (5th Cir. 2003), *as amended on denial of reh'g and reh'g en banc* (Jan. 8, 2004) (demonstrating a practical issue wherein SIP ineffectiveness and NAAQs attainment failures occurred because the city of Houston faced microclimate and urban planning challenges that created a natural pollution hotspot).

201. Rosenberg, *supra* note 198.

202. Typically, incentives are more politically and psychologically palatable. *See* Galle, *supra* note 144, at 843.

203. U.S. CONST. art. I, § 8, cl. 1.

204. Rosenberg, *supra* note 198.

205. *See generally* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009).

206. *Id.*

federalism framework like this could help building electrification leaders serve as regulatory examples to other localities looking to electrify.

To allow similar opportunities here, Congress should frame a federal building electrification policy as a floor rather than a regulatory ceiling. Express statutory language to this end would prevent federal preemption of positive decarbonization efforts by localities.[207]

2. Federally Preempting State Prohibitions on Electrification

The Commerce Clause of the U.S. Constitution provides Congress with the power to regulate building electrification since building infrastructure decisions and related real estate development activities substantially affect interstate commerce.[208] Although courts often afford local governments deference for matters of land use, federal regulation should not be controversial here.[209] Courts interpret the Commerce Clause broadly, including intrastate activities relating both directly and indirectly to interstate commerce; this includes permissible federal regulation of "commercial construction project" activities.[210] Building infrastructure decisions would fall under the commercial construction category.

Seizing federal authority on building electrification regulation could help localities combat state preemption laws by superseding them with federal preemption claims. Since an incentive-based program is voluntary in nature, Congress need not be concerned about inadvertently preempting productive local efforts to electrify because such programs can coexist. But for states that preempt natural gas bans or otherwise prohibit restrictions on natural gas infrastructure decisions, local governments can draw upon statutory congressional intent to argue federal conflict preemption of such state laws. Such state laws would run counter to the decarbonization objectives of the federal scheme, posing conflict preemption issues similar to those seen in federal preemptions of state regulation running counter to the Clean Air Act's Acid Rain program.[211] Federal preemption claims would be particularly strong if Congress adds statutory language expressly disallowing natural gas ban prohibitions.[212]

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207. *See, e.g.*, The Clean Air Act § 209, 42 U.S.C. § 7543 (1967) (enabling California to seek waivers from the EPA to set more stringent state air quality standards than the federal standards require).

208. U.S. CONST. art. I, § 8, cl. 3; *see also United States v. Lopez*, 514 U.S. 549, 559-60 (1995) (establishing that the Commerce Clause test requires courts to analyze whether the regulated activity in question "substantially affects interstate commerce").

209. *See* Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, AM. BAR ASS'N (Oct. 1, 2020), https://www.americanbar.org/groups/state_local_government/publications/urban_lawyer/2020/50-2/home-rule-and-state-preemption-local-land-use-control/.

210. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (holding that the Commerce Clause provides Congress the ability to regulate an intrastate toad protection issue because the associated development activity implicated interstate commerce).

211. *See generally* Clean Air Mkts. Grp. v. Pataki, 338 F.3d 82 (2nd Cir. 2003) (holding that a New York state law that impeded the execution of the purposes and objectives of the federal Acid Rain Program violated the Supremacy Clause of the Constitution).

212. However, the odds of Congress passing a statute with express language to this end may be low. *See* Galle, *supra* note 144, at 843; *supra* Part III(a).

3. Avoiding the Pitfalls of "Sticky" Subsidy Externalities

Many well-intentioned incentive instruments can become counterproductive over time. This is particularly true as technology advances and scientific breakthroughs occur.[213] Therefore, federal electrification incentives should consider time limitations and other mechanisms to limit their "stickiness" from resulting in perverse policy outcomes.

Especially in the energy law realm, policymakers should heed warnings about "sticky" subsidies. Rooftop solar net-metering incentives, like those established in California and Hawaii, serve as a well-known example.[214] Such programs originally expanded renewable energy adoption through credit compensation for households that fed excess renewable power from their roofs to the grid.[215] However, rooftop solar programs became a financial liability for Public Utility Commissions over time.[216] As the National Resource Defense Council explains, "the rate design has not evolved to keep in line with the success of rooftop solar."[217] Not only this, but this program poses unintended equity issues, as the people who receive financial benefits are often more affluent homeowners.[218] Many regions that have established this "sticky" incentive are now trying to roll back their program, resulting in complaints and protests from those it benefits.[219] When subsidies do not contain an end date, they risk becoming a liability over time.

In fact, the building decarbonization space already suffers the ill effects of "sticky" subsidies. Across the United States, antiquated gas piping and hookup

213. *See generally* Elizabeth Van Heuvelen, *Subsidy Wars*, FIN. & DEV., June 2023, at 54. https://www.imf.org/en/Publications/fandd/issues/2023/06/B2B-subsidy-wars-elizabeth-van-heuvelen.

214. Tony Clark, *Hard Truths About Net Metering and the Perils of Regulatory Nihilism*, UTIL. DIVE (June 24, 2020), https://www.utilitydive.com/news/hard-truths-about-net-metering-and-the-perils-of-regulatory-nihilism/580390/; Karinna Gonzalez, *A Brief History of California's Solar Agreement, Net Energy Metering*, HAMMOND CLIMATE SOLS. FOUND. (Apr. 29, 2021), https://www.hcs.foundation/blog/a-brief-history-of-californias-solar-agreement-net-energy-metering?6431d179_page=9.

215. *Customer-Sited Renewable Energy Generation*, CAL. PUB. UTIL. COMM'N, https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/demand-side-management/customer-generation (last visited Sept. 27, 2024).

216. THE UNINTENDED CONSEQUENCES OF NET METERING 1-4 (The Am. Consumer Inst. Ctr. for Citizen Rsch. ed., 2019), https://www.theamericanconsumer.org/wp-content/uploads/2019/08/Consumer Gram-Net-Metering.pdf.

217. *California's Rooftop Solar Net Metering Program*, NAT. RES. DEF. COUNCIL (Jan. 28, 2022), https://www.nrdc.org/bio/nrdc/californias-rooftop-solar-net-metering-program.

218. Severin Borenstein, *Rooftop Solar Inequity*, ENERGY INST. HAAS (June 1, 2021), https://energyathaas.wordpress.com/2021/06/01/rooftop-solar-inequity/.

219. Ivan Penn, *California Regulators Propose Cutting Compensation for Rooftop Solar*, N.Y. TIMES (Nov. 10, 2022), https://www.nytimes.com/2022/11/10/business/energy-environment/california-rooftop-solar-net-metering.html; Julie Cart, *California's Residential Solar Rules Overhauled After Highly Charged Debate*, CAL MATTERS (Dec. 15, 2022), https://calmatters.org/environment/2022/12/california-solar-rules-overhauled/; Sharon Udasin, *California Commission Issues Revised Proposal to Cut Paybacks to Rooftop Solar Customers*, HILL (Nov. 10, 2022), https://thehill.com/policy/equilibrium-sustainability/3729996-california-commission-issues-revised-proposal-to-cut-paybacks-to-rooftop-solar-customers/.

subsidies counteract electrification.[220] Such gas subsidies ironically originated as an effort to aid the clean energy transition at a time when coal and oil were the dominant energy inputs.[221] Only in 2022 did California become the first state to roll back such subsidies under the purview of the California Public Utilities Commission.[222] But in other regions across the United States, natural gas groups are adamant in fighting to keep these subsidies "sticky."[223] Ultimately, it is difficult to retroactively remove transitional legal incentives once they are no longer necessary and effective, so they should be implemented with caution and foresight.

Incentive expiration dates provide such safeguards, and here, long-term electrification goals could logically serve as the basis for subsidy expirations. Federal goals could model the DOE's Building Performance Standards for the Federal Buildings Program.[224] For example, the Federal Buildings Standard sets a threshold for agencies to "achieve zero scope 1 emissions in 30 percent of the building space owned by the Federal government by square footage by 2030."[225] Such year-based deadlines are a common anchoring feature in many climate change policies, and simultaneously serve as a subsidy time-limitation if applied to incentive-based programs.[226] These goals, or performance standards for receiving subsidies, could also emulate state-based electrification regulation, such as regulations from New York or Maryland.[227]

Given the DOE's institutional knowledge in formulating and monitoring similar standards for the Federal Buildings Program, the agency is well-positioned to take on the task. The EPA may also have institutional knowledge

220. ABIGAIL ALTER ET AL., OVEREXTENDED: IT'S TIME TO RETHINK SUBSIDIZED GAS LINE EXTENSIONS 5-12 (RMI ed., 2021), https://rmi.org/insight/its-time-to-rethink-subsidized-gas-line-extensions/; Laura Feinstein & Emily Moore, *It's Time to Stop Subsidizing New Gas Pipes*, SIGHTLINE INST. (Jan. 17, 2023), https://www.sightline.org/2023/01/17/its-time-to-stop-subsidizing-new-gas-pipes/.

221. *CPUC Decision Makes California First State in Country to Eliminate Natural Gas Subsidies*, CAL. PUB. UTIL. COMM'N (Sept. 15, 2022), https://www.cpuc.ca.gov/news-and-updates/all-news/cpuc-decision-makes-ca-first-state-in-country-to-eliminate-natural-gas-subsidies#:~:text=The%20subsidies%20originated%20at%20a,clean%20than%20it%20is%20today.

222. Shiloh Wallack & Angela O'Hara, *California Public Utilities Commission*, 28-FALL CAL. REG. L. REP. 73, 75-76 (2023); Kavya Balaraman, *California becomes first state to eliminate subsidies for gas line extensions amid electrification push*, UTIL. DIVE (Sept. 16, 2022), https://www.utilitydive.com/news/california-puc-gas-subsidies-electrification/632006/.

223. *See* Tom DiChristopher, *Subsidizing New Gas Utility Customers Creates Risk as Fuel's Future Dims – Study*, S&P GLOB. (Dec. 10, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/subsidizing-new-gas-utility-customers-creates-risk-as-fuel-s-future-dims-8211-study-68016073.

224. EnergyStar also has guidelines for Building Performance standards for state and local decision-makers. *See generally* BUILDING PERFORMANCE STANDARDS: OVERVIEW FOR STATE AND LOCAL DECISION MAKERS (EPA ed., 2021), https://www.epa.gov/sites/default/files/2021-02/documents/benchmarking_building_performance_standards_section2.pdf.

225. EPA, BUILDING PERFORMANCE STANDARDS, *supra* note 224.

226. *See, e.g.*, Kelly Levin, et al., *What Does "Net-Zero Emissions" Mean? 8 Common Questions, Answered*, WORLD RES. INST. (Mar. 20, 2023), https://www.wri.org/insights/net-zero-ghg-emissions-questions-answered.

227. St. John, *supra* note 43; Markind, *supra* note 36.

through their Energy Star label work.[228] However, when assessing the practicality of such a policy, decision-makers should consider potential data development and verification challenges. Such progress and measurements may be resource-intensive and logistically challenging to calculate. For the incentive program to be successful, policymakers and agencies should integrate best practices for ensuring that local governments track data accurately and with integrity.

CONCLUSION

Natural gas pipes sealed within new building walls today exacerbate the battle against climate change tomorrow. Ultimately, building electrification regulation is low-hanging fruit that U.S. federal policymakers should capitalize upon to aid an efficient low-carbon economic transition. Many local governments have the willpower and tailored expertise to promulgate such regulations. But they need federal support to guide the decarbonization agenda, fund policy actions, and fight fossil fuel industry pushback.

Congressional action should pave the way forward. As argued in this Note, a federal building electrification policy should prioritize short-term incentives for new building infrastructure decision-makers on the ground. Simultaneously, such regulation should leverage a cooperative local-federal framework for disseminating long-term electrification incentives and preempting state prohibitions on progress.

Beyond these preliminary steps, questions remain about decarbonizing the building sector. While this Note focuses on electrifying new buildings, retrofitting existing buildings equipped with natural gas piping presents more nuanced challenges. Building electrification regulation for retrofits creates heightened financial and logistical burdens for building dwellers. Developing retrofit regulation that is effective, fair, and garners local community support is a daunting task. But this is a challenge that needs to be addressed to fully decarbonize the commercial and residential building sector.

Equity impacts of retrofit and new building regulation also deserve more thoughtful consideration. Renters account for 36 percent of American households and are more likely to be economically disadvantaged or racial and ethnic minorities.[229] Therefore, building owners could disproportionately transfer regulatory cost impacts onto disadvantaged demographics.[230] Commercial building renters could face similar vulnerabilities. Future research should analyze opportunities for building electrification regulation to better safeguard public health, reduce long-term cost of living, and decrease inequities

228. *Energy Star*, *supra* note 133.

229. Drew DeSilver, *As National Eviction Ban Expires, A Look at Who Rents and Who Owns in the U.S.*, PEW RSCH. CTR. (Aug. 2, 2021), https://www.pewresearch.org/short-reads/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/.

230. *See id.*

in energy access.[231] Ultimately, additional research and deliberation are imperative for the U.S. to realize an equitable solution to building decarbonization.

231. *See* Mark Specht, *Why Berkeley Banned Natural Gas in New Buildings*, UNION CONCERNED SCIENTISTS (July 31, 2019), https://blog.ucsusa.org/mark-specht/why-berkeley-banned-natural-gas-in-new-buildings/.

Extraterritorial Toxics: Regulating California Hazardous Waste After *National Pork Producers Council v. Ross*

Adam R. David[1*]

In the United States, the production of hundreds of millions of tons of hazardous waste every year poses substantial harm to the environment and public health. While the Resource Conservation and Recovery Act (RCRA) defines what counts as hazardous waste and determines how it needs to be handled, states are free to set more stringent guidelines. California, known for surpassing federal environmental standards, has used a more expansive definition of hazardous waste. The result is a distinction between waste considered hazardous under RCRA (RCRA hazardous waste) and waste that is not considered hazardous under RCRA but is under California's definition (non-RCRA hazardous waste or "California hazardous waste"). Non-RCRA hazardous waste—mostly soil contaminated with heavy metals and DDT—accounts for 86.1 percent of hazardous waste produced in California since 2010. However, once California hazardous waste crosses state borders, it can be treated under federal law as regular municipal solid waste (MSW). According to a 2023 CalMatters investigation, California has exported almost half of its non-RCRA hazardous waste to Arizona and Utah MSW landfills in that period. This cross-border dumping echoes the problems that gave rise to the "garbage wars" of previous decades, in which states passed laws regulating out-of-state waste dumping. In almost every instance, the U.S. Supreme Court has struck down these laws as per se discrimination against interstate commerce in violation of the Dormant Commerce Clause (DCC). However, in the Court's most recent DCC case, National Pork Producers Council v. Ross *(*NPPC*)*, *a fractured Court upheld Proposition 12, a California law banning in-state sales of pork meat from pigs not raised in humane conditions under state law. In doing so, the Court rejected an "almost per se" rule against nondiscriminatory state laws whose*

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practical effects regulate out-of-state behavior. On the flip side, for laws not deemed per se illegal under the DCC, the Court reserved its power to balance a state law's putative benefits against its burdens on interstate commerce. By analyzing and applying the Court's reasoning in NPPC*, this Note makes two arguments. First, the majority's analysis of extraterritoriality in* NPPC *reinforces the case for overruling the previous "garbage cases" and refocusing the DCC on protectionism. Second, while California cannot directly regulate other states' waste management practices, it ought to exert control over its own toxic waste, even after the waste crosses state lines. While such a regulation would still face challenges under the DCC,* NPPC *makes the outcome of those challenges less clear-cut. Given that California must produce a comprehensive waste management plan by 2025, this Note uses California hazardous waste as a case study to inform discussions of how the state should consider evolution in DCC jurisprudence when crafting new regulations with out-of-state effects.*

INTRODUCTION

California often surpasses the federal government and other states in regard to enacting stringent environmental and health regulations. Examples abound of the Golden State not waiting for the federal government to pursue a more

ambitious regulatory agenda. And as California is the largest sub-national economy in the world, these regulations have caused ripple effects on industries doing business countrywide and even globally.[2] Of course, the U.S. Constitution gives a large degree of deference to the states to implement their police powers and to serve as laboratories of democracy, regardless of the states' sizes or political perspectives.[3] But such vertical federalism, the division of federal and state power, only paints half of the picture. A horizontal federalism question also arises: How far should a state's regulations be able to reach beyond that state's own borders?

This basic question of the limits on state power underlies what has come to be known as the Dormant Commerce Clause (DCC). The (wakeful) Commerce Clause, which is laid out explicitly in Article I of the U.S. Constitution, gives Congress the power to regulate interstate commerce.[4] However, its dormant counterpart, a product of Supreme Court precedent, functions as an implied limit on state regulations "designed to benefit in-state economic interests by burdening out-of-state competitors."[5] It is not difficult to observe how the effects of regulations from a state as large as California may impact industry in other states and run afoul of this constitutional mandate. But not all burdens on interstate commerce are equal, and the Court has employed different tests to determine which state regulations are acceptable and which are not.[6]

The reach of the DCC took center stage on May 11, 2023, when the Supreme Court decided *National Pork Producers Council v. Ross* (*NPPC*).[7] In *NPPC*, the Court ruled that California can, consistent with the DCC, enforce California Proposition 12 (Prop 12), which bans the sale of pork in the state that is not sourced from a pig raised humanely by California standards.[8] In a highly fractured opinion upholding the California law, the Court raised two key issues:

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2. For example, California has passed laws setting car emissions standards, low-carbon fuel requirements, greenhouse gas limits for power grids, cleaner fuel criteria for ships, and the elimination of PFAS from certain consumer products, all of which have some effect on corporations operating outside of California. *See* Peter Valdes-Dapena, *How California ended up in the zero-emissions driver's seat*, CNN, https://www.cnn.com/2022/09/06/business/california-emissions-regulations/index.html (last updated Sept. 6, 2022); *Advanced Clean Cars Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program (last visited Sept. 29, 2024); *Low Carbon Fuel Standard*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/low-carbon-fuel-standard/about (last visited Sept. 29, 2024); *Greenhouse Gas Cap-and-Trade Program*, CAL. PUB. UTIL. COMM'N, https://www.cpuc.ca.gov/industries-and-topics/natural-gas/greenhouse-gas-cap-and-trade-program (last visited Sept. 29, 2024); *Ocean-Going Vessel Fuel Regulation*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/ocean-going-vessel-fuel-regulation/about (last visited Sept. 29, 2024); *Food Packaging Containing Perfluoroalkyl or Polyfluoroalkyl Substances*, DEP'T OF TOXIC SUBSTS. CONTROL, https://dtsc.ca.gov/scp/food-packaging-containing-pfass .

3. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments").

4. U.S. CONST. art. I, § 8, cl. 3.

5. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–274 (1988)).

6. *See infra* Part I-B.

7. 598 U.S. 356.

8. *Id.* at 363-64; *see* CAL. HEALTH & SAFETY CODE § 25990(b)(2) (West 2018).

(1) the validity of the so-called "extraterritoriality" doctrine; and (2) the validity of the Court's previous balancing test.[9] However, the Court's reasoning may also shine light on its application of the DCC generally, including its holding that discriminatory state laws are invalid per se and the weight given to extraterritoriality as a factor in evaluating a relevant law's "burden" on interstate commerce.

This Note argues that after *NPPC*, the Court should reconsider its approach to state regulation of waste. First, despite *NPPC* not involving allegations of discrimination against interstate commerce, the Court's analysis helps demonstrate why its approach to supposedly discriminatory waste regulations has been flawed. Despite substantive federal law on the subject, waste management is largely the domain of states and localities. Waste management has also played an outsized role in DCC jurisprudence, having been subject to heightened DCC scrutiny in a series of Supreme Court cases from 1978 to 2007.[10] Much of the Court's analysis in dismissing the challenge to Prop 12, in fact, bolsters the challenges that scholars and Justices have voiced to the waste decisions. Second, even if the Court maintains its waste precedents, California can and should apply the logic of the Court's ruling to its current handling of toxic waste. Presently, certain waste that is considered non-hazardous under federal law is deemed hazardous under California law.[11] While at first blush this may seem consistent with the state's environmental values, the reality is more complicated as much of the state-defined hazardous waste ends up disposed in out-of-state regular solid waste landfills.[12] By passing stricter regulations on this type of disposal, the state can regulate evenhandedly in a way that acceptably restricts interstate waste trade but still passes constitutional muster.

This Note proceeds as follows. Part I provides background on the DCC including its history, modern application, underlying principles, and relationship to state waste regulations. Part II covers the arguments and outcome of *NPPC*, the Supreme Court's most recent DCC case. Part III discusses and applies the Court's rationale to earlier DCC waste regulation cases and proposes a solution to California's hazardous waste export problem that is more feasible post-*NPPC*.

I. THE DORMANT COMMERCE CLAUSE

A. History of the Dormant Commerce Clause

To fully understand the contours of the DCC and the murkiness around its application, it is helpful to start from the doctrine's inception.

The Commerce Clause as written in Article I of the Constitution empowers Congress to "regulate Commerce . . . among the several States . . . ."[13] The

9. *Id.* at 348 and 392.
10. *See infra* Part 1-D.
11. *See* CAL. CODE REGS. tit. 22, § (a)(2)(B) (2024).
12. *See infra* Part III-B.
13. U.S. CONST. art. I, § 8, cl. 3.

Supreme Court, by "reading between the Constitution's lines,"[14] has held that the Commerce Clause not only vests Congress with the ability to regulate interstate commerce but also contains an implicit negative command forbidding state laws that discriminate against interstate commerce.[15] This negative command is known as the dormant Commerce Clause.

In *Gibbons v. Ogden*, Chief Justice Marshall broadly defined the scope of Congress's power to regulate interstate commerce.[16] But in dicta, Marshall also considered the Commerce Clause as an independent limit on state power, even where Congress had not acted.[17] He wrote that states may pass laws regulating commerce in their own states, such as inspection, quarantine, and health laws, that still have "a remote and considerable influence on commerce" in other states.[18] But "when a State proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress and is doing the very thing which Congress is authorized to do."[19]

A few decades later, in *Cooley v. Board of Wardens*, the Court upheld a Pennsylvania law requiring all ships entering or leaving the Port of Philadelphia to use a local pilot or pay a fine that went to support retired pilots.[20] In doing so, the Court reasoned that Congress manifested an intention not to overrule state legislation about local ports, stating that "it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the parts within their limits."[21] The implied test articulated here by the Court was that when Congress had not definitely reserved its authority on a subject, states could legislate on such matters characterized by "local peculiarities," whereas areas requiring uniform treatment among the states required federal regulation. Many cases applied this "local vs. national character" test throughout the nineteenth and part of the twentieth century, drawing a stark divide between valid state regulations and those encroaching upon areas that required national uniformity of regulation.[22]

B. The Modern Dormant Commerce Clause

The Court eventually moved from this bright line rule to a balancing approach that weighs the benefits of a law against the burdens it imposes on interstate commerce.[23] The specific balancing test used depends first on whether

14. *NPPC*, 598 U.S. at 368.
15. *See* Nw. Airlines, Inc. v. Cnty. of Kent, 510 U.S. 355, 372-73, 373 n.18 (1994).
16. 22 U.S. 1 (1824).
17. *Id.* at 209.
18. *Id.* at 203.
19. *Id.* at 199-200.
20. 53 U.S. 299, 312 (1851).
21. *Id.* at 319.
22. *See, e.g.*, Welton v. Missouri, 91 U.S. 275 (1875); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886); Smith v. Alabama, 124 U.S. 465 (1888); Erb v. Morasch, 177 U.S. 584 (1900); Atchison Topeka & Santa Fe Ry. Co. v. R.R. Comm'n, 283 U.S. 380 (1931).
23. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 456–57 (6th ed. 2020).

the law at issue is (1) deemed discriminatory against out-of-staters or (2) treats in-staters and out-of-staters alike. If a state law is deemed discriminatory on its face or in its effect, it is deemed "virtually per se invalid,"[24] and only survives if it passes a rigorous strict scrutiny test.[25] The DCC strict scrutiny test upholds a discriminatory state law only if the law serves a legitimate local purpose that cannot be achieved by a less discriminatory alternative.[26] Once a law is determined to be discriminatory, it is almost certain to be struck down. If a law does not discriminate against out-of-staters but has only incidental effects on interstate commerce, the Court evaluates it under a more permissive balancing test, commonly referred to as *Pike* balancing, in which it weighs the local benefits of the law against its burdens on interstate commerce.[27]

1. Determining Whether a State Law Is Discriminatory

The first question the Court addresses in its analysis under the DCC is whether a state law is discriminatory. A law may be found to be facially discriminatory if its plain language draws distinctions between in-state and out-of-state economic interests. Or a law may be non-facially discriminatory if its language appears neutral, but the law nonetheless has a discriminatory effect.

In *City of Philadelphia v. New Jersey*, the Court first developed its two-step formulation for DCC analysis and used it to strike down a local law it deemed facially discriminatory.[28] To deal with a shortage of landfill space, the New Jersey legislature prohibited the importation of out-of-state waste for disposal in New Jersey. After identifying municipal waste as an article of commerce, the Court determined that the legislative purpose of the ban was not relevant to the constitutional issue because the New Jersey law discriminated against out-of-state articles of commerce "both on its face and in its plain effect."[29] In the Court's view, even a legitimate goal could not be pursued through illegitimate means. The Court concluded its analysis by cautioning against economic isolation:

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.[30]

24. Oregon Waste Sys. Inc. v. Dep't of Env't Quality of Or., 511 U.S. 93, 99 (1994).
25. *See* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COM. 395, 395–96 (1986).
26. *See id.* at 396.
27. *See id.* at 398; *see* Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970).
28. 437 U.S. 617, 624, 627–28 (1978).
29. *Id.* at 627.
30. *Id.* at 629.

Similarly, a law that does not discriminate on its face may be invalid if it unintentionally has a discriminatory effect. Consider *Hunt v. Washington State Apple Advertising Commission*,[31] in which an apple industry group brought a Commerce Clause challenge to a North Carolina statute requiring "all closed containers of apples sold, offered for sale, or shipped into the State to bear 'no grade other than the applicable U.S. grade or standard.'"[32] Washington was the largest producer of apples in the United States, and the law expressly prohibited the display of state grades on North Carolina-bound apples, creating a costly marketing problem for the state of Washington. The Court found the statute discriminatory in effect because it raised the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving their North Carolina counterparts unaffected, since they were not forced to alter their marketing practices to comply with the statute (effectively shielding the local apple industry from competition).[33]

Once the Court finds that a law is either facially or in effect discriminatory, it applies a strict scrutiny test, upholding the law only if it serves a legitimate local purpose that cannot be achieved by a less discriminatory alternative.[34] This test is hard to pass. The only time a discriminatory state law withstood a DCC challenge was in *Maine v. Taylor*.[35] There, the Court upheld a Maine statute that blocked all inward shipments of live baitfish at the state's border because "substantial scientific uncertainty surround[ed] the effect that baitfish parasites and nonnative species could have on Maine's fisheries."[36] There was no less discriminatory alternative because "there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species."[37]

Thus, when it comes to discriminatory state laws, the strictures of the DCC are well settled. Whether such laws are discriminatory in text or in effect, and no matter how laudable a state's policy goals may be, courts are almost certain to find less discriminatory alternatives that achieve those goals, rendering a finding of discrimination "practically outcome determinative."[38]

2. Pike *Balancing for Nondiscriminatory Laws That Have Only Incidental Effects on Interstate Commerce*

If a court finds a state law to be nondiscriminatory and having only incidental effects on interstate commerce, the court evaluates the law under the

31. 432 U.S. 333 (1977).
32. *Id.* at 335.
33. *Id.* at 350–52.
34. *See id.* at 396.
35. 477 U.S. 131 (1986).
36. *Id.* at 148.
37. *Id.* at 141.
38. Stephanie Postal, Note, *Looking Beneath the Surface of* Rocky Mountain Farmers Union *and Dormant Commerce Clause Challenges to State Environmental Efforts*, 41 ECOLOGY L.Q. 459, 463 (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 442 (4th ed. 2011) ("[S]tate laws that discriminate rarely are upheld, while nondiscriminatory laws are infrequently invalidated.")).

more permissive *Pike* balancing test. Under *Pike* balancing, the court will uphold the law if it finds that its benefits to the government outweigh its burdens on interstate commerce.[39]

The *Pike* balancing test originated from the case *Pike v. Bruce Church, Inc.*, which involved an Arizona statute requiring cantaloupes grown in Arizona to follow certain packing requirements.[40] A state official enforced the requirements by prohibiting Bruce Church, Inc. from transporting uncrated cantaloupes from its Arizona ranch to California for packing and processing, requiring the company to build an expensive new packing shed in Arizona.[41] The Court explained the balancing test as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[42]

The Court struck down the law, reasoning that the burden on commerce (requiring business to be performed in Arizona when it could be more efficiently performed elsewhere) clearly outweighed the state's "tenuous interest in having the company's cantaloupes identified as originating in Arizona."[43]

While *Pike* created a new test, scholars have questioned the extent to which it actually involved balancing rather than per se anti-protectionist considerations.[44] Judges and scholars have also criticized *Pike* balancing for its *Lochnerian* placement of the judiciary in position of evaluating economic policy.[45] The core concern of the DCC is striking down discriminatory state laws, so critics have stated that if a state law regulates evenhandedly, it should not be subject to an unpredictable, ad hoc balancing test.[46]

One thing is for certain. The fate of a state law facing a DCC challenge depends substantially on whether it is deemed discriminatory. Once determined

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39. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

40. *Id.* at 138.

41. *Id.* at 139–40.

42. *Id.* at 142.

43. *Id.* at 145.

44. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1220 (1986).

45. *See* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy." (internal citation omitted)); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 355 (2008) ("What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.").

46. *See* Farber, *supra* note 25, at 398–99 (internal citations omitted).

to discriminate between in-staters and out-of-staters, a law is unlikely to survive heightened scrutiny. Meanwhile, the test for evenhanded regulations, while uncertain, is much more flexible. The Court has not invalidated a law under *Pike* in more than three decades.[47] This is especially important given that the line between a law being discriminatory in effect and a law having incidental effects on interstate commerce is not entirely clear[48] but can wind up being outcome determinative.[49]

*3. Extraterritoriality Pre-*NPPC

Finally, before *National Pork Producers Council v. Ross*, it was thought that three Supreme Court decisions—*Baldwin v. G.A.F. Seelig, Inc.*,[50] *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[51] and *Healy v. Beer Institute, Inc.*[52]—elucidated a DCC test separate from the anti-discrimination principle and *Pike* balancing. The "extraterritoriality" doctrine inferred from these cases stemmed from language prohibiting state laws with the inherent practical effect of regulating out-of-state commerce.[53] Under the extraterritoriality test, a state law that regulates or applies to commerce "wholly outside of the State's borders"[54] is "virtually per se invalid"[55] even if it "neither discriminate[s] against out-of-state interests nor disproportionately burden[s] interstate commerce."[56] As demonstrated in Part II, the Supreme Court's most recent DCC decision

47. Brief for the State Respondents at 37, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2022) (No. 21-468); *see also* Bradley W. Joondeph, *State Taxes and "*Pike *Balancing",* 99 IND. L.J. 893, 905 n.81 (2024) ("There appear to be only seven decisions in which a majority or plurality of the Supreme Court has invalidated a nondiscriminatory, intra-territorial state law specifically due to its incidental burden on interstate commerce: *Quill*, 504 U.S. 298 (1992); *Edgar v. MITE Corp*., 457 U.S. 624 (1982); *Kassel v. Consolidated Freightways Corp*., 450 U.S. 662 (1981) (plurality opinion); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967); *Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 526 (1959); and *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 779 (1945).").

48. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997).

49. For a more recent example, consider the DCC challenge brought against California's Low Carbon Fuel Standard (LCFS). In *Rocky Mountain Farmers Union v. Corey*, out-of-state liquid fuel producers argued that the California Air Resources Board discriminated against renewable fuels produced outside of California by basing its credit calculation on the distance of shipment of fuels to California. The Ninth Circuit majority applied *Pike* balancing and upheld the LCFS, finding that it was within California's discretion to factor in real differences in carbon intensity. In contrast, the dissent applied strict scrutiny due to the law's facial geographic discrimination and the existence of less burdensome regulatory incentives. 730 F.3d 1070, 1093, 1109 (9th Cir. 2013).

50. 294 U.S. 511 (1935).

51. 476 U.S. 573 (1986).

52. 491 U.S. 324 (1989).

53. *See id.* at 336. ("[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'") (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982)).

54. *Id.*

55. Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013).

56. *Id.* at 378 (Sutton, J., concurring).

refused to extend the logic of the *Healy* line of cases beyond the discriminatory price-affirmation statutes at issue in those cases.[57]

C. Principles Underlying the Dormant Commerce Clause

Why adhere to an "implied" constitutional doctrine that was not explicitly laid out by the drafters of the Constitution? After all, it would not have been difficult for the framers to include, and Congress has the power to preempt state legislation that it perceives to overstep its bounds. Farber and Hudec pose the question: "Free trade may be a desirable state of affairs, but so are many other things that are left to the discretion of governmental units. Why not leave local units of government . . . with unlimited control over this area? Why have a . . . DCC at all?"[58]

Farber and Hudec go on to note two traditional justifications for the DCC: "free trade as a substantive value, and protection of outsiders as a process value."[59] The free trade rationale emphasizes the importance of guarding a national free market from protectionism. Protectionism refers to laws that intend to improve "the competitive position of local economic actors, just because they are local, vis-à-vis their foreign competitors."[60] In *Baldwin v. G.A.F. Seelig, Inc.*, for example, the Court invalidated the application of a New York law setting a minimum price for milk to a dealer buying its milk from a producer in Vermont.[61] Writing for the Court, Justice Cardozo described the Commerce Clause as a response to the protectionist retaliations that typified state relations under the Articles of Confederation. The Court noted that if New York "may guard [its farmers] against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."[62] *Baldwin* demonstrates the most traditional concern animating the DCC—protection of political union between states against protectionist laws which favor insularity and locality. [63]

While the free-market rationale focuses on antiprotectionism, the outsider protection rationale focuses on protecting outsiders from burdensome laws passed by state governments where they lack representation.[64] If a law burdens in-staters and out-of-staters equally, it is less likely to fail DCC scrutiny since the in-staters can hold government actors who passed the law politically

57. *See supra* Part II-C-1.

58. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATTs-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1404 (1994).

59. *Id.* at 1406.

60. Regan, *supra* note 44, at 1138.

61. 294 U.S. 511, 519–21 (1935).

62. *Id.* at 522.

63. C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 417 (1994) (Souter, J., dissenting).

64. Later use in this Article of the term "process protection" derives from Robert Verchick's use of the phrase to refer to the same idea of the outsider protection rationale. *See* Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1251 (1997).

accountable. For example, in *Minnesota v. Clover Leaf Creamery Co.*, the Court applied *Pike* balancing and upheld a statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard cartons.[65] The Court reasoned that the burden on the out-of-state plastics industry, compared to the Minnesota pulpwood industry, was not substantial enough to outweigh the state's interest in conservation.[66] Importantly, "two of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation [were] Minnesota firms."[67] As the Court explained in a footnote, "the existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse."[68]

These principles are especially important to consider regarding their role (or lack thereof) in the Court's application of the DCC to state environmental laws–particularly waste regulation, as will be examined next. In his examination of the "waste cases," legal scholar Robert Verchick observed, "the Court mov[ed], with only moderate dissent, from the harbor of representational concerns into the more expansive waters of substantive economic rights."[69] At the same time, the Court moved from an antiprotectionism analysis to one focused on protecting an "unfettered market."[70] However, the Court's logic in *NPPC* could support reorienting the DCC toward its traditional rationales. And while questions about the DCC's reach remain, putting extraterritoriality to rest may modestly expand state regulatory power over waste disposal that has previously been limited.

D. Relationship Between the Dormant Commerce Clause and Waste Regulation

The DCC has often been a roadblock to state environmental regulations that, while lacking protectionist intent, were nonetheless invalidated when subjected to strict scrutiny and found to discriminate against interstate commerce.[71] This has been especially true for interstate waste regulation, starting with *City of Philadelphia* and expanding in subsequent cases.[72] Environmental law scholar

65. 449 U.S. 456, 472–74 (1981).
66. *Id.* at 473.
67. *Id.*
68. *Id.* at 473 n.17.
69. Verchick, *supra* note 64, at 1255.
70. *Id.* at 1244, 1270–74.
71. *See, e.g.*, Sporhase v. Nebraska, 458 U.S. 941, 960 (1982) (holding unconstitutional, under the DCC, a Nebraska statute that required any person intending to withdraw groundwater from any well in the state and transporting it for use in an adjoining state to first obtain a permit from the Nebraska Department of Water Resources). The Court acknowledged that Nebraska had a legitimate interest in preserving its diminishing groundwater resource. *Id.* at 954. However, it took issue with the statute's reciprocity requirement, which required any state using Nebraska groundwater to grant reciprocal rights to withdraw and transport groundwater from that state into Nebraska. *Id.* at 957-58. The Court found the statute discriminatory on its face and not narrowly tailored enough to survive DCC scrutiny. *Id.*
72. This notable line of dormant Commerce Clause cases, referred to as the "garbage cases" or "waste cases," involved challenges brought by waste disposal companies against regulations from garbage-importing states seeking to curb the flow of out-of-state garbage. *See* City of Philadelphia v. New

Christine Klein noted that in DCC cases, "with only one exception, the Court has invalidated every state law protecting water or land resources that it has considered between 1978 and the end of the twentieth century."[73] This Part focuses on how the Court has applied heightened DCC scrutiny to state waste regulations without paying adequate attention to the doctrine's underlying principles outlined by Verchick. The devotion to protecting an unrestricted interstate market not only forced certain states to become dumping grounds for their neighbors, but also blurred the lines between discriminatory (per se invalid) and burdensome (deferential to the state) laws.

This blurred line takes us back to *City of Philadelphia*, discussed above, where the Court struck down a New Jersey law prohibiting the importation of out-of-state waste for disposal in New Jersey. The "virtually per se rule of invalidity" applied against the New Jersey import restriction was novel in the sense that the Court simply looked at the law's language and effect, when previous DCC cases encouraged courts to review legislative motive and the legislation's goals, with the aim of rooting out simple economic protectionism.[74] In this case, there was no evidence that New Jersey was attempting to favor local waste producers at the expense of New York waste producers, yet the Court declared any such motive irrelevant.[75] The Court ending its analysis at the law's facial discrimination based on geography demonstrates the Court's desire for an unfettered market as an end in and of itself.

Fourteen years later, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, the Court considered a Michigan law that prohibited private landfill operators from accepting solid waste that originated outside the county in which their facilities were located unless authorized by the receiving county's waste management plan.[76] Michigan, a "net exporter" of waste, "adopted the legislation as part of a comprehensive scheme to encourage local responsibility for waste management."[77] When St. Clair County prohibited a local landfill operator from accepting nonlocal waste, the operator sued. Michigan argued that the law operated "evenhandedly" because it equally burdened all out-of-state and most in-state waste.[78] Additionally, Michigan argued that the law did not unfairly burden outsiders since in-state interests could lobby against local trade barriers that threatened out-of-state interests as well. Moreover, the only plaintiff in *Fort Gratiot* resided in St. Clair County.

Jersey, 437 U.S. 617 (1978); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353 (1992); Oregon Waste Sys., Inc. v. Dep't of Env't. Quality of Or., 511 U.S. 93 (1994); C&A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Authority, 550 U.S. 330 (2007).

73. Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENV'T L. REV. 1, 44 (2003).

74. Verchick, *supra* note 64, at 1272.

75. *City of Philadelphia*, 437 U.S. at 626.

76. 504 U.S. 353, 357 (1992).

77. Verchick, *supra* note 64, at 1258.

78. *Fort Gratiot*, 504 U.S. at 361.

Nevertheless, the Court struck the law down for discriminating on its face against out-of-county waste generators.[79]

In *Chemical Waste Management, Inc. v. Hunt*, the Court struck down an Alabama law that imposed an additional disposal fee on all hazardous waste disposed of in Alabama facilities.[80] The Court found the discriminatory tax no different from the prohibition in *Fort Gratiot*.[81] Again, the plaintiff was the owner and operator of an in-state facility.[82] There was no reference in the opinion to outsized hardship on any specific out-of-state parties.

Similarly, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, Oregon, a net importer of waste, sought to impose a $2.25 per ton surcharge on in-state disposal of out-of-state solid waste to recoup costs.[83] Once again, the Court struck down the surcharge as discriminatory without seriously considering economic protectionism or process protection despite Oregon "impos[ing] restrictions on the [waste disposal] *of its own citizens*."[84]

In *C&A Carbone, Inc. v. Town of Clarkstown*, the Court considered a flow control ordinance requiring all solid waste to be processed at a selected transfer station before leaving Clarkstown, New York.[85] The town had planned to use the processing fees at the station to subsidize the facility's cost.[86] The Court invalidated the ordinance after finding it to be discriminatory against interstate commerce by favoring an in-state facility over out-of-state facilities.[87] As in the previous cases, the plaintiffs had a substantial in-state presence.[88] Moreover, the law in *Carbone* precluded competition from both in-state and out-of-state waste processors in favor of a centrally regulated approach to waste management.[89]

Finally, in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, the Court restricted the scope of the DCC regarding waste management.[90] The Court applied *Pike* balancing and upheld a county waste disposal ordinance virtually identical to that in *Carbone*, with the key differentiating factor being the favored facility was a state-created public benefit corporation owned and operated by the county government.[91] The Court

79. *See id.;* Verchick, *supra* note 64, at 1259-60.
80. 504 U.S. 334, 336–38.
81. *Id.* at 340–42.
82. *Id.* at 334.
83. 511 U.S. 93, 93 (1994); Verchick, *supra* note 64, at 1263–64.
84. *Oregon Waste Sys.*, 511 U.S. at 111 (Rehnquist, C.J., dissenting). Justice Rehnquist believed, for example, that the Court "ignore[d] the fact that in-state producers of solid waste support[ed] the Oregon regulatory program through state income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste." *Id.* at 110.
85. 511 U.S. 383, 386 (1994).
86. *Id.* at 387.
87. *Id.* at 391.
88. *Id.* at 387.
89. *Id.* at 390.
90. 550 U.S. 330, 342–47 (2007).
91. *Id.* at 334.

reasoned that "it simply 'does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.'"[92]

The above rulings demonstrate Verchick's argument that the waste cases exemplify the Court's increasing unwillingness to consider the traditional DCC principles of process protection and antiprotectionism.[93] Rather than weighing the benefits and burdens imposed by a state law to weed out disproportionate in-state representation or protectionist motives, the Court evidenced a broad distrust of laws that differentiate between in-state and out-of-state interests, with the outlier being laws favoring local government over both in-state and out-of-state private companies, such as the law upheld in *United Haulers*. And since waste regulation is far from entirely state run, *United Haulers*'s application of *Pike* balancing as opposed to the often-fatal strict scrutiny test represents an exception rather than the rule for states restricting the flow of waste.

II. *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*

With the waste cases and their focus on the per se antidiscrimination rule in mind, the relevance of *NPPC*'s focus on a nondiscriminatory animal welfare law is not obvious at first glance. However, a deep look shows that *NPCC* can provide further justification for reexamining the Court's broad view of discrimination under the DCC and the role of extraterritoriality in waste regulation. Before delving into its relevance to the waste cases and California's hazardous waste problem, this Part summarizes the key arguments made by both sides and the Court's ruling.

In November 2018, California's Proposition 12 (Prop 12) passed with 62.7 percent voter approval.[94] The law amended the state's Health and Safety Code to prohibit the sale of eggs, veal, and pork within the state when produced without following specific standards for freedom of movement, cage-free design, and specified minimum floor space.[95] Violations are punishable by a $1,000 fine or 180 days in prison, and they subject sellers to civil actions for damages or

92. *Id.* at 343 (Alito, J., dissenting).

93. *See* Verchick, *supra* note 64, at 1258 ("Of the four Supreme Court opinions addressing the waste trade since [*Philadelphia*], none of them can be explained easily in terms of the process protection rationale. Instead, each decision . . . strikes down, under the strictest of standards, popular laws that pose little threat to representational values. A brief examination of each case shows the Court moving, with only moderate dissent, from the harbor of representational concerns into the more expansive waters of substantive economic rights."); *see also id.* at 1270 ("While the language of these cases might suggest no more than an affirmation of the anti-protectionist view described earlier in this section, a closer investigation shows that Philadelphia and its progeny have moved beyond this justification and have reworked the familiar Commerce Clause doctrines to combat not only protectionism but almost any obstacle to an unfettered market.").

94. *See* Proposition 12, LEG. ANALYST'S OFF. (Nov. 6, 2018), https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018.

95. CAL. HEALTH & SAFETY CODE § 25991(e) (West 2018) (prohibiting the sale of such products when the animal is confined in a way "that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely," or "with less than 24 square feet of usable floorspace per pig.").

injunctive relief.[96] California law imposes the same confinement standards on farmers who raise sows in California, even if the meat of the pigs born from those sows (or of the sows themselves) is sold elsewhere.[97]

In December 2019, the National Pork Producers Council and the American Farm Bureau Federation (NPPC) filed suit in federal district court, alleging that Prop 12 violated the dormant Commerce Clause.[98] The United States District Court for the Southern District of California dismissed the complaint for failure to state a claim.[99] The organizations appealed, and the Ninth Circuit affirmed.[100] When the Supreme Court granted NPPC's petition for a writ of certiorari, "many anticipated NPPC could be one of the more significant 'horizonal federalism' decisions in a generation."[101]

A. NPPC's Argument

The National Pork Producers Council conceded that Prop 12 was not discriminatory but instead attacked the law via two other pillars of the DCC—extraterritoriality and *Pike* balancing.[102] The crux of NPPC's extraterritoriality argument was that the DCC disallows laws like Prop 12 that have the "practical effect" of regulating wholly out-of-state commerce, regardless of whether they also regulate in-state commerce.[103] What matters is not just discrimination or protectionism, but that the State is "impeding substantially the free flow of [interstate commerce]."[104] According to NPPC, the Court had embraced the doctrine in various prior cases.[105]

Moreover, NPPC argued that California exaggerated the potential negative effects of the extraterritoriality doctrine when the state claimed that the doctrine would constrain too many state regulations which often have out-of-state effects. NPPC differentiated between laws that regulate in-state conduct and merely have "effect[s]" on conduct in other states (which are permissible) and those that

96. CAL. HEALTH & SAFETY CODE §25993(b).

97. *See* CAL. HEALTH & SAFETY CODE §25990(b).

98. Complaint for Declaratory and Injunctive Relief at 1–5, Nat'l Pork Producers Council v. Ross, 456 F.Supp.3d 1201 (S.D.C.A. 2019) (No. 1), 2019 WL 6683174.

99. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 364 (2023).

100. *Id.*

101. Bradley W. Joondeph, *The 'Horizontal Separation of Powers' after* National Pork Producers Council v. Ross, 61 SAN DIEGO L. REV. 45, 60 (2024).

102. *See* Reply Brief for Petitioners, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2022) (No. 21-468).

103. *Id.* at 3.

104. *Id.* at 5 (quoting S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945)).

105. *See generally* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); *see also* Reply Brief for Petitioners, *supra* note 102, at 7 ("This Court's invalidation of discriminatory or protectionist laws does not mean that those are the only concerns of the dormant Commerce Clause. Respondents cite no case in which the Court considered and rejected the extraterritoriality doctrine on the grounds that it is not an aspect of the dormant Commerce Clause. Far from it, this Court has explicitly embraced the doctrine, in *Baldwin*, *Healy*, *Brown-Forman*, *Edgar*, and *Southern Pacific*, and recently reiterated its place in Commerce Clause jurisprudence in *Wayfair*.").

effectively control conduct entirely out of the state's jurisdiction or "usurp[] other States' policy-making prerogatives."[106]

Based on what NPPC framed as a "straightforward application" of DCC principles, that states cannot legislate commerce in other states, Prop 12 was an unconstitutional extraterritorial regulation.[107] 99.9 percent of sow farmers operate outside of California.[108] And given the "complex, vertically-segmented nature of pork production," most of them would have to "alter their facilities, practices, and contractual relationships" and incur significant costs to comply with the law.[109] Retail prices would increase both in- and out-of-state, and other states' views on sow housing would be overridden.[110] Striking down Prop 12 would "preserve[] the rights of other States to make their own policy choices regarding farming practices in their jurisdictions, and protect[] nationwide commerce in pork from Balkanized regulatory regimes."[111]

NPPC also argued that Prop 12 failed *Pike* balancing.[112] First, the regulation imposed substantial burdens on interstate commerce. The industry would have to completely change its current methods of sow housing which would "increase sow mortality, decrease herd size, interfere with entirely out-of-state contracts, and result in consumers nationwide paying for California's preferred out-of-state farming practices."[113] Second, NPPC argued that such burdensome effects on interstate commerce easily outweighed the law's alleged benefits. California, they argued, has no "legitimate local interest" in regulating out-of-state animal husbandry policies, and burdening interstate commerce based on "philosophical objection" would open the floodgates of economic Balkanization.[114] Furthermore, Prop 12 would "remove important tools for maintaining herd health," does not promote human health, and could actually increase the risk of foodborne pathogens.[115] Thus, because the regulation subjected the nationwide pork industry to burdensome regulations without clear local benefit, NPPC argued Prop 12 was invalid under *Pike*.

B. California's Argument

California addressed both of NPPC's arguments against Prop 12.[116] The state first addressed the extraterritoriality argument, stating that Prop 12 did not control out-of-state prices or directly regulate wholly out-of-state commerce.[117] California distinguished *Baldwin*, *Brown-Forman*, and *Healy* as specifically

106. Reply Brief for Petitioners, *supra* note 102, at 11.
107. *Id.* at 10.
108. *Id.* at 3.
109. *Id.* at 3–4.
110. *Id.* at 4–5.
111. *Id.* at 4.
112. *Id.*at 21.
113. *Id.* at 23.
114. *Id.* at 14–15.
115. *Id.* at 14, 16.
116. *See* Brief for the State Respondents, *supra* note 47.
117. *Id.* at 13.

dealing with price-control and price-affirmation statutes that sought to protect local industry with the effect of raising costs for out-of-state consumers or rival businesses.[118] All the state laws at issue in those cases were struck down as discriminatory against interstate commerce and per se invalid. Prop 12, the state argued, is nondiscriminatory. Because in-state and out-of-state pork producers are regulated evenhandedly, it is distinct from protectionist regulation of prices.[119] Respondents also distinguished Prop 12 from the law in *Edgar v. MITE Corp.* In *Edgar,* an Illinois securities statute directly regulating tender offers made by out-of-state buyers to "those living in other States and having no connection with Illinois."[120] The transactions in *Edgar* had no connection with the regulating state, whereas Prop 12 "serves the localized objective of 'eliminat[ing] inhumane and unsafe products from the *California marketplace*.'"[121]

California's second response to NPPC's extraterritoriality argument took aim at the doctrine itself. The state argued that the "practical effects" inquiry advanced by NPPC was not supported by case law and the Court had already rejected efforts to "convert *Healy*'s dicta into a sweeping new branch of dormant Commerce Clause doctrine."[122] Moreover, expanding the concept of extraterritoriality into a per se rule of invalidity would risk serious overinclusion and impinge on state sovereignty since "the States frequently regulate activities that occur entirely within one State but have effects in many."[123] Such a far-reaching standard would "invite abusive litigation and produce inconsistent results."[124] Finally, California noted existing constitutional safeguards, such as the affirmative Commerce Clause, Due Process Clause, and right to interstate travel, to address the federalism concerns raised by NPPC, as well as the state-level political checks evident in the passing of Prop 12.[125]

California also argued that Prop 12 meets NPPC's "practical effects" standard and does not regulate wholly out-of-state conduct. First, the law allows out-of-state producers to "freely choose whether to make the adjustments necessary to produce Prop[] 12-compliant pork" that may be sold in California (for a higher price) or sell non-compliant pork in other states.[126] Second, Prop 12 would not affect all pork production, as "[p]ork producers have used segregated supply chains for years" to produce specialized goods, including in response to Prop 12.[127]

Additionally, California argued that NPPC did not sufficiently state a *Pike* claim. First, the state argued that there is no cognizable burden on interstate

118. *Id.* at 13–16.
119. *Id.*
120. *Id.* at 16.
121. *Id.* at 18.
122. *Id.* at 19–20.
123. *Id.* at 22.
124. *Id.* at 24.
125. *Id.* at 25–27.
126. *Id.* at 28.
127. *Id.* at 29.

commerce, especially given the deferential nature of the balancing test to policies directed toward legitimate local concerns. Courts typically apply *Pike* balancing when there is a hidden discriminatory purpose, when the law directly interferes with instrumentalities or channels of interstate commerce, or when the regulated activity has no connection to the regulating state.[128] Second, even if there is a cognizable burden, it is not "clearly excessive in relation to the putative local benefits."[129] The state posited that California consumers clearly exhibited a moral interest in not contributing to animal cruelty. And while the risk of foodborne illness is not perfectly understood, Prop 12 is valid as a precautionary measure and the Court should not second-guess the utility of a democratically adopted state law.[130]

C. Breaking Down the Decision

The Court issued a plurality opinion not split between typical ideological lines, affirmed the judgment of the Ninth Circuit, and upheld Prop 12. [131] In its opinion, the Court evidenced a significant disagreement regarding the reach of the DCC, but a majority agreed to (1) clarify the lack of an independent extraterritoriality test and (2) preserve the *Pike* balancing test.[132]

1. Extraterritoriality

The Court unanimously refused to accept NPPC's invitation to enforce a per se extraterritoriality rule against state laws with the "practical effect" of regulating out-of-state commerce.[133] Writing for the Court, Justice Gorsuch emphasized the "antidiscrimination principle" at the core of DCC jurisprudence: the DCC is meant to strike down "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[134] He explained that NPPC wrongly interpreted an "almost per se" rule against extraterritorial regulations from *Healy*, *Brown-Forman*, and *Baldwin*, when those cases actually "typif[y] the familiar concern with preventing purposeful discrimination against out-of-state economic interests."[135] The Court in those cases took issue with

128. *Id.* at 36–40.
129. *Id.* at 44.
130. *Id.* at 44–48.
131. The plurality that invalidated Prop 12 included Justices Gorsuch, Thomas, Sotomayor, Kagan, and Barrett. Within the plurality, Justices Gorsuch and Thomas were squarely against applying the *Pike* balancing test. Justices Sotomayor, Kagan, and Barrett were in the pro-*Pike* camp, with the liberal Justices finding Prop 12 to flunk the balancing test, and Barrett stating she would have applied *Pike* balancing had the benefits and burdens been commensurable. Chief Justice Roberts, along with Justices Alito, Kavanaugh, and Jackson, would have vacated the judgment and remanded the case for the court below to decide whether the petitioners stated a claim under *Pike*. *See generally* Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).
132. *Id.* at 371, 380.
133. *Id.* at 376.
134. *Id.* at 369 (quoting New Energy Co. of Ind. v. Limbach, 486 U. S. 269, 273-274, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)).
135. *Id.* at 371.

specific impermissible extraterritorial effects; the statutes challenged in those cases regulated prices to limit out-of-state competitive advantages, protected local industry and operated like "a tariff or customs duty."[136] Gorsuch also echoed California's arguments regarding the danger of expanding the dicta in *Healy* given the interconnection of the modern marketplace. For example, "[e]nvironmental laws often prove decisive when businesses choose where to manufacture their goods."[137]

2. Pike *Balancing*

While NPPC did not fare any better with their *Pike* claim, the Court splintered on the validity of the test itself and how exactly it applied to Prop 12. Justices Gorsuch, Thomas, Sotomayor, and Kagan found that NPPC failed to plausibly allege that Prop 12 imposed a "substantial burden" on interstate commerce.[138] The possibility that "certain out-of-state farmers and processing firms will find it difficult to comply with Proposition 12 and may choose not to do so" is not enough.[139] Compliance is only required if a firm decides to avail itself of the California market, so costs would be borne either by those firms or California consumers.[140] And while Justice Barrett found that NPPC alleged a substantial burden on interstate commerce, she nonetheless found their *Pike* claim to be insufficient due to Prop 12's benefits and burdens being "incommensurable"—meaning that weighing California's moral interest in animal welfare against the law's monetary costs would require moral and policy judgment inconsistent with the judicial role.[141]

Meanwhile, Chief Justice Roberts, with Justices Alito, Kavanaugh, and Jackson, found that NPPC *had* plausibly alleged a substantial burden on the interstate pork market and found the benefits and burdens to be comparable.[142] These four Justices placed great weight on the compliance costs to farmers serving the California market and the spillover effects on firms that do not even sell in California. Such "sweeping extraterritorial effects," while not rendering Prop 12 per se invalid, were an important enough factor in the *Pike* analysis to overcome a motion to dismiss.[143]

Although all the Justices applied *Pike* balancing in their analysis, some expressed skepticism of the test. In the opinion of the Court, Justice Gorsuch explained, "[p]etitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule." And since the petitioners disavowed any discrimination claim, Justice Gorsuch reasoned, *Pike* was of little use. However,

136. *Id.* at 372 (quoting West Lynn Creamery, Inc. v. Healy, 512 U. S. 186, 194, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994)).
137. *Id.* at 374 (citing American Beverage Assn., 735 F. 3d, 379 (2013)).
138. *Id.* at 383–87.
139. *Id.* at 385.
140. *Id.*
141. *Id.* at 393–94 (Sotomayor, J., concurring in part).
142. *Id.* at 394, 397 (Roberts, C.J., concurring in part and dissenting in part).
143. *Id.* at 399–400 (Roberts, C.J., concurring in part and dissenting in part).

Justice Gorsuch was only joined by Justices Thomas and (to some extent) Barrett in his desire to discard *Pike* balancing entirely. To these three Justices, weighing a state law's burdens on interstate commerce against its local benefits is "a task no court is equipped to undertake" and should be left to the legislature.[144] The other six Justices, while disagreeing on *Pike*'s application in this case, refused to "pull the plug" on the controversial test.[145] In the lead dissent, Chief Justice Roberts stated that "sometimes there is no avoiding the need to weigh seemingly incommensurable values." This sentiment was echoed in Justice Sotomayor's concurrence and Justice Kavanaugh's dissent.[146] However, Justice Barrett refused to discard *Pike* balancing entirely and found that NPPC had plausibly alleged a substantial burden on interstate commerce, yet still found NPPC's claim insufficient because the benefits and burdens of Prop 12 were "incommensurable." Thus, if Justice Barrett believed the benefits and burdens to have been commensurable, the outcome of the case could have been drastically different since a majority of the court would have agreed to remand the case for the Ninth Circuit to apply *Pike*.

As Bradley Joondeph points out, "[t]he Court's holding with respect to this claim [] stands as a naked outcome, lacking any precedential rationale."[147] Going forward, *NPPC* may simply mean that California can enforce Prop 12. But the dicta regarding *Pike* balancing sheds somewhat greater light on how the Court may rule in future DCC cases. Given the uncertainty of *Pike* balancing, and the Court's clear refusal to read an extraterritoriality rule into the DCC, major unanswered questions in the wake of *NPPC* are: To what extent can a state regulate out-of-state behavior, and how should such regulation be evaluated?

III. WASTE WARS AND THE CALIFORNIA PROBLEM

Part I of this Note detailed the Court's historical treatment of the DCC and its application to state and local waste regulations. Part II examined how the Court addressed extraterritoriality and *Pike* balancing in its most recent DCC decision. With these issues in mind, this Part explains what *NPPC* can tell us about the Court's reasoning in the DCC waste cases and California's current hazardous waste problem.

*A. Reexamining the Waste Cases Post-*NPPC

The Court in *NPPC* was right to reject the petitioners' invitation to interpret the DCC as invalidating laws with the "practical effect" of controlling out-of-state transactions. In doing so, it reaffirmed what lower courts had already ruled: the *Healy, Brown,* and *Baldwin* line of cases dealt with specific impermissible

144. *Id.* at 382.
145. *Id.* at 395 (Roberts, C.J., concurring in part and dissenting in part).
146. *Id.* at 396–97 (Roberts, C.J., concurring in part and dissenting in part).
147. Joondeph, *supra* note 101, at 73.

extraterritorial effects.[148] It is true that the Court in those cases took issue with one state "project[ing] its legislation" onto another state and thus directly regulating interstate commerce. But as Justice Gorsuch pointed out in *NPPC*, those cases involved purposeful discrimination against out-of-state economic interests and amounted to "simple economic protectionism."[149] To yield to an "almost per se" rule because of a law's out-of-state "practical" effects "would invite endless litigation and inconsistent results."[150]

At the same time, Justice Gorsuch's criticism of NPPC's proposed rule invalidating a law based only on its out-of-state impact could just as easily apply to the per se rule of invalidity articulated in *City of Philadelphia* and applied to resource-protection laws that draw geographical boundaries. There was no clearly articulated reason any of the laws in the *City of Philadelphia* line of cases involved protectionist measures and could not "fairly be viewed as [] law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[151] Just as it is not clear where the line would be for permissible versus per se invalid extraterritorial regulation, it is also unclear what differentiates a law effectively discriminating against interstate commerce from one with merely an incidental burden on interstate commerce. *Fort Gratiot* saw the Court deem county-line restrictions that applied equally to interstate and intrastate waste discriminatory.[152] In *Oregon Waste*, an additional $0.14 per week cost for out-of-state waste producers was more than incidental.[153] In *C&A Carbone*, a flow control law that designated a transfer station for in- and out-of-state waste was also deemed discriminatory.[154] The burdens imposed on in-state interests in those cases arguably exceeded those in *NPPC*, where practically all affected producers operate outside of California. But the Court's use of "discrimination" as a placeholder for "protectionism" in the waste cases circumvented any inquiry into those effects, creating the same overinclusion problem the Court recognized in *NPPC*.

On the surface, there is a clear difference between Prop 12 and the laws at issue in the waste cases. The former regulates completely evenhandedly while the latter treated in-state and out-of-state waste differently. However, this surface-level approach to differentiate between discriminatory and nondiscriminatory laws is a shortcut that, in favoring unrestricted free trade as an end in and of itself, does not consider the more consistent principles of process protection and antiprotectionism. A fair analysis in the waste cases and *NPPC* would have focused on the burden on in-state interests versus out-of-state interests. Regarding Prop 12, most of the pork industry operates outside of the

148. *See, e.g.*, Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173-74 (10th Cir. 2015); Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013).
149. 598 U.S. at 372.
150. *Id.* at 375.
151. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).
152. *See infra* Part I-D.
153. *See infra* Part I-D.
154. *See infra* Part I-D.

regulating state, which may seem like a process protection concern. But this is tempered by the fact that compliance with Prop 12 is a precondition to accessing the California market, and voters agreed to the cost. Prop 12 had nothing to do with favoring local industry at the expense of out-of-state industry. These justifications would have made more sense than the fact that the law treated in-state and out-of-state producers the same, especially considering that almost no producers operate in California.

Likewise, in the *City of Philadelphia* line of cases, the Court focused on discrimination based on geography rather than whether the laws at issue created unfair economic advantages for in-state interests. This meant the Court did not even consider the significant presence of in-state plaintiffs, domestic burdens, and non-protectionist motives in those cases. As a result, the Court invalidated state laws that "bestow[ed] no benefit on a class of local private actors," and whose main effect and purpose was to "directly aid[] . . . government[s] in satisfying a traditional governmental responsibility."[155]

To sum up, just as a state has valid reasons to effectively regulate out-of-state behavior when the behavior has a connection to the regulating state, a state may also have reasons—such as environmental, health-based—that should be considered when evaluating "discriminatory" laws like those at issue in the waste cases. The *NPPC* Court emphasized the "antidiscrimination principle" at the core of DCC doctrine, rightfully associating it with concerns of protectionism, but the waste cases demonstrate how the Court has confused the two concepts in its pursuit of unrestricted commerce as its ultimate goal. After *NPPC*, states can more confidently pass laws that have extraterritorial effects, and such laws can affect the interstate market based on moral views of the regulating state. However, the exact extent of states' ability to do so is uncertain, and because of the Court's lack of clarity on the discrimination issue, states are still hamstrung in their attempts to pass non-protectionist laws to regulate waste disposal. Because waste moves in interstate commerce, the Court can always craft a less burdensome alternative and swiftly invalidate such laws that consider geography, thus preserving the free flow of waste despite states' valid reasons to control it.

B. Case Study: California Hazardous Waste

California is currently reckoning with its own waste crisis, and it is worth considering the potential implications of *NPPC* for the state's ability to regulate in ways that affect the interstate flow of waste. The waste cases demonstrated the Court's reluctance to allow states to regulate waste in a way it deems "discriminatory." However, given the Court's disavowal of the extraterritoriality rule and cautioning against overuse of *Pike* balancing in *NPPC*, there may be an opportunity for evenhanded regulation of California hazardous waste to promote public health and survive DCC scrutiny. This Part begins with an overview of the current waste regulation landscape in California. It proceeds by examining

155. C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 411 (1994) (Souter, J., dissenting).

California's hazardous waste crisis which is, in a way, the inverse of the waste problems faced by the defendants in the waste cases. This Part concludes with a proposal to expand the reach of the state's hazardous waste law in a manner arguably consistent with both the holding of *NPPC* as well as the DCC principles that this Note argues the Court has muddled.

1. Background: Hazardous Waste Regulation in California

Passed in 1976, the Resource Conservation and Recovery Act (RCRA)[156] is the nation's primary law governing the transportation, storage, treatment, and disposal of solid and hazardous waste.[157] RCRA grants the U.S. Environmental Protection Agency (EPA) authority to monitor hazardous waste from "cradle to grave" by imposing obligations on generators,[158] transporters,[159] and owners and operators of facilities that manage hazardous waste.[160] These obligations include completion of permitting procedures, compliance with a system of tracking hazardous waste, and maintenance of extensive records.[161]

However, federal law only acts as a baseline. California adopted its own comprehensive hazardous waste management program in 1972 under the Hazardous Waste Control Act (HWCA), which eventually served as the model for RCRA.[162] California's program is more comprehensive and regulates waste and activities not covered by RCRA. The law includes stronger testing requirements, along with stricter regulation of used oil, mercury-containing waste, hazardous waste containers deemed "empty" under RCRA, and mixtures of RCRA-defined waste.[163] Since 2010, 86.1 percent of the manifested[164] hazardous waste managed within California has been non-RCRA hazardous waste (or "California hazardous waste") and 12.9 percent has been RCRA hazardous waste.[165] The largest waste stream since 2010 has been contaminated soil from site cleanups, averaging more than 567,000 tons each year.[166]

156. 42 U.S.C. §§ 6901-6987.
157. *See id.* § 6902.
158. 40 C.F.R § 262.
159. *Id.* § 263.
160. *Id.* § 264.
161. Resource Conservation and Recovery Act (RCRA) Overview, https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview (last visited Sept. 29, 2024).
162. *Our History*, CAL. DEP'T OF TOXIC SUBSTS. CONTROL, https://dtsc.ca.gov/about-dtsc/our-history (last visited Sept. 29, 2024).
163. *5 Differences Between California and Federal RCRA Waste Laws*, TRIUMVIRATE ENV'T, (Oct. 21, 2021), https://www.triumvirate.com/blog/5-differences-between-california-and-federal-rcra-waste-laws.
164. "Manifested" in this context refers to the manifest system used to track hazardous waste during shipment and arrival at its destination. *See* DEP'T TOXIC SUBSTS. CONTROL, DRAFT HAZARDOUS WASTE MANAGEMENT REPORT 2, https://dtsc.ca.gov/wp-content/uploads/sites/31/2023/07/Hazardous-Waste-Management-Report_Section-3_accessible.pdf; *Hazardous Waste Management System*, EPA, https://www.epa.gov/hwgenerators/hazardous-waste-manifest-system (last visited Sept. 29, 2024) [hereinafter DTSC Report].
165. DTSC Report, *supra* note 164, at 7.
166. *Id.* at 8.

Approximately 93 percent of contaminated soil has been non-RCRA hazardous waste, and 56.1 percent of which has been managed out of state.[167] Because hazardous waste landfill capacity is finite and hazardous waste landfills are costlier to operate and more difficult to permit than regular municipal landfills, proper treatment and disposal is often at odds with cost considerations.[168] For example, the Department of Toxic Substances Control (DTSC) requires hazardous waste landfills to have "double composite liners and leachate collection systems," but there are no such requirements for municipal solid-waste landfills.[169]

2. California Toxics and Interstate Disposal

California government agencies and businesses have transported much of the state's hazardous waste to nearby states with weaker environmental regulations and dumped it at regular municipal landfills. Since 2010, just over half of California's land-disposed hazardous waste (approximately 6,509,000 tons) has been disposed of outside of the state.[170] In most cases, this waste is "not required to be managed as hazardous waste in other states," so those states are "not required to dispose of California's non-RCRA waste in permitted hazardous waste land disposal facilities."[171] Since 2010, approximately 43.1 percent of California's manifested land-disposed hazardous waste was managed at Class 2 or Class 3 landfills (non-hazardous waste landfills).[172]

The biggest source of waste leaving California is soil from site cleanups contaminated with heavy metals like lead and chemicals like DDT.[173] While some of the waste ends up in Oregon and Nevada, which have laws that effectively treat it as hazardous if neighboring states do,[174] much of the waste ends up in Arizona and Utah, which do not have such laws.[175] Once this waste enters Arizona or Utah, it is all considered regular solid waste.[176]

In January 2023, nonprofit news outlet CalMatters published a series of articles chronicling its four-month-long investigation of California's out-of-state toxic waste dumping.[177] While CalMatters "found no reports directly linking California waste to public health issues in surrounding communities," the out-of-state landfills largely rely on self-reporting, and at least one does not conduct

167. *Id.* at 8–9.
168. *Id.* at 28.
169. NATIONAL RESEARCH COUNCIL, RISK-BASED WASTE CLASSIFICATION IN CALIFORNIA 19 (Nat'l Academy Press, 1999).
170. DTSC Report, *supra* note 164, at 22.
171. *Id.* at 24.
172. *Id*.
173. Robert Lewis, *California Toxics: Out of State, Out of Mind*, CALMATTERS (Jan. 25, 2023), https://calmatters.org/environment/2023/01/california-toxic-waste-dumped-arizona-utah/?series=hazardous-waste-california.
174. *Id.*; Or. Admin. R. 340-093-0040; Nev. Admin. Code 444.8565.
175. Lewis, *supra* note 173.
176. *Id*.
177. *Id.*

groundwater testing.[178] Specifically, the La Paz County, Arizona, landfill sits five miles from the Colorado River Indian Tribes Reservation, is subject to limited oversight, and does not monitor groundwater at the site.[179] Another significant destination of contaminated soil is the South Yuma County landfill:

> [The landfill] sits just a few miles from the Cocopah Indian Tribe's reservation and abuts the lush, green orchards of a company that grows organic dates. It's a landfill that the Arizona Department of Environmental Quality labeled as posing an "imminent and substantial threat" in 2021 after an inspection noted windblown litter, large amounts of "disease vectors" (flies and birds), and groundwater with elevated levels of chromium—a metal that can harm people and the environment.[180]

The ECDC Environmental, LLC landfill in East Carbon, Utah is also a major destination for California's contaminated soil. While the Utah landfill conducts groundwater testing and has shown no problems thus far, the risk to groundwater is still a concern due to its proximity to an aquifer.[181] A company called Promontory Point Resources (PPR), at the time of publishing of the CalMatters report, was attempting to get a permit from Utah regulators to operate a similar landfill on the shores of the Great Salt Lake, raising contamination concerns. In February 2023, Utah regulators denied PPR's permit because there was already sufficient landfill capacity to meet current needs, quelling concerns for the near future.[182] However, landfill capacity is inherently limited, and permitting authorities may find that projected needs necessitate approval in the future.

The lucrative business of sending contaminated soil to landfills like those in La Paz County, South Yuma County, and East Carbon demonstrates the "seriously unequal patterns in the interstate and intrastate distribution of garbage. . . . Interstate waste flows from richer states to poorer states, from less polluted states to more polluted states, and from more densely populated states to less densely populated states."[183] In short, California's environmentally stringent standards come at the expense of exposed communities in other states. *NPPC*'s outcome, and its shortcomings, illuminate how California may take responsibility for its own waste and stay true to its environmental goals.

3. An Extraterritorial Approach?

A 2021 law requires California to craft a new hazardous waste management plan by spring 2025.[184] While the issue of hazardous waste dumping is decades

178. *Id.*
179. *Id.*
180. *Id.*
181. Leia Larsen, *Utah regulators to deny permit for landfill on the shores of Great Salt Lake*, SALT LAKE TRIBUNE (Feb. 23, 2023), https://www.sltrib.com/news/environment/2023/02/23/utah-regulators-deny-permit/.
182. *Id.*
183. Verchick, *supra* note 64, at 1294.
184. S.B. 158, 2021 Leg. (Cal. 2023).

in the making and "state regulators sa[y] there's not much they can do to stop private entities from taking waste across the border," California's Department of Toxic Substances Control should consider *NPPC* and its impact on DCC jurisprudence when designing the plan. [185] This may potentially allow the state to create a plan that impacts out-of-state behavior while still regulating evenhandedly. Specifically, the DTSC should consider applying the HWCA definition of hazardous waste to all waste generated within its borders regardless of its destination. Such a regulation would certainly raise DCC questions given its conflict with other states' more lenient hazardous waste standards. But after the Court's rejection of a per se extraterritoriality rule in *NPPC*, courts would be less likely to strike down this type of regulation under the DCC.

An important pre-*NPPC* case to consider is *Daniels Sharpsmart, Inc. v. Smith*, in which the Ninth Circuit affirmed a grant of a preliminary injunction against the California Department of Public Health (DPH) due to what it characterized as impermissible extraterritorial regulation of medical waste disposal.[186] Daniels, a corporation handling the transport and treatment of medical waste, operated a medical waste treatment and transfer station in Fresno and was subject to California's Medical Waste Management Act (MWMA).[187] "In general, under the MWMA, California-generated waste must be incinerated."[188] At issue in this case was the provision stating that "[m]edical waste transported out of state shall be consigned to a permitted medical waste treatment facility in the receiving state."[189] In 2014, Daniels transported its medical waste to locations in Kentucky and Indiana, where the waste would be treated by non-incineration methods that were legal under those states' regulations (and more cost-effective for Daniels).[190] The DPH imposed a $618,000 penalty, and Daniels filed a complaint alleging the Department violated the DCC by applying the MWMA extraterritorially.[191] The Court found that Daniels was likely to succeed on the merits, citing *Healy* and *Brown-Forman* in a fashion very similar to the *NPPC* plaintiffs: "The mere fact that some nexus to the state exists will not justify regulation of wholly out-of-state transactions."[192] The Court justified finding a per se violation of the DCC by reasoning that otherwise, "California could purport to regulate the use or disposal of any item . . . everywhere in the country if it had its origin in California."[193]

But five years later in *NPPC*, the Supreme Court refused to extend the *Healy* dicta in the way the Ninth Circuit did in *Sharpsmart*. And without a per se extraterritoriality rule, it would be insufficient for a plaintiff to argue that

185. Lewis, *supra* note 173.
186. Daniels Sharpsmart, Inc. v. Smith 889 F.3d 608, 608 (9th Cir. 2018).
187. *Id.* at 612.
188. *Id.* at 612 (citing CAL. HEALTH & SAFETY CODE §§ 118215(a)(1)(A), (a)(3)(A)).
189. *Id.*
190. *Id.* at 612–13.
191. *Id.* at 613.
192. *Id.* at 616.
193. *Id.* at 618.

California is regulating wholly out-of-state commerce by penalizing actors dealing in California hazardous waste. Enforcing HWCA on in-state entities shipping waste out-of-state would not require other states to adopt California's hazardous waste requirements but would merely require that in-state generators and transporters of hazardous waste comply with HWCA regardless of the state in which they dispose the waste. Moreover, landfill operators in other states would only have to comply with HWCA if dealing in California waste.

A key distinction from Prop 12, however, is that HWCA's out-of-state oversight would apply to commerce leaving the state while Prop 12 was a precondition to dealing *within* the California market. Importantly, this distinction makes the proposed law's validity less certain if subject to *Pike* balancing. Because the law does not discriminate, a court would have to determine if its burdens on interstate commerce outweigh its putative local benefits. Those that save money from transporting California hazardous waste to Arizona or Utah, and the out-of-state landfills that profit from accepting said waste, would certainly face a burden from extending HWCA's regulations. On the other hand, the DTSC has a valid interest in ensuring that the state safely and responsibly treats and stores what it considers to be hazardous waste instead of dumping contaminated soil in regular landfills near critical agricultural hubs and water sources. Based on *NPPC,* six Justices on the Court—Roberts, Alito, Jackson, Kavanaugh, Sotomayor, and Kagan—could very likely find these burdens and benefits commensurable.[194] The law's extraterritorial effects, including its application of HCWA to out-of-state dumping and resulting cost increases, would become significant factors in such a balancing test.

However, as suggested by Verchick and this Note's analysis, *Pike* balancing should be understood as a proxy for evaluating a law's protectionist effects and process concerns. Under this framework, the preponderance of local burdens imposed by the law, like in the waste cases, should be considered. Local actors, including the DTSC itself, have benefited from dumping California hazardous waste in Arizona and Utah. Extending HWCA's requirements to those actors' activities outside California would not benefit local commerce at the expense of out-of-state commerce. Challengers could argue that extending HWCA's requirements would remove the incentive to export waste to other states, thus benefiting California waste disposal companies and hurting out-of-state landfills that profit from accepting California's contaminated soil. However, extending HWCA, much like Prop 12, would simply set conditions for companies doing business in California; significant costs would be borne in-state, and environmental benefits would flow out-of-state. Such a law arguably "falls

194. *See* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 391–93 (2023) (Sotomayor, J., concurring in part) ("The means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble Justice Gorsuch."); *see also id.* at 394–95 (Roberts, C.J., concurring in part and dissenting in part) ("Although *Pike* is susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be 'free private trade in the national marketplace.'").

outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting."[195] It would likely not benefit California's economy at the expense of out-of-state competitors since California generators would be more stringently regulated and incentivized to properly manage, under state law, all non-RCRA hazardous waste. The law also would not violate representational values because California businesses that face increased costs would arguably serve as adequate proxies for out-of-state waste recipients that lose potential business.

It is true that this proposed regulation could be vulnerable under *Pike* balancing. Because extending HWCA to California-generated waste that is taken out-of-state would hinder interstate waste trade, *Pike* balancing in its current form may endanger the law if a majority of the Court found this hindrance to outweigh the law's benefits. This possibility further supports Verchick's argument that the DCC should strictly be applied to protectionist laws and laws that violate principles of fair representation. Such an approach would not only allow states like California to take responsibility for domestically produced waste, but it would also prevent courts from taking the shortcut of equating protectionism with discrimination and applying strict scrutiny, as in *City of Philadelphia*, or evaluating state laws against amorphous "burdens" on interstate commerce. Furthermore, it would prevent courts from applying the DCC inconsistently and arbitrarily, a danger the *NPPC* court correctly foresaw would flow from the petitioners' proposed extraterritoriality test.

CONCLUSION

Forty-five years after the Court deemed waste to be an article of commerce in *City of Philadelphia*, its movement across state lines continues to create significant problems for "dumping ground" states that serve as destinations for other states' waste. Because *NPPC* has somewhat reoriented the DCC to its original purpose and ended the per se rule against extraterritoriality, California should extend enforcement of HWCA to actors dealing in California waste even outside of its borders. However, while expanding HWCA's reach would be more in line with California's values than the status quo, it might still face significant legal hurdles due its burden on interstate commerce. The *NPPC* opinion, in warning against the overinclusion problems with the extraterritoriality rule, could have also applied that argument to the Court's application of heightened scrutiny against past waste regulations deemed discriminatory. Instead of prioritizing an unfettered market over valid state regulations, the Court should tame the DCC further by restricting its application to laws designed to benefit in-state industry over out-of-state industry. While expanding HWCA's reach is more feasible post-*NPPC*, a more consistent approach to the DCC would further enable such non-protectionist, evenhanded laws with out-of-state effects.

195. C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 411 (1994) (Souter, J., dissenting).

Of course, many loose ends remain. Should extending HWCA in the manner proposed be treated differently under the DCC since it is an administrative measure rather than a measure adopted democratically via a ballot like Prop 12 was? Should more credence be given to the argument that laws like the one proposed create inconsistent regulations between states? What types of cost-saving measures would need to be implemented to make the proposed law more feasible given the high cost of hazardous waste landfill permitting and operation? Additionally, only two hazardous waste landfills operate in California, which warrants deeper examination of the environmental justice implications of and alternatives to disposal. These are valid questions that future research should explore.

What *NPPC* means going forward is not entirely clear, but it certainly has opened opportunities for both doctrinal reconsiderations and extending California waste regulation beyond state lines. If courts have less freedom to use the DCC to strike down non-protectionist state laws in favor of unfettered free trade across borders, states like California will have more freedom to regulate legitimate environmental and health concerns surrounding toxic waste that have been decades in the making.

We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.

A Textualist's Guide to "Waters of the United States" and Federal Environmental Statutes

By Liam Chun Hong Gunn[*]

Debates about textualism are now more practical than black-and-white arguments whether it is inadequate or the only true way to interpret law. This is likely because textualism is now the dominant method of interpretation on the U.S. Supreme Court. And yet, the textualist justices have begun interpreting environmental laws differently. Two current discussions help explain why. First is a methodological divide within textualism: flexible textualism versus strict ("formalist") textualism. Second is what Kevin Stack calls "the enacted purposes canon," which strict textualists use to resolve genuine textual ambiguities by staying true to textualism's principle of restraint. This Note first examines how textualism's plain meaning rule requires the enacted purposes canon. Next, it examines the Clean Water Act, which has a purposes section ideal for interpretation under the enacted purposes canon because of its clarity, specificity, and comprehensiveness. Finally, it examines the conservative split in Sackett v. EPA*, finding flexible textualism in Justice Alito's majority opinion and strict textualism in Justice Kavanaugh's concurrence. The* Sackett *example illustrates how interpreting the 1970s federal environmental statutes is the perfect test of whether textualism can work as intended: textualism's success depends on principled judges' good-faith restraint and deference to legislatures.*

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> I know what's legal, not what's right. And I'll stick to what's legal. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide . . . the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.[1]

1. Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978) (quoting ROBERT BOLT, *A Man for All Seasons* act 1, p. 147 (Heinemann ed. 1967)).

INTRODUCTION

"[C]urious," a "paradox," and "[not aligned] with some modicum of common sense and the public [interest]" is not how we expect Supreme Court justices to describe the practical consequences of their own opinions.[2] Chief Justice Warren Burger did not hide his disapproval of the Endangered Species Act in his famous and controversial majority opinion in *TVA v. Hill*. He noted that, in this case, a principled textualist approach would require sacrificing millions of dollars in public funds.[3] At oral argument, he even doubted the environmentalist plaintiffs' sincerity that they cared about the species at issue: "I am sure they just do not want this project."[4] Despite these misgivings, Burger ignored his personal view of reasonable public policy in favor of a textualist approach to the Endangered Species Act.

Does the story of *TVA v. Hill* show that textualism is, quite literally, an unreasonable failure of judicial interpretation? On the contrary, the whole story is a true success for conservative values, demonstrating textualism's potential for federal environmental law. Specifically, textualism urges judges' deference to legislatures to promote some of American conservatism's classical-liberal[5] values: democratic rulemaking by elected officials rather than judges, the rule of law, and holding elected legislators politically accountable. Despite Chief Justice Burger having no love for the Endangered Species Act's purposes or design,[6] he applied a textualist reading in good faith without succumbing to the temptations of a "judicial rewrite."[7]

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2. *Id*. at 172, 194.

3. *Id*. at 174.

4. Oral Argument at 01:07:02, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (No. 76-1701), https://www.oyez.org/cases/1977/76-1701.

5. Classical liberalism is the political tradition historically shared by the American "Left" and "Right" that includes, *inter alia*, lawmaking only with consent of the governed, rule of law that applies equally to all citizens, and legal protection of rights. Because this is a broad political tradition, it includes a variety of ideologies ranging from libertarianism to limited government intervention that promotes citizens' rights and welfare. SHANE D. COURTLAND, GERALD GAUS & DAVID SCHMIDTZ, LIBERALISM, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2022 ed. 2022) (noting many classical liberals advocated professional licensing, health and safety regulations, banking regulations, government infrastructure, improving the economic welfare of the poor, and sometimes even unionization). To be clear, this Note uses "classical liberalism" to refer to the values traditionally shared by the Left and the Right, rather than just one of the various ideologies that fall under its umbrella, such as libertarianism. *Id*. (noting that "[a]lthough classical liberalism today often is associated with libertarianism," the latter should not be confused with "the broader classical liberal tradition").

6. *See generally*, Holly Doremus, *The Story of Tennessee Valley Authority v. Hill: A Little Fish, a Pointless Dam, a Stubborn Agency, and a Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES: AN IN-DEPTH LOOK AT TEN LEADING CASES ON ENVIRONMENTAL LAW (Oliver A. Houck & Richard J. Lazarus eds., 2005).

7. *Tennessee Valley Authority*, 437 U.S. at 187 ("One might dispute the applicability of these examples to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. *But neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations.* On the contrary, the plain language of the Act . . . shows clearly that Congress viewed the value of endangered species as 'incalculable.'") (emphasis added).

This Note is not a conservative defense or a progressive attack on textualism. Helping textualist judges do their jobs is more useful than an academic battle to praise or condemn their approach. This Note therefore explores how federal judges can best apply textualism in good faith to federal environmental statutes. Textualism's classical-liberal values are generally not controversial. Instead, the two most important controversies are whether textualism succeeds in practice at advancing these values, and if not, whether they even could in theory. This Note demonstrates that textualism can promote these values for at least some laws—but only if judges live up to its principle of self-restraint. Federal environmental statutes that have specific and comprehensive enacted purposes, such as the Clean Water Act, are ideal for such an approach. Moreover, the success or failure of textualism to put its best foot forward may play a major role in whether young Americans, who especially care about environmental protection,[8] see textualism as legitimate when they eventually become future practitioners, scholars, and judges.

This Note's goal is to serve as a guide for textualist analysis of federal environmental statutes. It rests on three premises. First, it accepts that textualism is now one of—if not the—dominant approach to statutory interpretation in federal courts.[9] Second, it acknowledges good-faith criticisms of textualism that can help judges mitigate its key risks. Third, it notes two historical associations and rejects the idea that they are fundamental: textualism's association with conservativism, and conservatism's association with opposing conservation. Textualism's progressive critics and conservative supporters were equally shocked by Justice Gorsuch's recent principled textualist analysis in *Bostock*, which found Title VII prohibits discrimination of sexual orientation and gender identity.[10] Likewise, conservative values often align with environmental protection.[11] Many American conservatives have long argued that "Conservation

8. Valentino Dardanoni & Carla Guerriero, *Young People' s Willingness to Pay for Environmental Protection*, 179 ECOLOGICAL ECONOMICS 106853 (2021), https://www.sciencedirect.com/science/article/pii/S0921800920304523 (last visited Mar 16, 2025); *Do Younger Generations Care More About Global Warming?*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION, https://climatecommunication.yale.edu/publications/do-younger-generations-care-more-about-global-warming/ (last visited Mar 16, 2025) (finding that 70% of adults aged 18-34 say they worry about global warming); Gallup Inc, *Are Americans Concerned About Global Warming?*, GALLUP.COM (2024), https://news.gallup.com/poll/355427/americans-concerned-global-warming.aspx (last visited Mar 16, 2025).

9. *See* Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:09, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg (Justice Elena Kagan famously declaring, "we're all textualists now").

10. Bostock v. Clayton County, 590 U.S. 644, 653 (2020) This case held that when an employer fires an employee for being homosexual or transgender, they are discriminating based on traits or actions that the employer would not have questioned in members of a different sex, and so are discriminating based on sex in violation of Title VII of the Civil Rights Act of 1964 because "the limits of the drafters' imagination supply no reason to ignore the law's [textual] demands. *When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.*" *Id.* (emphasis added).

11. Matthew Feinberg & Robb Willer, *The Moral Roots of Environmental Attitudes*, 24 PSYCHOL. SCI. 56, 56-61 (2013) ("Conservatives are more likely to adopt proenvironmental positions if these

is Conservative."[12] Today, evangelical values inspire a growing chorus of young conservatives to carry on this mantle.[13] After all, it is quite literally more *conservative* to trust the traditional relationships that society developed with land and resources over many centuries of known climate conditions.[14] Likewise, it is more *liberal* to put one's faith in unregulated markets and inventions reshaping communities for an uncertain future without any concern of "progress" eroding our society's core values.[15]

This Note focuses on the Supreme Court's recent case of *Sackett v. EPA* as a comparison of how well the two distinct types of textualism follow the methodology's core values. Part I begins with an overview of textualism, including a discussion of the plain meaning rule, textualism's core principles and values, criticisms of textualism, and the two types of textualism: strict textualism and flexible textualism. It then introduces the enacted purposes canon. Part I ends by showing that flexible textualism permits using the enacted purposes canon,

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positions are discussed in moral terms that resonate with their moral commitments. . . . [R]esearchers have found evidence for five fundamental domains of human morality, which they labeled "harm/care" (concerns about the caring for and protection of other people), "fairness/reciprocity" (concerns about treating other people fairly and upholding justice), "in-group/loyalty" (concerns about group membership and loyalty), "authority/respect" (concerns about hierarchy, obedience, and duty), and "purity/sanctity" (concerns about pre-serving purity and sacredness often characterized by a disgust reaction). . . . [C]onservatives endorse in-group/loyalty, authority/ respect, and purity/sanctity more than liberals do. . . . [M]essages couched within a particularly conservative moral domain led them to adopt more proenvironmental attitudes, comparable to those of liberals. . . . [P]olitical polarization around environmental issues is not inevitable but can be reduced by crafting proenvironmental arguments that resonate with the values of American conservatives.").

12. ConservAmerica, formerly known as Republicans for Environmental Protection, has long used this slogan, citing traditional conservative philosophy and writings of Edmund Burke, Russell Kirk, and Richard Weaver. CONSERVAMERICA, https://www.conservamerica.org/ (last visited Mar. 7, 2024).

13. Feinberg and Willer, *supra* note 11, at 61 (citing Arjan Wardekker, Arthur Petersen & Jeroen P. van der Sluijs, *Religious Positions on Climate Change and Climate Policy in the United States*, *in* COMMUNICATING CLIMATE CHANGE: DISCOURSES, MEDIATIONS AND PERCEPTIONS 53 (2008), http://www.lasics.uminho.pt/ojs/index.php/climate_change) (finding that many Christian groups had become proponents of environmental protection by 2008, some of whom "perceive[d] environmental degradation as a desecration of the world God created and a contradiction of moral principles of purity and sanctity . . . . More generally, most of the world's religions emphasize humanity's role as stewards of the earth charged with keeping pure and sacred God's creation . . . "); *see, e.g.*, Meera Subramanian, *Generation Climate: Can Young Evangelicals Change the Climate Debate?*, INSIDE CLIMATE NEWS (Nov. 21, 2018), https://insideclimatenews.org/news/21112018/evangelicals-climate-change-action-creation-care-wheaton-college-millennials-yeca/.

14. *See* Michael Oakeshott, *On Being Conservative*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 168 (1962) ("To be conservative, then, is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss. Familiar relationships and loyalties will be preferred to the allure of more profitable attachments; to acquire and to enlarge will be less important than to keep, to cultivate and to enjoy; the grief of loss will be more acute than the excitement of novelty or promise . . . . It is to be equal to one's own fortune, to live at the level of one's own means, to be content with the want of greater perfection which belongs alike to oneself and one's circumstances.").

15. *See generally* Michael Keary, *A Green Theory of Technological Change: Ecologism and the Case for Technological Scepticism*, 22 CONTEMP. POL. THEORY 70 (2023) (contrasting environmentalists' fears that environmental problems will have social-political consequences with liberalism's faith that new technologies will resolve current foreseeable environmental problems).

while strict textualism requires it. Then, Part II shifts to a brief background on the Clean Water Act, its enacted purposes, and the Supreme Court's evolving interpretation of the term "waters of the United States." Part III brings these together by applying the principles discussed in Part I to the Clean Water Act topics discussed in Part II. This section shows how Justice Alito's flexible textualism fails to fully achieve the impartiality that textualists believe in, in contrast to Justice Kavanaugh's strict textualism defers to the legislature's written goals. Thus, a close examination makes *Sackett* an ideal lesson in how to apply the two textualisms to federal environmental statutes. Not all textualism is equal: the sharp contrast between the two approaches in *Sackett* reveals that strict textualism both better embodies textualism's core values and is far more appropriate for interpreting federal environmental statutes.

I. THE TWO TEXTUALISMS AND THE ENACTED PURPOSES CANON

To understand textualism's methodology and purposes, this Part begins with the plain meaning rule. Next, it discusses some of the most widespread criticisms of textualism so that judges can better mitigate important issues that critics identify. Then, it defines "strict textualism" and "flexible textualism," and explains the different rules of thumb, called "canons of statutory interpretation," that they rely on. Finally, it shows how the enacted purposes canon gives strict textualism many of the strengths that purposivism claims when statutes have enacted purposes sections, including many federal environmental statutes.

A. The Plain Meaning Rule

In the spirit of textualism, it is best to begin with its definition:

> Textualism is a method of statutory interpretation that asserts that a statute should be interpreted according to its plain meaning and not according to the intent of the legislature, the statutory purpose, or the legislative history . . . Even if the textualist approach is commonly regarded as a conservative approach to the law, the rigor of its application can lead to progressive outcomes.[16]

To this end, textualism relies first and foremost on the *plain meaning rule*:

> [When] interpreting a statute[,] a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[17]

16. *Textualism*, LEGAL INFORMATION INSTITUTE (2022), https://www.law.cornell.edu/wex/textualism.

17. Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted). *See also* United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940) (per Reed, J.) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

In other words, when the text has a single meaning in ordinary language with a clear application to the case's real-world content, then judges should look at only that plain meaning.

Returning to *TVA v. Hill*, Chief Justice Burger noted that few federal statutes speak in "plainer" language than the Endangered Species Act did in making no room for exceptions.[18] This was Congress's deliberate choice.[19] In its most modern form, called "new textualism," statutory interpretation starts and ends with the text, reading the whole act—or sometimes the entire U.S. code—for context.[20] During this analysis, judges often check how the legislature used the same or similar phrases in other provisions or in similar statutes.

What textualism excludes is most "external aids": anything outside the "four corners" of the text, such as legislative history, committee notes, or academic commentary. Textualists and critics alike note that because legislatures often produce laws through compromise, different legislators likely intend different purposes for the same provision.[21] Even worse, other legislators who voted for the same text might have even read different meanings into it![22] Legislators often write the final text through give-and-take compromises, settling on language that satisfies two (or more) sides that interpret the same words and phrases differently. For this reason, textualists fear that using external aids corrupts analytical rigor and risks judges cherry-picking support for what they *want* to read into a statute. Judge Harold Leventhal once said that all a judge needs to do to "support" their personal bias with legislative history "is to look over the heads of the crowd and pick out [their] friends."[23] Textualist justices further argue that even if a majority of both houses of Congress shared an intent, courts should not focus on legislative history as evidence of that intent because "we are a government of laws, not of men."[24] Courts should therefore focus on what Congress actually enacted rather than deciphering what it intended. In other words, even if almost all the legislators agreed on a single meaning, the

18. Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978) ("One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act . . . This language admits of no exception.").

19. *Id.* at 182-185. Chief Justice Burger doublechecked this plain meaning analysis against the legislative history, finding that Congress had actually removed draft language that would have limited the relevant section, Endangered Species Act, 16 U.S.C. § 1536 (1973), to only when it would be "practicable." *Id*. As I will discuss later, modern "new textualists" do not do this because if it were to contradict the plain meaning, the plain meaning would still be definitive. *Infra* Part I.

20. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 197-98 (3rd ed. 2022) (citing John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997)).

21. ERWIN CHEMERINSKY, *The Epistemological Problem*, *in* WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 44, 52-53 (2022).

22. *Id.*

23. ANTONIN SCALIA, A MATTER OF INTERPRETATION 36 (1997).

24. Digital Realty Tr., Inc. v. Somers, 583 U.S. 149, 172-73 (2018) (Thomas, J., concurring in part) (internal citations omitted). This opinion criticized the majority's reliance on a single Senate report, but suggested that enacted purposes might be treated differently. *See id.* at 173 (comparing the intent that "Congress [] state[s] in committee reports" as inferior to "that which is obvious on the face of a statute") (internal citations omitted).

legislative history does not guarantee the judge's interpretation is the same as the legislators'. In contrast, textualists argue, presuming that a legislature "says . . . what it means and means . . . what it says"[25] at least promises a single, objective meaning based on impartial and predictable methods.

To be clear, the plain meaning rule requires interpreting a statute according to its ordinary and plain meaning *only when* the language is, in fact, "clear and unambiguous." This raises two questions. First, how should a textualist decide when language is "clear and unambiguous"? And second, what should textualist judges do when the language is not? While this Note cannot definitively answer the first question,[26] it is important for understanding how strict and flexible textualists differ in approaching the second question.

B. The Purposes and Risks of Textualism

1. Textualism's Values

Although textualism is intended to be an objective, value-neutral approach, textualism as a judicial philosophy is not value-neutral. Textualism's self-restraint and focus on a law's text have explicitly classical-liberal ideals: democratic rulemaking; public policy made by elected officials with more expertise than judges; promoting the rule of law with a fixed meaning of laws that the general public can understand; and holding elected legislators accountable by requiring them to fix their mistakes.

The first value, democracy, includes a reason Chief Justice Burger cited in *TVA v. Hill*: preserving separation of powers by honoring legislative intent.[27] He explains that under the constitutional separation of powers, the Court may not use interpretative principles to dodge Congress's policies simply because judges believe they are unreasonable.[28] Just as "'[i]t is emphatically the province and duty of the judicial department to say what the law is,' . . . it is equally—and emphatically—the exclusive province of the Congress" to set priorities and design public policy.[29] Textualists' commitment to the strict separation of powers prohibits any Supreme Court decrees that override constitutional acts of Congress,[30] even ones out of step with "common sense." In other words,

25. Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

26. The Supreme Court has noted "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." United States v. Turkette, 452 U.S. 576, 580 (1981).

27. Tennessee Valley Authority v. Hill, 437 U.S. 153, 194-95 (1978) ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.' Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.").

28. *See id.* at 195.

29. *Id*. at 194 (quoting Marbury v. Madison, 5 U.S. 177 (1803)).

30. Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[S]ome may conceive of judging more

textualists do not truly ignore the legislative intent. They simply determine it from *only* the statute's text in context, presuming that a legislature "says . . . what it means and means . . . what it says"[31] to prevent judges cherry-picking legislative history to disregard the text that the legislature actually enacted. Textualists believe this approach is necessary to uphold the separation of powers.[32] They fear judges who do not follow formalist approaches will invade Congress's lawmaking authority by "substituting their [preferences for] that of the legislative body."[33]

This democratic separation of powers goes hand-in-hand with textualism's value of practical policymaking: elected legislators are better placed to write laws than judges are to legislate from the bench. Chief Justice Burger's Hill opinion articulates this as well:

> Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species. Our responsibility . . . is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives.[34]

In other words, even if courts had the constitutional authority to craft nuanced public policy, judges typically lack the technical expertise and workforce to do so. Chief Justice Burger explains that legislating from the bench on complex technical issues is futile because judges have deep but narrow expertise that leaves them well-qualified to decipher legalese, but unqualified to comment on scientific and public policy matters.[35]

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as a . . . policymaking exercise in which judges should or necessarily must bring their policy and philosophical predilections to bear on the text at hand. I disagree with that vision of the federal judge in our constitutional system. The American rule of law . . . depends on neutral, impartial judges who say what the law is, not what the law should be. . . . [this is] a constitutional mandate in a separation of powers system [because] . . . When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power.").

31. Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted); *see also* United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *see generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

32. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 197 (3rd ed. 2022) (citing James J. Brudney, *Confirmatory Legislative History,* 76 BROOK. L. REV. 901 (2011)).

33. *Id*. at 200 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)); *see, e.g.,* Kavanaugh, *supra* note 30, at 2120 ("Under the structure of our Constitution, Congress and the President—not the courts—together possess the authority and responsibility to legislate. As a result, clear statutes are to be followed.").

34. ESKRIDGE JR., BRUDNEY, AND CHAFETZ, *supra* note 32, at 169 (quoting Hill v. Tennessee Valley Auth., 549 F.2d 1064 (1977)).

35. *Id*. at 169-95 ("We have no expert knowledge on . . . endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam . . . 'Current project status cannot be translated into a workable standard of judicial review. Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species. Our responsibility under § 1540(g)(1)(A) is merely to preserve the status quo . . . guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives.'").

Third, some textualists believe that interpreting laws according to their most ordinary and natural reading also provides the fairest notice to the public.[36] This is intuitive: the general public is more likely to understand laws that actually mean what people think they mean than laws that can only be understood by judges fluent in legalese and conducting comprehensive legislative history surveys. Plus, presuming laws to mean their plain meaning maintains predictability and consistency over time. As I will discuss later, this especially relevant for the Clean Water Act.[37]

Finally, textualism is intended to help voters hold legislatures accountable. The plain meaning rule does not assume that all written laws are perfect when judges interpret them. Instead, textualist judges leave to those legislators the responsibility of fixing any flaws they wrote in the law. Because Congress is responsible for writing laws, textualists believe it should also be responsible for choosing which amendments are necessary and which issues to tolerate. By focusing only on the text, judges prevent legislators from punting their responsibility to write laws that are clear and precise enough to guide private citizens and government agencies. If the statute is too ambiguous or leads to outcomes that voters dislike, the legislature cannot simply wait for judges to fix it before they are held accountable in the next election.

This back-and-forth[38] between Congress and the Court is precisely what unfolded after the *TVA v. Hill* decision. Although the Court disapproved of the policy's design, it still enforced the "unreasonable" outcome that Chief Justice Burger felt the statute's text mandated.[39] This preserved Congress's political incentive to update the Endangered Species Act, rather than punt a flaw it created to another branch of government. In fact, mere months after the Supreme Court decision, Congress amended the Endangered Species Act to create a new exemption process.[40] These amendments even specifically required the Committee to consider exemptions for the dam in *TVA v. Hill*. Creating this new exemption as a "pressure-relief valve" was a compromise between environmentalists and non-environmentalists.[41] But more importantly, deference to Congress to carefully craft compromises is itself a pressure-release valve

36. *See generally Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).

37. Unlike many criminal laws, the Clean Water Act includes some criminal sanctions under a *mens rea* of negligence. Sackett v. EPA, 598 U.S. 651, 681 (2023) ("Facing severe criminal sanctions for even negligent violations, property owners are left to feel their way on a case-by-case basis. Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what Congress certainly intended the statute to cover.") (internal citations and quotations omitted).

38. In technical terms, we might call this a dialectic: Congress's original policy is its thesis, the Court's criticism and public opposition to the results is antithesis, and Congress's response through either amendments or clarification is the synthesis.

39. *Tennessee Valley Authority*, 437 U.S. at 166.

40. Holly Doremus, *The Story of Tennessee Valley Authority v. Hill: A Little Fish, a Pointless Dam, a Stubborn Agency, and a Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES: AN IN-DEPTH LOOK AT TEN LEADING CASES ON ENVIRONMENTAL LAW 23 (Oliver A. Houck & Richard J. Lazarus eds., 2005).

41. *Id.*

superior to any ad hoc, piecemeal solutions decided by whoever the majority of justices happened to be at any given time.[42] Altogether, the story of *TVA v. Hill* shows that, as long as textualist judges are principled enough to tolerate public policy outcomes they find unreasonable, textualism can sometimes succeed in promoting its core values.[43]

2. Criticisms of Textualism

Critics of textualism generally fall into two camps. The first says that textualism is impossible even in theory; the second argues that regardless of whether it is theoretically possible, in practice, it is merely "a smokescreen by conservative judges to reach ideological[] outcomes."[44] In the first category, much of the literature focuses on the fundamental limits of language, especially language written by compromising authors. These critics ask how judges should determine where language is genuinely "clear and unambiguous." Luckily for Chief Justice Burger, the Endangered Species Act's relevant language truly was unambiguous.[45] For most laws, however, judges are not so lucky. Textualism does not presume every word to have its literal meaning in modern English, so even textualist judges must sometimes go beyond "the four corners of the page" to specific secondary sources to determine a phrase's meaning in context.[46]

These critics then ask how textualism deals with language that could have multiple interpretations. Famously, textualists such as Justice Scalia jump first to dictionaries to resolve ambiguous words and phrases.[47] But this in turn raises two questions. First, which dictionary should a judge use? If the statute borrows language from an earlier statute, did the drafters fully understand the original

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42. It was likely Chief Justice Burger's actual intention as a textualist to rely on this legislative pressure-relief valve. *Id.* at 22 ("[Chief Justice] Burger may have been trying to goad Congress into action. His memo assigning himself the case had noted that he planned to 'serve notice on Congress that it should take care of its own 'chestnuts.' He went out of his way to point out in a footnote exactly how trivial this species was, noting how many darter species occurred in the Tennessee system, how often new ones were discovered, and how hard it was to tell the species apart.").

43. Compare this with purposivism, which does ask judges to consider whether relying on only the text's plain meaning is reasonable in light of the "spirit of the law." *Cf.* United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("[E]ven when the plain meaning did not produce absurd results but *merely an unreasonable one* 'plainly at variance with the policy of the legislation as a whole' [courts should] follow] that purpose, *rather than* the literal words.") (emphasis added) (citations omitted).

44. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265-66 (2020).

45. *Tennessee Valley Authority*, 437 U.S. at 173 ("One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to insure[sic] that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species . . .' This language admits of no exception.") (quoting Endangered Species Act, 16 U.S.C. § 1536 (1973)).

46. *See, e.g.*, Grove, *supra* note 44 at 291 ("[A] textualist is unlikely to read 'domestic violence' in the Ku Klux Klan Act to encompass tragic abuses within a family. Instead, textualists (of all stripes) construe semantic language with attentiveness to cultural cues, such as the history that tells us 'domestic violence' may also refer to a violent uprising.").

47. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 732 (2006) (plurality opinion) (quoting Webster's New International Dictionary 2882 (2d ed. 1954)) (basing its ultimate finding largely on the different definitions of "water" and "waters").

language in that earlier period's context? Even if so, the drafter may have updated some phrasing while intending to keep the same meaning as the original words that no longer exist, requiring some discretion to decide if the words are "substantially" the same.[48] Second, once a judge selects a dictionary, how should they decide between different definitions for the same word that might produce different outcomes, but seem equally reasonable? Finally, dictionary definitions are of little help when dictionaries define related words by referencing each other.[49] Or statutes might simply contradict themselves or each other.[50] Critics frequently raise these questions because textualists only indirectly factor into their methodology the drafters' intent or range of intents.

Textualism is often contrasted with another approach called *purposivism*: the view that the statute's text should be secondary when its plain meaning conflicts with what the judge believes its purpose to be based on context clues, including any "patterns of policy judgments made in related legislation, the 'evil' that inspired Congress to act, [and] the legislative history."[51] In other words, purposivist judges try to understand the law's purpose based on both its text and sources, and then interpret it according to "the spirit of the law" rather than "the letter of the law."[52] Purposivist critics point out that if textualism becomes simply "dictionary-shopping and statute-parsing," it would replace purposivists' "complex normative art" with "a mere shell game" of disguising judges' policy goals.[53] To these critics, textualism is a mere excuse for judges continuing to "look . . . out over the crowd and pick . . . out [their] friends," no different from textualists' criticism of purposivism.[54] Others fear that statutory interpretation

48. *See, e.g.*, Olevik v. State, 806 S.E.2d 505, 515-16 (2017) (reasoning that "criminate" in Georgia's 1877 constitution and "incriminating" in the modern constitution have "identical" meanings).

49. For example, if *A*'s definition includes *B*, *B*'s definition includes *C*, and *C*'s definition includes *A*, this circular definition creates uncertainty.

50. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 649-73 (2007) (addressing the contradiction in the Endangered Species requiring Fish and Wildlife Service consultation for any federal action that may affect listed species, while the Clean Water Act provides that the U.S. Environmental Protection agency "shall" transfer NPDES authority to a state that meets specific enumerated criteria).

51. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006).

52. *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) ("There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes," but simply reading its plain meaning is not always "sufficient . . . to determine the purpose of the legislation. . . . Frequently[], even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [courts should] follow[] that purpose, *rather than* the literal words."). This case has been called "the most important purposivist precedent of the twentieth century." Manning, *supra* note 51, at 87. Intentionalist purposivists focus on the legislature's *intended purpose*, while teleological purposivists focus on the law's *"objective" purpose*. M. Aalto-Heinila, *Purposivism*, ENCYCLOPEDIA OF THE PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY (2023), https://doi.org/10.1007/9 78-94-007-6730-0_1124-1. But this is distinction is not as important for this Note as the differences between purposivism and textualism.

53. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 202 (3rd ed. 2022).

54. *Id.* at 203.

without legislative history creates a "law without mind": interpretation that mindlessly focuses on the text without any of the motivation behind it "sever[s] the connection between democracy and the rule of law,"[55] worsening the risk of judicial rewrites.[56] These critics fundamentally disagree that judges should be "umpires" who merely "call balls and strikes, and [do] not to pitch or bat."[57]

Sadly, empirical data seems to support this criticism regarding textualism's most famous advocate in the Supreme Court's environmental jurisprudence.[58] A survey of Justice Scalia's opinions in environmental cases found that while he adhered to his textualist principles from 1990 to 2000, he increasingly abandoned textualist methodology from 2001 to 2016 for both interpretations of "legislative intent" and "economic arguments" to limit environmental regulation.[59]

C. Two Textualist Approaches to Ambiguity

1. Strict Textualism and Textual Canons

In "Which Textualism?" Tara Leigh Grove lays out the different fundamentals of "formalistic" textualism, which I will refer to as *strict textualism* and *flexible textualism*.[60] Under strict textualism, judges faithfully parse the statutory language by "focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case."[61] Critically, all textualists recognize that textualism is not "literalism" because language can only be understood in context.[62] The key question is what parts of

55. *Id.* at 202 (citation omitted).

56. *See, e.g.,* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 323-24 (2006) (Breyer, J., dissenting) ("[O]ur ultimate judicial goal is to interpret language in light of the statute's purpose. Only by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate implementation, upon which the legitimacy of our constitutional system rests. . . . By disregarding a clear statement in a legislative Report adopted without opposition in both Houses of Congress, the majority has reached a result no Member of Congress expected or overtly desired.").

57. *Cf* John G. Roberts, Jr., Opening Statement at the Confirmation Hearing for Chief Justice of the United States (Sept. 29, 2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process.

58. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (calling the presumption that the plain meaning is the "best evidence" of legislative intent a "false notion," and instead advocating lawyers and judges to do uncover legislative intent through historical research).

59. *See* Canaan Suitt, *The Promise and Perils of Textualism for Environmental Advocacy*, 46 WM. & MARY ENVTL. L. & POL'Y REV. 811, 827 (2022) (citing Rachel Kenigsberg, *Convenient Textualism: Justice Scalia's Legacy in Environmental Law*, 17 VT. J. ENVTL. L. 418 (2016)). This contrasts with the textualist argument that the rule of law requires a more predictable method of statutory interpretation. *See e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 UNIVERSITY OF CHICAGO LAW REVIEW 1175, 1179 (1989); Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

60. Grove, *supra* note 44 at 265-66.

61. *Id.* at 267.

62. This can be incredibly frustrating. *See id.* at 280 (pointing out that "[t]extualists have variously used terms such as 'semantic context,' 'social context,' and 'full context,' without [clearly defining them or] explaining whether the terms refer to the same or different concepts").

the context should matter. What defines strict textualism is the agreement that it should be limited to textual analysis and textualist canons of interpretation. Even when the text leads to unreasonable outcomes, "naked policy appeals" should not invite judges to legislate from the bench.[63] For a fuller list of these textualist canons, see the Appendix.

Critics argue that this "wooden" approach is numb to the specific statute's goals and justifications.[64] Setting aside the enacted purposes canon for the moment, this is partially true. But strict textualism is not a cult for grammar and dictionaries. Instead, it has a well-documented goal of deference *across* cases, rather than switching moral codes with each new statute or new Supreme Court.[65] Restraint should constrain judicial discretion so that a judge does not unintentionally, or intentionally, misread a statute to "pursue his own objectives and desires."[66]

2. Flexible Textualism and Normative Canons

In contrast, flexible textualism allows interpreters to understand statutory text by considering policy context, social context, and practical outcomes, but still focuses primarily on the text without legislative history. Justice Alito explained his approach in these terms in *Bostock*: the Court needed to acknowledge "societal norms" in 1964 to understand "what the text was understood to mean when adopted" instead of "an impermissible attempt to displace the statutory language."[67] In contrast, Judge Easterbrook, a leading advocate of using textualism to restrain judicial activism, argued that this intention-focused approach may not sufficiently constrain judges because "[t]he use of original intent rather than an objective inquiry [into the text's] language . . . greatly increases the discretion, and therefore the power, of the court" because it has "endless flexibility" to decide whose intent matters.[68] Including a judge's subjective ideas about "social norms" makes the court an active

63. Grove, *supra* note 44 at 282 (quoting Bostock v. Clayton County, 590 U.S. 644, 680-81 (2020)) ("Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.").

64. *Id*. at 270.

65. *See id.*

66. ANTONIN SCALIA, A MATTER OF INTERPRETATION 17-18 (1997).

67. *Bostock*, 590 U.S. at 716-17 (Alito, J., dissenting); *see also* Grove, *supra* note 44 at 284-85 (further documenting Justice Alito's flexible textualist criticism of Gorsuch's textualist majority opinion in non-textualist grounds such as circuit precedents and subsequent legislative history).

68. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 62-63 (1988); *see also* ERWIN CHEMERINSKY, *The Rise of Originalism*, *in* WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 1, 21-22 (2022) (noting, for example, that constitutional originalists still debate whether their focal point should be the original intent of the Framers or the society at large; and that even those who argue for the latter must answer which citizens' interpretations should resolve disagreements).

participant that decides how to apply its canons, pushing the boundaries of an "umpire . . . call[ing] balls and strikes."[69]

Still, flexible textualists insist that attention to practical policy outcomes makes it the more valid textualism. In *Bostock*, Justice Alito attacked the majority's "brusque refusal to consider the consequences of its reasoning" as "irresponsible."[70] Finding some common ground with purposivists, flexible textualists believe that it does not serve justice for judges to find interpretations that undermine public policy. This belief is embodied in "normative canons" of interpretation. For textualists, the most controversial of these normative canons is the absurdity doctrine: judges should reject an interpretation that would lead to "practically absurd" outcomes, even if otherwise required by the text's plain meaning.[71] Absurd outcomes "sharply contradict society's 'common sense' of morality, fairness, or some other deeply held value."[72] By introducing personal judgment and social norms into the very definition of absurd, this doctrine gives judges the chance to override the law's plain text by interpreting "absurdity" according to their own policy goals.[73]

To be clear, the Burger Court also typically applied a "soft" plain meaning rule, using legislative history and purpose as "confirmatory" evidence for double-checking whether the plain meaning was as unambiguous as they first thought. The key difference between this and the later flexible textualism is a matter of restraint. As Justice Barrett has noted, non-textual canons become a problem for textualists when applied so "aggressive[ly]" that they enable a "court to forgo a statute's most natural interpretation in favor of a less plausible one."[74] Building on this, Grove argues that the safest approach for textualists is to use normative canons only where a statute is genuinely ambiguous, and even then, only to resolve that ambiguity and no more.[75]

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69. *Cf* John G. Roberts, Jr., Opening Statement at the Confirmation Hearing for Chief Justice of the United States (Sept. 29, 2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process.

70. *Bostock*, 590 U.S. at 725 (Alito, J., dissenting).

71. Importantly, in this context, "absurd" in this context does not mean "illogical" or self-contradicting, but "ridiculously unreasonable, unsound, or incongruous; . . . extremely silly or ridiculous," but rather the everyday meaning of "absurd" as silly or insane. *Absurd definition & meaning*, MERRIAM-WEBSTER (2024), https://www.merriam-webster.com/dictionary/absurd.

72. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2405-06 (2003).

73. Grove, *supra* note 44 at 286 (2020) ("the absurdity doctrine enables a court to inject policy concerns into the interpretive inquiry—even to the point of overriding a plain text."); Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) To avoid judges simply using the absurdity canon to "fix" policies that they believe Congress mistakenly wrote, the bar of absurdity must be very high because "one person's reasonableness may be another person's absurdity. Or one person may think that an idea is bad but not absurd whereas another person may think it absurd." *Id.*

74. Amy Coney Barrett, *Substantive Canon and Faithful Agency*, 90 BOS. U. L. REV. 109, 109-10 (2023) (suggesting judges should draw the line by applying normative canons in an "aggressive" fashion only when they have clear constitutional underpinnings but acknowledging that this will not always be clear); *see also id.* at 167-77.

75. Grove, *supra* note 44 at 287 (2020). *See also*, Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARVARD LAW REVIEW 515 (2023).

Both forms of textualism rely on judicial restraint. However, navigating this narrow tightrope is perhaps the key reason flexible textualism depends so much more heavily on restraint in muddied linguistic waters than strict textualism.

D. The Enacted Purposes Canon

Strict textualism requires deference to the plain meaning whenever possible, without looking beyond the law's text to legislative history, policy considerations, or most other external aids. But as we have seen, strict textualists still face the challenge of genuine ambiguity. Fortunately, in the context of environmental statutes, strict textualism allows for and even requires judges to interpret ambiguities in the context of their "enacted purposes": the goals that the statute's text clearly and explicitly states.

Justice Lewis Powell best articulated the enacted purposes doctrine: "We cannot interpret federal statutes to negate their own *stated* purposes."[76] This is intuitive enough. Because the legislature wrote purposes into the law itself, judges should understand those purposes as important context to understand what each specific passage means.[77] This aligns with one of the most fundamental principles of textualism: when Congress votes to include purposes into the text, judges cannot override the election representatives' consensus interpretations with their own interpretations.[78]

Most helpfully for textualists, agencies and activist judges cannot simply "interpret [a passage] to negate [the statute's] own stated purposes," the legislature's enacted purposes narrow the range of plausible interpretations.[79] In addition, enacted purposes explicitly prohibit those agencies and judges from making self-serving inferences by cherry-picking other parts of the U.S. Code with goals that are in tension with the statute at hand.[80] For example, when a court reviews an agency's action, it can quickly disregard an agency interpretation broadly inconsistent with the statute's enacted purposes, limiting a President's ability to drive policies that are in tension with Congress's goal for the statute.[81]

This might sound too good to be true. After all, isn't this suspiciously like purposivists' reliance on legislative history that textualists criticize? To the contrary, purposivism is significantly different because it considers unenacted committee notes, preambles, and legislative records alongside the enacted

76. New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419-20 (1973). *See also,* King v. Burwell, 576 U.S. 473, 493 (2015) (citing *Dublino* and reaffirming the use of this canon to resolve textual ambiguity) (emphasis added).

77. Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA LAW REV. 283, 287 (2019) ("[B]ecause purpose clauses are enacted into law as part of the statute and . . . provide authoritative context for reading the entire statute . . . [they should] guide judicial discussions of the statutory purpose").

78. *Id.*

79. *Dublino*, *supra* note 76.

80. Stack, *supra* note 77, at 286.

81. *Id.*

purpose provisions.[82] In contrast, textualists consider only purposes that the House of Representatives, Senate, and President all approved (or that has passed over a presidential veto) to be written into the law.[83] Under the enacted purposes canon, the only authoritative purposes are those that the legislature passes through the same democratic crucible as the rest of the text.[84] Bicameralism and presentment to the President ensures that a supermajority approved of Congress's written purposes. Political minorities had the power to block legislation, or at least to insist upon compromise. As Jarrod Shobe explains, "a statute's [textual] findings and purposes can serve as guideposts to understanding . . . the rest of the text" because they reflect congressional intent better than committee notes or cherry-picked quotations from the legislative record.[85]

Like any canon of construction, the enacted purposes canon cannot eliminate all ambiguity. Purpose statements will not always dictate using one interpretation over another.[86] However, it is still a powerful and uncontroversial tool that provides context for ambiguous words and phrases.[87] Indeed, at least one liberal and one conservative justice on the Supreme Court have explicitly said that if Congress wishes the courts to rely on any part of the legislative record in future cases, it needs only to vote to make that provision authoritative.[88]

As this Note will explore in the Clean Water Act context, the enacted purposes canon is necessary for the core democratic principle of textualism: requiring agencies and judges to defer to the legislature's will. Because flexible textualism allows a judge to override the enacted purposes with their preferred normative canons, it gives the judge leeway to insert their own policy preferences—or at least their own prioritization of the enacted purposes. In contrast, strict textualism's deference to the legislature's enacted purposes when they are clear and relevant to the issue at hand, ensures judges do not simply

82. *Id.* at 286-87 (emphasis added); *cf id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012)) (arguing that a preamble, like true enacted purposes section, "*is* a permissible indicator of meaning")) (emphasis added).

83. Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2134 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[Putting] the key [passages of] committee or conference reports . . . into the statute itself and have the Members of Congress vote on it . . . would be both formally and functionally authoritative. [And this] would be more effective and far more acceptable to all judges than [purposivism].").

84. Stack, *supra* note 77, at 286-87.

85. Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 715 (2019).

86. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2143-44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (noting that Congress cannot feasibly anticipate all future issues with written goals and instructions on how to interpret its text, particularly given its strict time constraints); *see generally* Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA LAW REV. 283, 287 (2019).

87. Stack, *supra* note 77, at 302.

88. Kavanaugh, *supra* note 86 at 2122-24, 2123 ("[I]f there is some key point in the committee report, there is an easy solution to make sure it is "authoritative": vote on it when voting on the statute."); Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 32:10, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg ("[Committee reports are] not what Congress passed, right? If they want to pass a committee report, they can go pass a committee report. They can incorporate a committee report into the legislation if they want to.").

replace an agency's unreasonable interpretation with their own unreasonable interpretation. Because the judiciary branch has the final say in interpretation,[89] judges' power to unilaterally or inconsistently interpret statutes would be more fatal to Congress's control and separation of powers than agencies' arbitrary and capricious interpretations.[90]

Textualists and purposivists should join in support of the enacted purposes canon, even if purposivists might prefer the broader prefatory-materials canon.[91] Those who fear that textualism results in "law without mind" should at least be satisfied when the canon is applied to statutes with sufficiently comprehensive enacted purposes, including many federal environmental statutes.[92] Furthermore, textualists and their critics should agree that this approach narrows the range of acceptable interpretations, rather than broadening it. Some critics have argued that textualism backfires because a court whose interpretation draws only from the statute's text actually has more leeway than one that is also limited by non-textual canons of construction and precedent.[93] Even if textualists and their critics never agree if this is true in general, both could agree that purposes written into the very text of the statute narrow the range of acceptable interpretations.

The enacted purposes doctrine strengthens textualism with purposivism's key promise without incorporating its key weakness because it uses textualism's rigorous methodology to ensure democratic policymaking. However, as we will see in *Sackett*, its key challenge is that judges must still resolve how to prioritize enacted purposes that are in tension with one another.[94]

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89. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

90. *Compare* Transcript of Oral Argument at 142-43, Relentless, Inc. v. Department of Commerce, 2024 WL 250638, 142-143 (2014) (No. 05-493) (Kavanaugh, J.,) (criticizing *Chevron* deference by noting "the role of the judiciary historically under the Constitution [is] to police the line between the legislature and the executive to make sure that the executive is not operating as a king, not operating outside the bounds of the authority granted to them by the legislature") *with id.* at 69-70, 99 (J. Jackson) ("I'm worried about the courts becoming uber-legislators . . . judicial policymaking is very stable but precisely because we are not accountable to the people and have lifetime appointments. . . . [W]e would have a [] separation-of-powers concern related to judicial policymaking.").

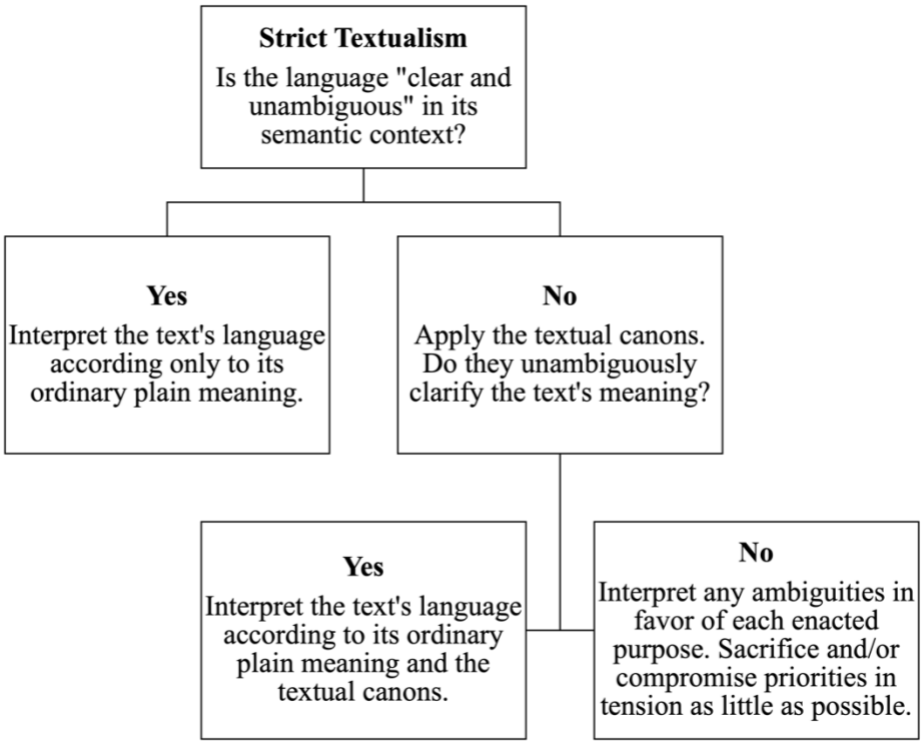
91. Stack, *supra* note 77, at 285-86, 313-16 ("[T]he canon has the pragmatic virtue of being a point of common ground between textualist and purposivist approaches to statutory interpretation. On the one hand, it satisfies textualism's core commitment to privileging the enacted text. . . . On the other hand, it reflects the core commitment of purposivism that the specific provisions of statutes be interpreted in light of their more general purposes. . . . The principle has been relied upon by jurists with very different perspectives on statutory interpretation—suggesting its prospects for emerging as a consensus plank on a closely divided Supreme Court.")

92. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 202, 202 (3rd ed. 2022) (arguing that it "[s]hould[] make a normative difference that a statute was enacted by legislators seeking to solve a social problem in the face of disagreement, and not by a drunken mob of legislators with no apparent purpose or who had agreed to adopt any bill chosen by a throw of the dice . . . .").

93. *Id.* at 200.

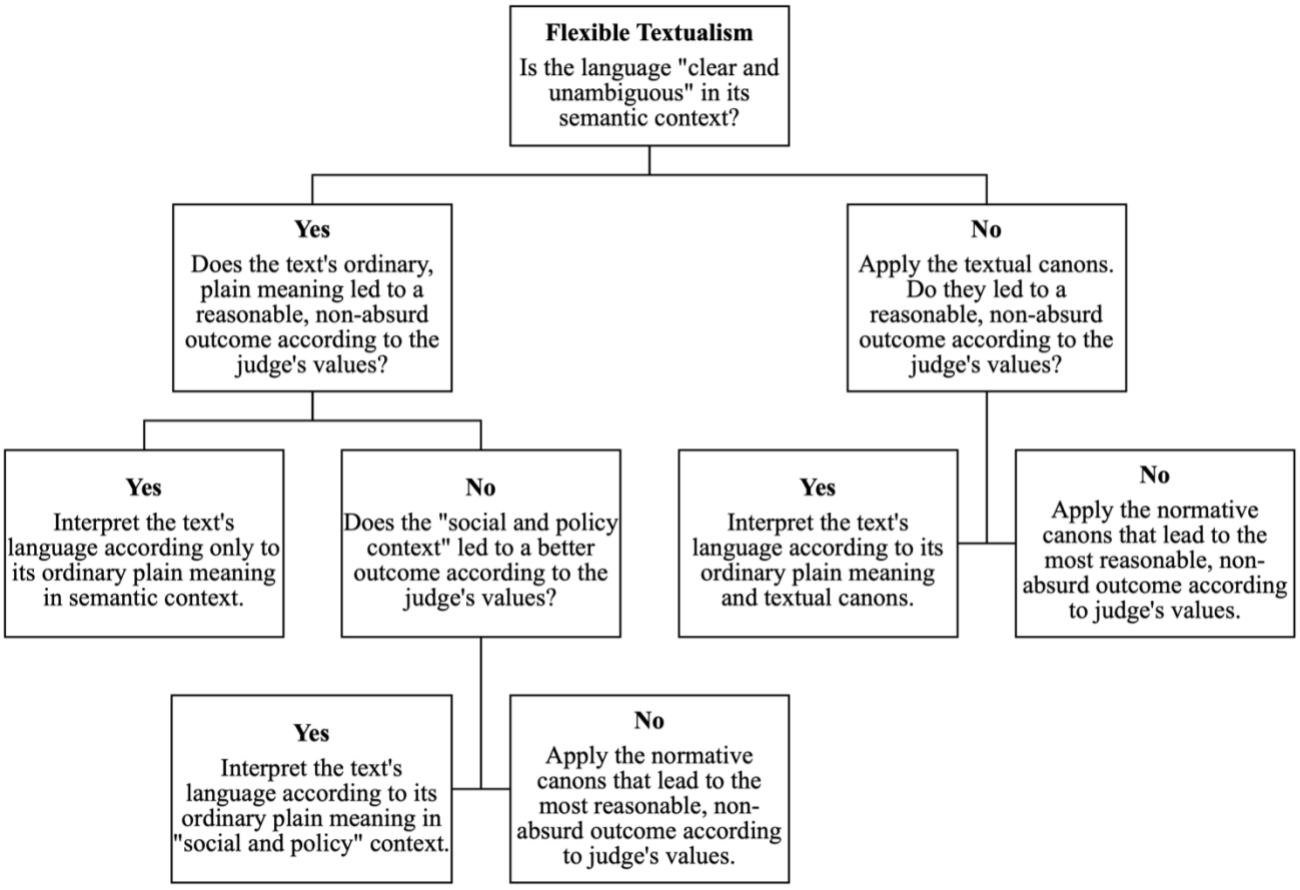
94. *See, e.g.*, Fed. R. Civ. P. 1. The Federal Rules of Civil Procedure shall "be construed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.* Although the rules begin with some of the language most obviously guiding future interpretation, for any complex

Figure 1: Under strict textualism, a judge's sense of reasonableness never allows them to insert their own values and policy objectives.



action, speed and cost-efficiency will always be intention with a court's deliberateness and carefulness to ensure procedural justice and just outcome.

Figure 2: Under flexible textualism, a judge's sense of "reasonableness" allows their values to determine the ultimate outcome at multiple points.



II. A BRIEF HISTORY OF "WATERS OF THE UNITED STATES"

The Supreme Court's textualist justices showcased the contrast in how strict and flexible textualism handle Congress's enacted purposes in *Sackett v. Environmental Protection Agency*.[95] The only way to understand *Sackett*'s significance for textualism is to see how the Supreme Court had already used textualism to address the Clean Water Act's central ambiguity: the meaning of the phrase "waters of the United States." [96] Beginning almost forty years before *Sackett*, the Supreme Court twice clarified where the outer limits lie. In the first of the original trilogy of waters of the United States cases, *United States v. Riverside Bayview Homes*, the Court unanimously used the Clean Water Act's enacted purposes to find that "waters of the United States" must mean at least

95. *See generally* Sackett v. EPA, 598 U.S. 651 (2023).
96. 33 U.S.C. § 1362 (1977).

some wetlands.[97] In the second case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the majority relied on good-faith textualism to identify some of the water bodies that do not fall into this category.[98] The third case, *Rapanos v. United States*, was a split decision.[99] A disagreement between the two textualist approaches left property owners and regulators unsure which wetlands count as "waters of the United States."[100] While agencies under the Obama Administration followed Justice Kennedy's middle-ground approach in *Rapanos*, Justice Alito's later opinion in *Sackett* followed and built on Justice Scalia's plurality opinion in *Rapanos*.

Throughout this trilogy, strict textualist, flexible textualist, and purposivist justices each began their analysis with the Clean Water Act's purposes as they are written into the statute's text. These enacted purposes are the best place to start our understanding of textualism for the Clean Water Act.

A. The Clean Water Act's Enacted Purposes

Sackett and the trilogy of cases that came before it focused on the meaning of "waters of the United States" in the Clean Water Act.[101] The Act defines the scope of its jurisdiction with its predecessor's[102] language: "navigable waters."[103] However, the Act then vaguely redefines this term as "waters of the United States" (often abbreviated to "WOTUS"). Although justices from all ideological leanings agree that "waters of the United States" does not mean only interstate waters that are literally navigable,[104] federal agencies faced a series of lawsuits with private landowners for almost half a century to determine its exact term's meaning and scope.

Importantly for an enacted purposes analysis, the Clean Water Act begins by declaring Congress's goals and priorities. Its first goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[105] Supporting this, the Act lays out seven sub-goals, such as to "end all discharge of pollutants into 'the navigable waters' by 1985; making all waters safe for fishing and swimming by 1983; and ending the discharge of toxic

97. 474 U.S. 121, 133 (1985).

98. 531 U.S. 159, 171-72 (2001). This decision was based in part on Article I interstate commerce powers that are not relevant for this Note. *See generally id.*

99. 547 U.S. 715 (2006).

100. *See* Adrienne Froelich Sponberg, *US Struggles to Clear Up Confusion Left in the Wake of Rapanos*, 59 BIOSCIENCE 206 (2009).

101. 33 U.S.C. § 1362 (1977).

102. Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407-426 (1899).

103. 33 U.S.C. § 1362 (7).

104. *See* Sackett v. EPA, 598 U.S. 651, 672 (2023) ("[W]e have acknowledged that the [Clean Water Act] extends to more than traditional navigable waters."); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 175 (2001) (Stevens, J. dissenting) (analyzing the Clean Water Act's legislative history to conclude that the definition of "waters of the United States" "requires neither actual nor potential navigability").

105. 33 U.S.C. § 1251(a).

pollutants in toxic amounts."[106] The Act's second purpose is to preserve federalism and states' primary responsibilities in water pollution management: "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ."[107]

Together, these goals give us two takeaways. First, the Clean Water Act has two goals relevant to our analysis: restoring the nation's waters' ecological health[108] and preserving states' primary responsibility in this mission.[109] At first glance, the plain meaning of these enacted purposes does not directly establish either goal as more important than the other. And as a matter of public policy, reasonable people can disagree about whether effective water pollution control or vertical federalism should be more important in this context. But the answer to this debate is not immediately obvious within the four corners and plain meaning.

Second, the text gives different instructions for these two priorities. Twice, it calls states' responsibilities and rights in water pollution management "primary"—not "exclusive."[110] Therefore, while the text does not spell out a clear ranking of these priorities, the second priority is at least plainly limited to states' primacy rather than exclusivity.[111]

Finally, it is important to note that Congress passed the Clean Water Act, like many environmental laws of the 1970s, with broad bipartisan support because environmental protection was less politically divisive at the time. In fact, the Clean Water Act of 1972 had so much support from both parties that Congress even overruled a presidential veto.[112] Such unanimous support, along with detailed and specific goals written in the statute's text, makes the Clean Water Act an excellent example for studying the enacted purposes doctrine.[113]

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106. *Id.*

107. 33 U.S.C. § 1251(b).

108. 33 U.S.C. § 1251(a).

109. 33 U.S.C. § 1251(b).

110. In contrast, the seventh and final purpose clearly shows that the Clean Water Act does not limit or reduce the state's control over water *quantity* management, as opposed to the water quality that the Act focuses on. *See* 33 U.S.C. § 1251(g) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.").

111. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-33 (1985) (holding that Congress "*demanded* broad federal authority to control pollution" to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters") (emphasis added) (citations omitted).

112. E. W. Kenworthy, *Clean-Water Bill Is Law Despite President's Veto*, N.Y. TIMES, Oct. 19, 1972 at 26.

113. To be clear, such a survey of legislative history is not part of a modern textualist analysis. I instead mention this history in the same manner as Chief Justice Burger to double-check how the Clean Water Act's history confirms its text's enacted purposes.

B. United States v. Riverside Bayview Homes

The first case in the original "waters of the United States" trilogy is the most important for understanding the textualism *Sackett* breaks away from. When a home developer wanted to fill wetlands on the shores of a lake recognized as "waters of the United States," the U.S. Army Corps of Engineers sued the developer.[114] The Army Corps asserted that adjoining wetlands were also part of "waters of the United States," so the developer needed to apply for a permit under the Clean Water Act to fill them.[115] Specifically, the Army Corps believed that "waters of the United States" included all freshwater wetlands that navigable waters flood frequently enough for the wetlands to support aquatic vegetation.[116] The Sixth Circuit held that such "adjacent wetlands" could not qualify as "waters of the United States,"[117] because Congress did not intend for "navigable waters" to include every wetland that navigable waters flood.[118]

The Supreme Court unanimously rejected the lower court's narrow interpretation. It held that two years after the Army Corps interpreted "waters of the United States" to include adjacent wetlands, Congress explicitly adopted that meaning by amending the Clean Water Act to prohibit states issuing permits for dumping dredged or fill material into "waters of the United States," "including wetlands adjacent."[119] Thus, in that 1977 Act, Congress recognized adjacent wetlands as "waters of the United States." The Court upheld the Army Corp's interpretation under *Chevron* deference (federal courts' practice at the time to defer to an agency's interpretation of ambiguous statutes unless its interpretation was "unreasonable"[120] given the text, legislative history, and "purposes"[121]).

In the most textualist passage of its analysis, the Court criticized any categorical divide between land as dry and waters as wet as "simplistic . . . [because] the transition from water to solid ground is not necessarily or even typically an abrupt one."[122] Linguistic clarity alone does not equal real-world conceptual clarity. The Court never used today's term "enacted purposes canon," but it followed the same methodology to a tee: ambiguity in "waters of the United States" cannot be interpreted in a way directly contrary to the goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's

114. *Riverside Bayview*, 474 U.S. at 123-124.

115. *Id.*

116. 33 C.F.R. § 209.120(d)(2)(h) (1976). *See also* 33 C.F.R. § 323.2(c) (1978) ("[Wetlands are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.").

117. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 396 (6th Cir. 1984), *rev'd* 474 U.S. 121 (1985).

118. *Riverside Bayview*, 474 U.S. at 125.

119. Sackett v. EPA, 598 U.S. 651, 675 (2023).

120. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984).

121. *Riverside Bayview*, 474 U.S. at 131.

122. *Id.* at 132.

waters."[123] Given this goal's breadth, the Court concluded that "Congress chose to define the waters covered by the Clean Water Act broadly . . . to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[124] Because protecting adjacent wetlands is necessary to restore and maintain neighboring navigable waterways, the Court held that the only interpretation consistent with this goal's plain meaning is that "waters of the United States" includes adjacent wetlands. Although the Supreme Court issued this ruling under *Chevron* deference, the Court's strong and unanimous language indicated that the Army Corps' interpretation was more than reasonable—it was the product of explicitly delegated discretion.

This case has four critical takeaways. First, the Supreme Court unanimously agreed that wetlands adjacent to traditionally navigable waters fall within "waters of the United States." Second, how the Court arrived at this holding demonstrates that textual analysis of a clear enacted purposes section can help resolve the Clean Water Act's ambiguities. Third, textualists must keep in mind that an author's conceptually clear language (i.e., "waters" versus "land") may not provide enough practical clarity for real-world applications (i.e., is a specific wetland a "water body," or simply land that is wet?). Finally, the unanimity of this opinion demonstrates that textualism with an enacted purposes analysis can be uncontroversial between textualists and purposivists.

C. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

The second case in the trilogy used a good-faith textualist interpretation of "waters of the United States" to show the outer limits of the phrase. *Solid Waste Agency of Northern Cook County* (often abbreviated to "*SWANCC*") focused on several ponds at an abandoned sand and gravel pit, none of which crossed state lines or were adjacent to traditionally navigable waterways or their tributaries.[125] The Army Corps asserted its jurisdiction after determining that migratory birds used the ponds.[126] Because this habitat would help promote the biological and ecological integrity of the protected water bodies that these birds also migrated to, the Army Corps asserted they were "navigable."[127] In other words, it believed the Clean Water Act's scope included even isolated, intrastate waters not adjacent to traditionally considered navigable waters.[128]

The Supreme Court ruled against the Corps. It upheld *Riverside Bayview*, noting that "the term 'navigable' is of 'limited import[ance]'" because the text

123. *See id.* at 132-33 (noting that because the Clean Water Act's first enacted purpose was "a comprehensive legislative attempt" to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with "a broad, systemic view of the goal of maintaining and improving water quality," Congress "demanded broad federal authority to control pollution") (citations omitted).

124. *Id.* at 133.

125. *Solid Waste Agency*, 531 U.S. at 162-66.

126. *Id.*

127. *Id.*

128. *Id.*

clearly expresses Congress's intent to regulate at least some waters that are not "'navigable' under the classical understanding of that term."[129] However, the Court limited the expansion of "waters of the United States" because "navigable" could not be read out of the text altogether. Rather, the word "navigable" showed that Congress had in mind waters that were or could be made navigable.[130] Thus, *Solid Waste Agency* follows in *Riverside Bayview*'s textualist footsteps of using the enacted purposes canon to find what "waters of the United States" means in specific circumstances.

D. Rapanos v. United States

The final case in the original trilogy was a split decision that left the meaning of "waters of the United States" unresolved until *Sackett*. In *Rapanos*, private landowners planned to develop wetlands that were not directly adjacent to navigable waters (unlike *Riverside Bayview*), but rather adjacent to man-made ditches draining into the tributaries of navigable waters.[131] The U.S. Army Corps of Engineers asserted jurisdiction under the Clean Water Act, requiring permits for the proposed landscaping.[132] Like in *Riverside Bayview*, the Army Corps asserted that the Clean Water Act gave them authority to regulate these even wetlands that were not directly connected to navigable waters because pollution in them could affect navigable waters downstream.[133] Although five Justices ruled in favor of remanding the lower court's ruling against the landowners, they were unable to agree on a single legal theory for a majority decision.[134]

In his concurrence, Justice Kennedy returned to the unanimous *Riverside Bayview* holding and *Solid Waste Agency* majority. Adjacent wetlands fall within "navigable waters" because they are "integral parts of the aquatic environment" that share a "significant nexus with navigable waters."[135] Based on this, nonadjacent wetlands fall under the navigable waters definition when they share a "significant nexus" to the "chemical, physical, and biological integrity" of traditionally covered waters.[136] This "significant nexus" language came from the Court's earlier deductions of the text plain meaning in light of the enacted purposes section.[137] Like the unanimous Court in *Riverside Bayview*, Justice Kennedy did not mention the enacted purposes doctrine by name, but he clearly followed it: he continued to interpret the ambiguous boundary between land and water to serve the textual "'objective' of the Clean Water Act . . . 'to restore and

129. *Id.* at 167.
130. *Id.* at 171-72.
131. Rapanos v. United States, 547 U.S. 715, 719-20 (2006) (plurality opinion).
132. *See id.* at 720-21.
133. *Id.* at 739-41.
134. *See generally id.*
135. *Id.* at 779 (Kennedy, J., concurring) (citing *Solid Waste Agency*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Clean Water Act] in *Riverside Bayview Homes*.")).
136. *Id*. at 779-80 (Kennedy, J., concurring).
137. *Solid Waste Agency*, 531 U.S. at 167.

maintain the chemical, physical, and biological integrity'" of the nation's waters.[138] This opinion illustrates yet again how judges can use the enacted purposes canon to resolve ambiguities in favor of Congress's enacted goals.

Although Justice Kennedy's concurrence was not the plurality decision, it is the Supreme Court's most nuanced textualist analysis to provide a workable rule for the scope of "waters of the United States." In addition, Justice Scalia's plurality decision lives on in Justice Alito's majority opinion in *Sackett*. For that reason, I discuss them together in the following section.

III. COMPARING *SACKETT*'S TWO TEXTUALISMS UNDER TEXTUALISM'S VALUES

This Part examines two applications of textualism in the recent Supreme Court case of *Sackett v. Environmental Protection Agency*. Here, a majority of the justices narrowed the scope of "waters of the United States" so sharply that it suddenly no longer included more than half of the wetlands long believed to be protected under *Riverside Bayview* and *Solid Waste Agency*.[139] It begins by examining how the legacy of the split decision in *Rapanos* shaped the regulation in *Sackett*. Finally, it explores the significant differences between Justice Alito's and Justice Kavanaugh's distinct textualist approaches. Their differences reveal the weaknesses of flexible textualism and the strengths of strict textualism.

A. Rapanos *and Pre*-Sackett *Regulations*

After the Court's split decision in *Rapanos* provided no clear interpretation of "water of the United States," the EPA and the Army Corps adopted Kennedy's significant nexus test as the most workable interpretation and a political compromise between the plurality and dissent.[140] Their "waters of the United States" rule defined "adjacent" to include not just wetlands directly "bordering" and "contiguous" to traditionally navigable waters, but also those "neighboring."[141] Army Corps guidance instructed officials to assert jurisdiction over wetlands "adjacent" to non-navigable tributaries when those wetlands had "a significant nexus to a traditional navigable water."[142] A "significant nexus" existed when "wetlands, either alone or in combination with similarly situated

138. *Rapanos*, 547 U.S. at 759 (Kennedy concurring) (quoting 33 U.S.C. § 1251(a)). Although the use of "objective" sounds like teleological purposivism, Justice Kennedy quotes only the enacted purposes. *See id.*

139. James Doubek, *The EPA Removes Federal Protections for Most of the Country's Wetlands*, NPR (Aug. 29, 2023), https://www.npr.org/2023/08/29/1196654382/epa-wetlands-waterways-supreme-court (last visited Mar 25, 2024).

140. *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, EVERYCRSREPORT.COM (Apt. 27, 2016), https://www.everycrsreport.com/reports/RL33263.html (last visited Mar 25, 2024) (citing Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 Fed. Reg. 37054-56, June 29, 2015).

141. Sackett v. EPA, 598 U.S. 651, 664 (2023) (citing 40 C.F.R. §§ 230.3(b), (s)(3), (s)(7) (2008)).

142. *Id.* at 662.

lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters.[143]

For the Sacketts, this definition included wetlands on their property across a thirty-foot-wide road from an unnamed tributary to a non-navigable creek, which then fed into a navigable lake. The facts of the case proved less important to the legal reasoning than in prior Supreme Court cases because the Court unanimously ruled in favor of the plaintiffs, and disagreeing only about the legal definition of "waters of the United States."[144] What matters is that the EPA argued the Sacketts' wetlands were "waters of the United States" because, together with a large nearby fen, all these wetlands as a whole "significantly affect[ed]" the lake's ecology.[145]

The EPA justified this rule both textually and atextually. Its textual argument was that the plain meaning of "waters" includes wetlands because the "presence of water is universally regarded as the most basic feature of wetlands."[146] The EPA also asserted precedent: since its earliest post-*Riverside Bayview* rules, "adjacent" had not been interpreted to mean *only* "directly adjoining."[147] The EPA argued that in context, Scalia's "reasonably continuous surface connection" test in *Rapanos* had no grounding in the Clean Water Act's history since *Riverside Bayview*.[148] Finally, the EPA made a policy argument that the "reasonably continuous surface connection" test would "seriously compromise the Act's comprehensive scheme" to restore and maintain their integrity by denying protection to wetlands with a significant potential to impact traditionally navigable waters.[149] By definition, the scope of EPA's protection of navigable waters would be narrower and weaker if arbitrary outcomes were based on the presence or absence of a small surface connection.[150]

B. Justice Alito's Flexible Textualism

The central holding of Justice Alito's majority opinion in *Sackett* directly draws on Justice Scalia's plurality opinion in *Rapanos*. Both Justices argue that "waters" means only water bodies such as "streams, oceans, rivers, and lakes" plus adjacent wetlands that are so connected above ground that they are "indistinguishable."[151] Justice Alito nominally defers to *Riverside Bayview*'s unanimous opinion because the Court's prior interpretations are still an important consideration for textualists, even if they are given somewhat less weight than in

143. *Id.*
144. *See generally id.*
145. *Id.* at 663
146. *Id.* at 674 (quotations omitted).
147. Brief for Respondents at 17, *Sackett*, 598 U.S. 651 (2023) (No. 21-454).
148. *Id.*
149. *Id.*
150. *Id.* (discussing how under the majority rule, the Clean Water Act's coverage will "come and go as floods or storms created or breached natural barriers like berms and dunes").
151. *Sackett*, 598 U.S. at 671, 678 (citing 33 U.S.C. § 1362(7)).

other approaches.[152] But his opinion rejects its legacy and the significant nexus test drawn from its conceptual core.[153]

1. Undermining Goals in the Clean Water Act's Text

The central thrust of Justice Alito's opinion was rejecting the EPA's "significant nexus" interpretation as incompatible with the plain meaning of "waters." He notes that the Clean Water Act's usage of "navigable waters" is confusing.[154] Its predecessor had used the term with a well-established meaning,[155] but the Clean Water Act redefined it as "the waters of the United States"[156]—"decidedly not a well-known term . . . ."[157] Mistakenly believing "waters" to be a plural noun, Justice Alito finds that the ordinary meaning of "waters"—rather than "water"—is a water body.[158] Notably, "waters" is not the plural of "water" because "water" is an uncountable "mass noun."[159] Still, combining his misreading with a desire to not totally read "navigable" out of the statute,[160] he concludes that wetlands that are "waters of the United States" must

152. *See generally* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018) ("The Supreme Court's textualist justices are far more willing to overturn precedent in statutory interpretation cases than justices who prefer other approaches. Two reasons for this are likely fundamental to the textualist approach: judge-made legal tests are less important than the statute's text, and textualism is based on the presumption that there is only one 'correct' interpretation of the text's plain meaning. Together, these imply that an incorrect interpretation should be overturned. However, it also argues some justices who happen to be textualist are overruling prior precedents simply because they disagree with the earlier statutory interpretation. This would not merely be weakening *stare decisis*, but directly abandoning it.").

153. *See Sackett*, 598 U.S. at 671-77 (reasoning that the Court's new "reading follows from . . . [how t]his Court has understood [Clean Water Act]'s use of 'waters' in [*Riverside Bayview*]," and that "the thrust of observations in decisions going all the way back to *Riverside Bayview*" was that only "certain 'adjacent' wetlands are part of 'waters of the United States'").

154. *Id.* at 671.

155. Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407-426 (1899).

156. 33 U.S.C. § 1362 (7).

157. *Sackett*, 598 U.S. at 671.

158. *Id.* at 674.

159. *What's The Plural of "Water"?*, MERRIAM-WEBSTER, https://www.merriam-webster.com/grammar/water-and-other-noncount-nouns (last visited Jan 19, 2025) ("These words don't take the traditional plural -s or -es ending—except sometimes . . . only [] on special occasions. Their very oddness conveys an immediate understanding that something different is being expressed—often something more figurative or poetic: 'The *waters* of March . . .'.") (emphasis added). For example, one might refer to "two bunches of *bananas*" but not "two lakes of *water*." Similarly, one would say "less *water*" rather than "fewer *waters*."

160. *Sackett*, 598 U.S. at 672-77.

be connected to a navigable body of water.[161] Although "water" is the "the most basic feature of wetlands," its mere presence is not enough.[162]

Because Justice Alito concluded that "navigable waters" was ambiguous,[163] a strict textualist reading would examine how the Court had already unanimously clarified this ambiguity, the enacted purposes section, and indeed the statute's name "Clean *Water* Act."[164] Instead, the majority opinion most clearly crosses into flexible textualism with a formula that Justice Kavanaugh referred to as "unorthodox statutory interpretation."[165] I include the following passage largely unedited to highlight the oddity of Justice Alito admitting it is a "convoluted formulation," while still arguing it is clear enough for ordinary people to reach the same conclusion:

> [S]tate permitting programs may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) "including wetlands adjacent thereto." . . . When this convoluted formulation is parsed, it tells us that at least some wetlands must qualify as "waters of the United States" . . . which we may call category A. The provision provides that States may permit discharges into these waters, but it then qualifies that States cannot permit discharges into a subcategory of A: traditional navigable waters (category B). Finally, it states that a third category (category C), consisting of wetlands "adjacent" to traditional navigable waters, is "include[ed]" within B. Thus, States may permit discharges into A minus B, which includes C. If C (adjacent wetlands) were not part of A ("the waters of the United States") and therefore subject to regulation under the [Clean Water Act], there would be no point in excluding them from that category. Thus, [this provision] presumes that certain wetlands constitute "waters of the United States . . . . [But] because the adjacent wetlands . . . are "includ[ed]" within "the waters of the United States," these wetlands must qualify as "waters of the United States" in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes "waters" under the [Clean Water Act].[166]

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161. *Id.* at 671-72 (quoting *Rapanos*, 547 U.S. at 740 (plurality opinion) ("This reading follows from the [Clean Water Act]'s deliberate use of the plural term 'waters.' . . . That term typically refers to bodies of water like those listed above. *See, e.g.*, Webster's Second 2882; Black's Law Dictionary 1426 (5th ed. 1979) ('especially in the plural, [water] may designate a body of water, such as a river, a lake, or an ocean, or an aggregate of such bodies of water, as in the phrases 'foreign waters,' 'waters of the United States, and the like'); Random House Dictionary of the English Language 2146 (2d ed. 1987) (Random House Dictionary) (defining 'waters' as 'a. flowing water, or water moving in waves: The river's mighty waters. b. the sea or seas bordering a particular country or continent or located in a particular part of the world'. This meaning is hard to reconcile with classifying 'lands,' wet or otherwise, as 'waters.'")).

162. *See id.* at 674 (reasoning that this interpretation "proves too much" because "puddles . . . are also defined by the ordinary presence of water even though few would describe them as 'waters'").

163. *Id.* at 671.

164. 33 U.S.C. § 1251 et seq. (emphasis added).

165. *Sackett*, 598 U.S. at 723 (Kavanaugh, J., concurring).

166. *Id.* at 675-76 (citing 33 U.S.C. § 1344(g)(1)) ("[A]ny State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward

When the Court's decision was announced, this formula was just as novel as it was confusing for property owners, courts, agencies, and state governments.[167]

What makes this textualism "flexible" is that Justice Alito found that the term "navigable waters" is clear enough to substantially weaken the Clean Water Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[168] while elsewhere finding it "complicate[d]" and "frustrating . . . to make sense of."[169] In fact, this linguistic interpretation is difficult for many lawyers to follow—let alone ordinary property owners who are not fluent in legalese.[170] In the following section, I discuss more fully why this counts as "flexible" textualism. In the end, it is because this analysis did precisely what Justice Barrett has warned textualists against: it ignored "the most natural interpretation" of clear language "in favor of a less plausible [interpretation]" based on the most controversial ambiguities in the statute.[171]

2. Vertical Federalism in the Clean Water Act

Justice Alito's second justification was a non-textual canon: the federalism clear statement rule, which judges often use when statutes implicate states' powers. Under this canon, a court should presume that Congress only uses "exceedingly clear language" to alter the balance of federal and state government powers to regulate land use and private property.[172] Justice Alito noted that for most of the United States' history, only state and local governments regulated water pollution (alongside the common law of torts). By contrast, federal water regulation historically focused on keeping "traditional[ly] navigable" interstate waters unobstructed and usable for navigation and commerce.[173] Put together: a statute's language must include a clear statement for courts to find that the scope of "the waters of the United States" limits states' exclusive role in regulating water pollution.[174]

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to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the [EPA] Administrator a [proposal].").

167. Bobby Magill, *Supreme Court's Wetlands Ruling Sows State Permitting Confusion*, BLOOMBERG LAW (July 13, 2023), https://news.bloomberglaw.com/environment-and-energy/wetlands-confusion-reigns-as-dust-settles-after-sackett-ruling (last visited Mar 30, 2024).

168. 33 U.S.C. § 1251(a).

169. *Sackett*, 598 U.S. at 671 (citing 33 U.S.C. § 1362(7)) ("[T]he Act applies to 'navigable waters,' which had a well-established meaning at the time of the [Clean Water Act]'s enactment. But the [Act] complicates matters by proceeding to define 'navigable waters' as 'the waters of the United States,' which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt.") (internal citations omitted).

170. Magill, *Supreme Court's Wetlands Ruling*, *supra* note 167.

171. Amy Coney Barrett, *Substantive Canon and Faithful Agency*, 90 BOS. U. L. REV. 109, 109-10 (2023).

172. *Sackett*, 598 U.S. at 679.

173. *Id.* at 679-80 (citing 33 U.S.C. § 407).

174. *See id.* at 681.

Justice Alito observes that the Clean Water Act expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[175] Reasoning that states' role could not remain "primary" if the EPA had jurisdiction over everything "defined by the presence of water" and that the EPA noted its significant nexus-based rule could include "almost all waters and wetlands,"[176] Justice Alito found that the federalism clear statement rule does not allow any interpretation of "waters of the United States" that would give federal agencies authority over lands that are wet.[177]

The more fundamental concern for textualists is that Justice Alito found that the Clean Water Act's language is clear enough for the policy goals that he was sympathetic to, but too vague for those that he was not. Because flexible textualism includes so many normative canons,[178] Justice Alito could apply the federalism clear statement rule's high standard to find the statutory language was too ambiguous for the long-standing broad interpretation of "waters of the United States," while elsewhere using the plain meaning rule to find that it is clear enough to deduce his "unorthodox statutory interpretation."[179] This again raises the question: how should a judge decide when language is or is not "clear and unambiguous?" Although an answer to this question is outside the scope of this note, I will return to Justice Kavanaugh's explanation of why any textualist should be troubled by Justice Alito's odd finding.

3. Flexible Textualism's Problem of Notice

Although Justice Alito's third line of reasoning was based on a normative canon, the canon is an uncontroversial one that aligns with textualism's core value of notice. He invoked the rule of lenity, which instructs courts to interpret any ambiguity in a statute with criminal penalties in the defendant's favor. There are two underlying rationales: to punish only individuals who had fair notice to avoid breaking the law and to shift the burden of determining what criminal statutes mean from private citizens and the judiciary to the legislators who draft those statutes.

Justice Alito rightly feared landowners facing too much difficulty determining the scope of "waters of the United States" before developing their private property, and then facing the Clean Water Act's criminal penalties under strict liability.[180] When landowners were unsure if they needed Clean Water Act

175. 33 U.S.C. § 1251(b).

176. *Sackett*, 598 U.S. at 669, 674.

177. *Id.* at 674.

178. *See Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VANDERBILT LAW REVIEW 395, 395, 401-406 (1950) (noting that there are opposing canons on almost every point, suggesting that there is "no single right and accurate way of reading one case"); *see also* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARVARD LAW REVIEW 515 (2023) (arguing that the normative canons simply cannot be reconciled with textualism).

179. *Id.* at 723.

180. *Id.* at 669-70.

permits under the significant nexus-based regulations, the EPA recommended they ask the Army Corps to conduct a "jurisdictional determination" based on several technical factors.[181] However, the Army Corps said it had no legal obligation to provide jurisdictional determinations.[182] Many property owners needed to hire expensive expert consultants to analyze their property and present non-binding findings that might persuade the Army Corps.[183]

The first textualist problem with this line of argument is that, as previously discussed, there are other times where Justice Alito found that the scope of "navigable waters" is clear. Of course, a phrase can be ambiguous in some contexts but clear in others.[184] But the jurisdictional boundary between the unprotected wetlands and protected "navigable waters" is the same question whether or not criminal sanctions trigger the rule of lenity.[185]

Moreover, Justice Alito fell into a classic textualist pitfall: confusing linguistic clarity for practical clarity.[186] While "reasonably continuous surface connection" is more intuitive language than "significant nexus," it provides little guidance on *how* continuous is continuous *enough*.[187] Before *Sackett*, developers needed consultants to determine if a wetland fell under the Clean Water Act's jurisdiction.[188] Most citizens, and indeed most lawyers, would be unable to identify a significant nexus between wetlands and a non-adjacent navigable water body. But these consultations at least offered ordinary landowners an informed determination of their obligations before any legal proceedings or criminal charges. Now, without any objective criteria, private citizens must make their best guess of how "continuous" surface connections must be to be "continuous enough" for a judge's subjective judgment. Even once common law evolves to fill this gap, landowners may be confused by circuit splits when one judge rules differently from judges directly upstream, downstream, or across the river from them, but in another circuit or district.

The second and most concerning problem is that after finding the rule too ambiguous to provide notice, Justice Alito concluded that the judiciary—not

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181. *Id.* at 667.

182. *Id.*

183. *Id.*

184. *See, e.g.,* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984) (noting that the term "stationary source [of air pollution]" clearly refers to buildings, structures, power plants, and installations rather than motor vehicles, but does not make clear whether it is referring to the individual emitting device or the polluting overall facility).

185. *Sackett*, 598 U.S. at 663, 668.

186. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) ("Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.").

187. The majority's notes only "low tides," "dry spells," and artificial barriers would not count. *Sackett*, 598 U.S. at 678. However, this dictum does not provide any guidance on how long a "dry spell" is, providing little real-world guidance to property owners where dry periods and rainy seasons can be highly variable. *See id.*

188. *See id.* at 661.

Congress—should rewrite the rule. Judges rewriting laws and legislating from the bench is the very thing that textualism's goal of notice seeks to prevent. After all, if liability for criminal penalties changes whenever the balance of power in the Court shifts, how can any citizen ever truly be on notice?[189]

Unfortunately, like his search for a bright line between "land" and "waters," Justice Alito's new reasonably continuous surface connection test illustrates the fundamental difference between linguistic clarity and practical clarity. By replacing a test that gives practical notice with the mirage of linguistic clarity,[190] the majority's attempt to promote notice simply backfired.

C. Justice Kavanaugh's Strict Textualism

Justice Kavanaugh concurred with the majority's decision to overrule Justice Kennedy's significant nexus test, although oddly, without explaining why.[191] But Justice Kavanaugh's separate opinion did note several places where Justice Alito's flexible textualism departed from a strict textualist analysis, making the new "reasonably continuous surface connection" test unsound on both textualist and conservative grounds.[192] And crucially, although Justice Kavanaugh never refers to the enacted purposes canon by name, his recent explanation of its principle[193] is evident throughout the opinion.

1. The Plain Meaning of "Adjacent"

Justice Kavanaugh's first and most crucial point was that the plain meaning rule did not support Justice Alito's finding that "adjacent" means "adjoining." The majority decision gave only a weak explanation: "[t]he term 'adjacent' may mean either 'contiguous' or 'near.' . . . Wetlands that are separate from

189. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S.Ct. 789, 790 (2020) (opinion of Gorsuch, J.) (noting that ordinary citizens cannot realistically keep up when interpretations of criminal law change almost as often as presidential administrations).

190. See, e.g., *Sackett*, 598 U.S. at 727 (Kavanaugh, J., concurring) ("[H]ow difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How 'temporary' do 'interruptions in surface connection' have to be for wetlands to still be covered? How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert? The Court covers wetlands separated from a water by an artificial barrier constructed illegally, but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority? The list goes on.") (citations omitted).

191. *See id.* at 716-28 (Kavanaugh, J., concurring).

192. *Id.*

193. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2123, 2134, 2143-44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[I]f there is some key point in the committee report, there is an easy solution to make sure it is "authoritative": vote on it when voting on the statute. . . . [Putting] the key [passages of] committee or conference reports . . . into the statute itself and have the Members of Congress vote on it . . . would be both formally and functionally authoritative.").

traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[194] But Justice Kavanaugh emphasized that "adjacent" and "adjoining" have different plain meanings:

> Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, and (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.[195]

In other words, "adjacency" is broader than "adjoining" because it does not require that two objects directly touch. Thus, the majority's conclusion that wetlands are included in "waters of the United States" only when they directly touch traditional navigable waters is too narrow.

Justice Kavanaugh presumed that Congress said what it meant and meant what it said, so it did not mean "adjoining" wetlands when it wrote "adjacent" wetlands.[196] He criticized the majority's "unorthodox statutory interpretation . . . formula," reasoning that it "just seems to be a fancier way of arguing (against all indications of ordinary meaning) that 'adjacent' means 'adjoining.'"[197] He further noted that Justice Alito's redefinition of "adjacent" to mean the same thing as "adjoining" excluded "wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like," regardless of how close and connected they are to navigable waters.[198] Unfortunately, the majority's "one-size-fits-all approach" overlooked the reality of our nation's many "non-navigable waters" critical for restoring navigable waters. These range from pocosins (isolated bogs) and Delmarva bays (seasonal, ellipsis-shaped freshwater wetlands with sandy rims) in the Chesapeake Bay area, and intermittent and ephemeral waters in dry Western lands that play an outsized role in nearby navigable waters when they seasonally run.[199]

Moreover, "connected-on-the-surface-continuously-enough" provides less notice than a layperson's understanding of "adjacent." No advanced training in legalese is necessary to understand that "a marsh is adjacent to a river even if separated by a levee, just as your neighbor's house is adjacent to your house even if separated by a fence or an alley."[200] Private landowners and industry leaders

194. *Sackett*, 598 U.S. at 676 (Kavanaugh, J., concurring) (internal citations omitted) (citing RANDOM HOUSE DICTIONARY 25; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26 (1976); OXFORD AMERICAN DICTIONARY & THESAURUS 16 (2d ed. 2009) (listing "adjoining" and "neighboring" as synonyms of "adjacent")).

195. *Id.* at 716 (Kavanaugh, J., concurring).

196. *Id.* at 718-19 (Kavanaugh, J., concurring).

197. *Id.* at 723 (Kavanaugh, J., concurring).

198. *Id.* at 717-18 (Kavanaugh, J., concurring).

199. E.A. Crunden & Pamela King, *Post-Sackett, Chaos Erupts for Wetlands Oversight*, E&E NEWS BY POLITICO (Jun. 2, 2024), https://www.eenews.net/articles/post-sackett-chaos-erupts-for-wetlands-oversight/ (last visited Mar 17, 2024).

200. *Sackett*, 598 U.S. at 719 (Kavanaugh, J., concurring).

were not asking for the majority's clear linguistic distinction, but a practical distinction to figure out which real-world wetlands are federally protected.[201]

The core of Justice Kavanaugh's plain meaning criticism is that the majority's bizarre formula "impose[d] a restriction nowhere to be found in the text," and "the Court has no good answer for why Congress used the term 'adjacent' instead of 'adjoining.'"[202]

2. Using Historical Consensus to Uncover Ordinary Meanings

Justice Kavanaugh provided another textualist argument that is perhaps the best test for how people actually use a term or phrase. He reasoned that if an agency's consistent, longtime interpretation reflects a statute's ordinary meaning (rather than atextual reasons such as precedent or purposivism), it can be a useful reference for uncovering the plain meaning.

Justice Kavanaugh noted that the new "reasonably continuous surface connection" test goes against a longstanding agency interpretation that was consistent across various administrations of both parties.[203] Despite their different ideologies and approaches to environmental policy, each administration agreed that "adjacency" included wetlands separated by barriers as well as those that directly touch covered waters. Like Chief Justice Burger double-checking his plain meaning analysis in *TVA v. Hill*, Justice Kavanaugh saw that the long-time and consistent agreement between the executive and judicial branches confirmed his plain meaning understanding of "adjacent."[204] Two years after the

201. Bobby Magill, *Water Permitting Uncertainty Remains as Industry Blasts EPA Rule*, BLOOMBERG LAW (Aug. 29, 2023), https://news.bloomberglaw.com/environment-and-energy/water-permitting-uncertainty-remains-as-industry-blasts-epa-rule (last visited Mar 17, 2024) (noting industry leaders' frustration that EPA's updated "waters of the United States" regulation following *Sackett* does not provide a clear definition of "relatively permanent" waters, aggravating the uncertainty that only Congress, not the courts, could have resolved).

202. *Sackett*, 598 U.S. at 718-19 (Kavanaugh, J., concurring). Justice Kavanaugh notes several places where the Clean Water Act's text expressly uses the term "adjacent" or "adjoining": "Compare 33 U.S.C. § 1344(g) with §§ 1321(b)-(c) ('adjoining shorelines' and 'adjoining shorelines to the navigable waters'); § 1346(c) ('land adjoining the coastal recreation waters'); *see also* § 1254(n)(4) ('estuary' includes certain bodies of water 'having unimpaired natural connection with open sea'); § 2802(5) ('coastal waters' includes wetlands 'having unimpaired connection with the open sea up to the head of tidal influence'). The difference in those two terms is critical to this case. Two objects are 'adjoining' if they 'are so joined or united to each other that no third object intervenes.' *Adjoining*, BLACK'S LAW DICTIONARY (rev. 4th ed. 1968); *see also id.* ('Adjoining" means 'touching or contiguous, as distinguished from lying near to or adjacent.'); *Adjoining*, BLACK'S LAW DICTIONARY (5th ed. 1979) (same); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26-27 (1961) (similar)". *Id.*

203. *Id.* at 1363-64 (Kavanaugh, J., concurring) (reasoning that "[t]he ordinary meaning of the term 'adjacent' has not changed since Congress amended the Clean Water Act in 1977 to expressly cover 'wetlands adjacent' to waters of the United States. 91 Stat. 1601; 33 U.S.C. § 1344(g) . . . . the definitions of 'adjacent' are notably explicit that two things need not touch each other in order to be adjacent").

204. *Id.* at 1365-66 (Kavanaugh, J., concurring) "[The] longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute. The eight administrations since 1977 have maintained dramatically different views of how to regulate the environment, including under the Clean Water Act. Some of those administrations promulgated very broad interpretations of adjacent wetlands. Others adopted far narrower interpretations. Yet all of those eight different administrations have recognized as a matter of law that the Clean Water Act's coverage of adjacent wetlands means more than

Army Corps interpreted "waters of the United States" to include adjacent wetlands, Congress even recognized this definition of adjacent wetlands as "waters of the United States."[205] Textualism's fundamental commandment that courts presume the "legislature says . . . what it means and means . . . what it says" compels strict and flexible textualists to conclude that Congress's understanding of the scope of "waters of the United States" includes adjacent wetlands that were not directly adjoining.

Moreover, it is difficult to imagine how upending a regulatory definition that was unchanged for almost fifty years improved notice for criminal penalties. Justice Alito's new *Sackett* standard still requires officials to determine on a case-by-case basis which wetlands and waterways are federally protected. As previously noted, what private landowners and industry leaders need is real-world, practical certainty that only Congress can provide.[206] In this way, Justice Alito's flexible textualism's approach backfired. His approach provides greater latitude for judges to redefine the "plain meaning" of words as common as "adjacent," undermining fair notice for complex, technical environmental statutes with criminal penalties. Such unpredictability in how the Supreme Court interprets criminal laws causes textualism to lose legitimacy in the eyes of both the public and future generations of lawyers and judges.[207]

3. Justice Alito's Test versus the Enacted Purposes

Finally, Justice Kavanaugh implicitly referenced the goals in the Clean Water Act's text to find that Congress had a clear, deliberate purpose for the provision relevant to *Sackett.*[208] He argued that the majority's interpretation is not consistent with the Clean Water Act's purposes because interpreting "adjacent" as "adjoining" would have significant real-world implications, so this new, narrower interpretation would leave many wetlands suddenly unregulated. But many wetlands that are not directly adjoining to "navigable waters" still hold polluted water that moves between the two through sporadic or underground connections. Because these wetlands are so essential to protecting neighboring

adjoining wetlands and also includes wetlands separated from covered waters by man-made dikes or barriers, natural river berms, beach dunes, or the like. That consistency in interpretation is strong confirmation of the ordinary meaning of adjacent wetlands.").

205. *Id.* at 1363 (Kavanaugh, J., concurring).

206. Magill, *Water Permitting*, *supra* note 201 (noting industry leaders' frustration that EPA's updated "waters of the United States" regulation following *Sackett* does not clearly define "relatively permanent" waters, creating uncertainty that "only Congress can now offer clarity [to resolve]").

207. *See* Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 GEORGETOWN L. J. 111, 176 (2023) (noting that only 60 percent of law professors instructing future practitioners and judges approve of textualism, notably lower than the percent who endorse purposivism and pragmatism); Ilya Somi, *What Law Professors Think About Legal Issues—and Why It Matters*, REASON: FREE MINDS AND FREE MARKETS (Aug. 10, 2022), https://reason.com/volokh/2022/08/10/what-law-professors-think-about-legal-issues-and-why-it-matters/ (last visited Mar 30, 2024) (arguing that this difference is important because law professors influence the views of law students, who go on to be the next generation of lawyers, politicians, and judges, and because "[c]ourts often adopt ideas that were first developed by academics").

208. *See Sackett*, 598 U.S. at 719 (Kavanaugh, J., concurring).

and downstream waters, they "may affect downstream water quality and flood control in many of the same ways" that directly-adjoining wetlands impact the "chemical, physical, and biological integrity of the Nation's waters."[209]

Although Justice Kavanaugh never invoked the terms of "formalistic textualism" or "enacted purposes doctrine," he was not subtle in criticizing flexible textualism's implications for the Clean Water Act's textual goals. He concluded that the majority's "atextual test—rewriting 'adjacent' to mean 'adjoining'—will produce real-world consequences for the waters of the United States and will generate regulatory uncertainty. I would stick to the text."[210] Combining a basic plain meaning analysis with the concerns for textualism's core values made his strict textualism a superior textualist analysis.

4. Strict Textualism and the Enacted Purposes Doctrine

Justice Kavanaugh did not address one crucial flaw in Justice Alito's flexible textualism: prioritizing states' *exclusive* role in regulating water pollution and private property rights over effective pollution reduction without a sufficient textual reason. This mirrored the very vulnerability to judge's personal policy preferences that textualists see in purposivism. Justice Alito pointed out that the Clean Water Act's enacted purposes provision includes an explicit goal to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[211] He reasoned that the states' role could not be "primary" if the EPA had jurisdiction over everything "defined by the presence of water" and that the EPA admitted that Justice Kennedy's significant nexus test might include "almost all waters and wetlands."[212]

Here, Justice Alito's error was not a difference between strict and flexible textualism—it was simply a mistake in applying the plain meaning rule. Much like he misinterpreted adjacent to mean adjoining,[213] he misinterpreted states' *primary* role in regulation to mean their *exclusive* role in regulation. "Primary" suggests that states' role in regulation should be "of first rank, importance, or value,"[214] but it does not require "exclusivity": "commanding, controlling, or prevailing over all others."[215] After all, Justice Alito actually noted that "the [Clean Water Act] specifies . . . that States may permit discharges into ['waters of the United States'], but it then qualified that States cannot permit discharges

209. 33 U.S.C. § 1251(a); *Sackett*, 598 U.S. at 726-27 (Kavanaugh, J., concurring) (noting some specific benefits such as filtering pollutants, storing water, and enhancing flood control).

210. *Sackett*, 598 U.S. at 727 (Kavanaugh, J. concurring).

211. 33 U.S.C. § 1251(b).

212. *Sackett*, 598 U.S. at 669.

213. *See id.* at 676 (citing RANDOM HOUSE DICTIONARY 25; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26 (1976); OXFORD AMERICAN DICTIONARY & THESAURUS 16 (2d ed. 2009)).

214. *Primary definition & meaning*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/primary (last visited Nov. 10, 2023).

215. *Dominant definition & meaning*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/primary (last visited Nov. 10, 2023).

into . . . traditional navigable waters."[216] In contrast, nothing in the first goal's text allowed public health and environmental protection to be weakened to prioritize states' exclusive role in regulation.[217] For other statutes, the enacted purposes canon might not be enough to uncover how the text balances goals when they have tension.[218] But for the Clean Water Act's federalism goal, a good-faith reading of the words within the four corners of the page is enough to see that it permits states to sometimes give federal regulators the lead. Here, textualists do not even need the enacted purposes, let alone an appeal to judges' preferences, to determine which goal Congress allowed flexibility and deprioritization.[219]

This vulnerability to judges' individual policy goals is precisely why all textualists, whether strict or flexible, must always exercise restraint. Textualism began as a theory of adjudication that would reign in judicial discretion.[220] Its first, last, and only line of defense against error is a challenge for each judge to constantly look within themselves to rigorously question any possibility that their personal opinions, preferences, or biases are seeping in under the surface and polluting their plain meaning analysis.

CONCLUSION

Justice Kavanaugh's strict textualist approach might not name the enacted purposes canon, but he still employed it to demonstrate more honest good faith deference to the legislature than purposivism or flexible textualism. These lessons from *Sackett* are crucial because many other of the 1970s federal environmental statutes include comprehensive, explicit, and specific enacted purposes provisions. This includes the Endangered Species Act, as Chief Justice Burger found in *TVA v. Hill*, but also extends to other increasingly politically salient statutes such as the Clean Air Act.

As environmental litigation in appellate courts continues to become more high-profile, the public's trust in the judiciary as apolitical continues to erode.[221] Judges must protect the courts' reputation by resolving conflicts in the most democratic and least controversial manner.[222] Relying on only rhetorical appeals

216. *Sackett*, 598 U.S. 675 (citations omitted).

217. 33 U.S.C. § 1251(a).

218. *Id.*

219. 33 U.S.C. § 1251(b).

220. Grove, *supra* note 44 at 295.

221. Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx (last visited Mar 24, 2024); Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CENTER (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/ (last visited Mar 24, 2024).

222. Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2118-19 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[J]udges sometimes decide (or appear to decide) high-profile and important statutory cases not by using settled, agreed-upon rules of the road, but instead by selectively picking from among a wealth of canons of construction. Those decisions leave

to textualism is not enough to protect public trust in the Supreme Court because no justice is consistently a "flexible" or "strict" textualist. In practice, each textualist judge sometimes applies one approach, and in other cases applies the other.[223]

The bad news is that the success or failure of textualism depends entirely on a judge's consistent self-restraint. This makes its critics skeptical of new judges who promise to exercise good-faith textualism. But the good news is that strict textualism's genuine, good-faith deference to the legislature can alleviate the public's growing distrust.[224] Experts who study public approval of the Supreme Court tend to agree that its long-term legitimacy is determined by outcomes that do not surprise the public with drastic changes to longstanding law.[225] Because strict adherence to the plain meaning would avoid strings of decisions that are consistently more conservative or progressive than the public expects, rejecting flexible textualism can help repair the Supreme Court's bruised reputation. At the same time, environmental cases are gaining visibility among young people,[226] who are especially concerned with our nation's ecological future[227] regardless of party affiliation.[228] Because this generation will be important in deciding textualism's future, strict textualism's restraint and democratic deference might be as good an opportunity to repair textualism's reputation as the Supreme Court's.

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the bar and the public understandably skeptical that courts are really acting as neutral, impartial umpires in certain statutory interpretation cases.").

223. Grove, *supra* note 220, at 271.

224. *Id.* at 270-71.

225. *See id.* at 299-300.

226. Stephanie Hanes, *Suing the World to Save It. Children Pioneer a Right to a Secure Future.*, CHRISTIAN SCI. MONITOR (Nov. 20, 2023), https://www.csmonitor.com/Environment/2023/1120/Suing-the-world-to-save-it.-Children-pioneer-a-right-to-a-secure-future (last visited Mar 24, 2024); *see, e.g.*, Held v. Montana, 2023 WL 1997864 (D. Mont. 2023) (a high-profile lawsuit on behalf of sixteen Montana children, aged two to eighteen, successfully arguing that the state's support of the fossil fuel industry had deprived them of their state constitutional rights by worsening the effects of climate change on their lives).

227. Hickman Caroline et al., *Climate Anxiety in Children and Young People and Their Beliefs about Government Responses to Climate Change: A Global Survey*, 5 LANCET E863 (2021) (finding that 59 percent of youth and young adults said they were very or extremely worried about climate change, stemming from feelings of fear for their own lives under future climate conditions, fear for the lives of their children and loved ones, and betrayal by older generations).

228. Cary Funk, *Key Findings: How Americans' Attitudes about Climate Change Differ by Generation, Party and Other Factors*, PEW RSCH. CTR. (May 26, 2021), https://www.pewresearch.org/short-reads/2021/05/26/key-findings-how-americans-attitudes-about-climate-change-differ-by-generation-party-and-other-factors/ (last visited Mar 31, 2024) (finding that compared to their older counterparts, to young adult "Republicans and Republican-leaning independents" are much less likely to support continued fossil fuel use, including: 30 percent less likely to favor hydraulic fracturing, three times more likely to support phasing out fossil fuel use entirely, 20 percent more likely to support phasing out gasoline-powered vehicles). *Cf id.* (finding more consistent generational polling among Republicans on other climate issues, with 88 percent of supporting largescale tree planting for drawing down carbon emissions by planting large numbers of trees, 73 percent favoring a corporate tax credit for carbon-capture technology, and about half favoring a tax on corporate carbon emissions (50 percent) and stricter fuel-efficiency standards for cars and trucks (49 percent)).

APPENDIX OF TEXTUALIST CANONS OF STATUTORY INTERPRETATION

Strict Textualism's Textual Canons[229]

Rule	Definition
Associated-words Canon ("*noscitur a sociis*")	Each word's meaning is determined by the context of surrounding words. Each item in a list should be interpreted as similar to the others.
"Of the Same Kind" Canon ("*ejusdem generis*")	When a list of specific items ends in a general term (e.g., ". . . and other foods"), that general term should be interpreted to include only things similar to the specific items.
Negative-Implication Canon ("*expressio unius est exclusion alterius*")	When a statute explicitly specifies one thing (e.g., an exception to a general rule), it implies the exclusion of other things (e.g., other exceptions) absent clear evidence of legislative intent.
Whole Text Rule	Each part of a statute should be interpreted in the context of the entire statute, such that all provisions make sense as a cohesive whole.
Related-Statutes Canon ("*In pari materia*")	Related statutes should be interpreted in the context of each other, such that they all make sense as part of a cohesive whole.
Canon Against Surplusage	Every word and provision should be given effect, avoiding interpretations that make any words or phrases redundant or meaningless.
General-Specific Canon	When a general rule and a specific provision conflict, the specific provision should be considered an exception to the general rule.
Presumption of Consistent Usage	A statute should be presumed to use words and terms with the same meaning throughout.

229. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xii-xvi (2012).

Flexible Textualism's Normative Canons[230]

Constitutional-Doubt Canon	If a statute can be interpreted multiple ways, and one way conflicts with the U.S. Constitution, it should not be interpreted in that way.
Federalism Clear Statement Rule	A statute should not be interpreted to change the balance of powers between the states and federal government, unless the text makes Congress's intent to do so "unmistakably clear."
Rule of Lenity	Any ambiguity in criminal statutes should be interpreted in the way most favorable to the defendant.
Absurdity Doctrine	Courts should avoid interpretations that "sharply contradict" society's "common sense," including for policy outcomes.[231]

230. *Id.*

231. *See* Grove, *supra* note 44 at 286 (noting that the "absurdity doctrine enables a court to inject policy concerns into the interpretive inquiry—even to the point of overriding a plain text . . . [but] even Justice Scalia endorsed a narrowly defined absurd results exception") (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) (Scalia, J., concurring)).

"Tó éí iiná"—Water is Life: Repairing the Indian Trust Doctrine With an "Environmental Justice-Plus" Agency Approach

Grace Siu Hing Taylor Li[*]

The federal Indian trust responsibility is a legal obligation stemming from the unique government-to-government relationship between the federal government and pre-constitutional, sovereign Native Nations.[1] *This moral and fiduciary duty requires the United States to support Tribal self-determination in a way that protects Tribal treaty rights, assets, lands, natural resources, and more. But the Supreme Court's decision in Arizona v. Navajo Nation casts doubt on the federal judiciary's willingness to uphold the trust doctrine and provide duly needed recourse to Native Nations, absent specific circumstances.*[2] *Amidst a serious public health crisis and increasingly dry conditions due to climate change, the Navajo Nation sought quantification of its water rights to the Colorado River. The Nation argued that the trust doctrine obligates the federal government to quantify those water rights. But the Bureau of Reclamation has historically excluded Natives from discussions regarding the Colorado River Compact. In June 2023, the highest court failed to provide the Navajo people with redress. Does this decision mean that the trust doctrine is broken beyond repair? I argue no. The case did not eviscerate the Navajo Nation's right to water quantification. The courts are failing to uphold the responsibility as intended. This Note calls on federal administrative agencies to view the Indian*

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1. In this Note, the term "pre-constitutional" describes the deep history of Native Nations in the present-day United States, which dates back prior to the founding of the country. The Supreme Court has made clear that because Tribal powers of self-government and self-determination "existed prior to the Constitution," Tribes "were not bound by the Constitution." Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 566-67 (2021) (citing Talton v. Mayes, 163 U.S. 376, 384 (1896)). Moreover, pre-constitutional sovereignty gives effect to the political inherent right to self-government, which is another core principle of federal Indian law.

2. *See generally* Arizona v. Navajo Nation [hereafter *Arizona III*], 599 U.S. 555 (2023).

trust responsibility under an "environmental justice plus" lens to legally enforce the trust doctrine with solutions for the Navajo.

INTRODUCTION

While falling almost entirely within the Colorado River ("the River") Basin, nearly a third of Navajo Nation ("Navajo" or "the Nation") residents live without access to clean, reliable drinking water in the arid Southwestern United States. Water insecurity severely impacts the Navajo reservation residents, causing

negative public health and economic effects.[3] Indians[4] living on the reservation drive for miles a day to haul pumped groundwater in jugs, barrels, or other containers for cooking, cleaning, and washing.[5] As anthropogenic climate change exacerbates desertification, securing the right to divert water from the Colorado River is imperative to the Tribe's and its members' continued well-being.[6]

The Navajo's claims derive from the trust doctrine (hereafter also referred to as the "trust relationship" or "trust responsibility"), a federal common law doctrine expressed in numerous treaties and statutes. It establishes a moral and fiduciary obligation on the part of the federal government to support the well-being of Native Nations.[7] The Treaty of 1868 ("1868 Treaty") between the Navajo and the U.S. both created the Navajo reservation and established the trust relationship between the federal government and the Nation. In doing so, the federal government appointed itself as trustee, and the Nation as beneficiary.

Federal common law is clear that breach of trust claims against the federal government raise federal questions.[8] The trust responsibility relationship is akin to a private fiduciary relationship in contract law.[9] Although one of the most significant "bedrock" principles in federal Indian law, it is a paternal premise for the relationship between the U.S. and sovereign Native Nations.[10]

For decades, the Navajo have fought for access to surface water to pipe to more remote locations across the approximately "27,000 square-mile reservation" spanning three states.[11] The reservation lies "almost entirely within

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3. Detailed *infra*, Section I.

4. The term "Indian" is a legal term of art employed in the field of federal Indian law. FELIX S. COHEN, ET AL., 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.01 (2023). Many Indigenous peoples identify themselves using different terminology and primarily identify themselves as constituents of bands or other familial or cultural groups, but the term "Indian" is most commonly used in federal law. *Id.* at n.1. In this Note, I use "Indian(s)," "Nation(s)," and "Tribe(s)" to refer to "group[s] of native people with whom the federal government has established some kind of political relationship." *Id.* § 3.02(2). I also capitalize "Navajo," "Nation(s)," "Tribe," "Tribal," and "Indian(s)" to pay respect for the pre-constitutional sovereignty and inherent right to self-government of Indigenous peoples.

5. Michael Phillis, *Navajo Nation Wants US Government to Account for Tribe's Water Needs*, AZCENTRAL (Mar. 17, 2023, 2:28 PM), https://perma.cc/G28J-G6WP.

6. *See, e.g.*, *The Drying U.S. West*, NASA EARTH OBSERVATORY, https://perma.cc/ENE5-APLJ (last visited Mar. 26, 2024).

7. COHEN, *supra* note 4, § 5.04(3)(a).

8. COHEN, *supra* note 4, § 5.05(1)(a)); *See, e.g.*, Cobell v. Babbitt, 30 F. Supp. 2d 24, 31, 39 n.14 (D.D.C. 1998) (stating that federal question jurisdiction can be based on "the federal common law of Indian trust management"); Vizenor v. Babbitt, 927 F. Supp. 1193, 1198-99 (D. Minn. 1996) (holding that the question of whether a trust relationship between a Tribe and the U.S. obligates the U.S. to appoint independent trustee to oversee and prevent alleged mismanagement of Tribal funds of Tribal business committees is a federal question); White v. Matthews, 420 F. Supp. 882, 887-88 (D.S.D. 1976) (holding that a federal question was raised when the guardian of a mentally ill ward claimed the federal government had a trust obligation to provide her with medical care).

9. *See generally* United States v. Mitchell, [hereafter *Mitchell II*], 463 U.S. 206 (1983).

10. *See* Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397 (2017).

11. Phillis, *supra* note 5.

the Colorado River Basin, and three . . . rivers—the Colorado, the Little Colorado, and the San Juan—border the reservation."[12] The Nation successfully negotiated water settlements from the San Juan River in New Mexico and Utah, both of which draw from the Colorado River's Upper Basin.[13] But the Nation is yet to reach an agreement with either Arizona or the federal government for water rights from the Colorado River's Lower Basin.[14]

To date, the Nation's protracted efforts to secure decreed water rights to the Colorado River have failed in the courts. In 2014, the Nation brought a suit against the Department of the Interior ("Interior"), the Interior Secretary, the Bureau of Reclamation ("Reclamation"), the Bureau of Indian Affairs (BIA), and various water districts. The Nation alleged that the federal government "failed in its trust obligation to assert and protect" the Navajo's water rights and "violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) by undertaking actions to manage . . . [the] Colorado River's Lower Basin" flow.[15] The 1868 Treaty establishing the Navajo reservation promised that the land would serve as a "permanent home" for the Tribe and its people.[16] But the Navajo argued that its designated reservation cannot be a permanent home without sufficient access to water.[17] The Nation therefore asked the court for injunctive and declaratory relief compelling the federal defendants to determine the water required, and devise a plan to meet the Nation's needs.[18]

The Ninth Circuit agreed in 2017, holding that the federal government has an affirmative duty under the trust doctrine to quantify the Nation's water rights.[19] But in June 2023, the Supreme Court reversed.[20] Writing for the majority, Justice Kavanaugh rejected the Ninth Circuit's understanding of what the trust doctrine requires of the federal government.[21] Because the 1868 Treaty does not contain specific language regarding an affirmative obligation on the U.S. government to supply water, he found no affirmative duty to quantify the Nation's water rights.[22] The judicial system failed the Navajo.

Considering the Supreme Court's determination, what federal institution can best provide the Nation with an appropriate remedy? While the federal government could address the situation through executive or congressional

12. *Arizona III*, 599 U.S. at 561.

13. *See id.* at 562.

14. *See id.* at 581-84 (Gorsuch, J., dissenting).

15. Navajo Nation v. U.S. Dep't of the Interior, 43 F. Supp. 3d 1019 (D. Ariz. 2014) (Westlaw synopsis), *aff'd in part, rev'd in part*, 876 F.3d 1144 (9th Cir. 2017).

16. Treaty Between the United States of America and the Navajo Tribe of Indians, art. XIII, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

17. *Arizona III*, 599 U.S. at 558-59.

18. *Id.* at 584 (Gorsuch, J., dissenting).

19. *See generally* Navajo Nation v. Dep't of the Interior, 876 F.3d 1144 (9th Cir. 2017).

20. *Arizona III*, 599 U.S. at 569-70, *rev'g* 26 F.4th 794 (9th Cir. 2022) (specifically, the Supreme Court reversed the Ninth Circuit's subsequent instruction to allow the Nation to amend its complaint).

21. *Id.*

22. *Id.* at 563-65.

action, this Note asserts that administrative agencies are the most properly equipped institutions to do so. As argued in this Note, agencies have a moral obligation to do so under the principles of environmental justice (EJ) and a legal obligation to do so under the trust doctrine. Reclamation and the BIA are the most aptly suited institutions to quantify Navajo water rights. Reclamation is responsible for general water appropriation across the Colorado Basin, and the BIA is responsible for various Indian affairs, including water rights disputes. Together, these federal agencies carry vast institutional knowledge. Further, the Secretary of the Interior retains power as the Lower Basin "Water Master," but has historically excluded Indians from Colorado River Compact negotiations.[23] The Interior should therefore mend a doctrine that it has played a role in breaking.

The Navajo Nation is just one of thirty federally recognized Tribes in the Colorado River Basin.[24] Each Tribe's culture, organization, legal status, and resources are complex and different, with unique histories and present-day challenges. But Indians are relevant stakeholders in ongoing Colorado River management. And both current and future Tribal public health and economic prosperity depends on reserved and quantified water rights.[25] With their established expertise and federally-mandated duties, Reclamation and the BIA are both best equipped and required to take the differing needs of Tribes into account.

Moreover, the time is ripe to act. President Biden and Vice President Harris campaigned on confronting longstanding environmental injustices and inequities, and EJ remains a top priority for the White House.[26] During his first week in office, President Biden signed Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*.[27] Given the history of pervasive environmental injustice against Indians, their injustices should be some of the first to be rectified. Many federal agencies issue non-binding EJ guidance, but there is currently no statutory mandate for including EJ in executive branch processes or legislation.[28] Moreover, they must make several important water management decisions for governing and operating Colorado River facilities and

23. *See Hoover Dam: Frequently Asked Questions and Answers*, BUREAU OF RECLAMATION, https://perma.cc/PSN4-J8T5 (last updated Mar. 12, 2015).

24. *Tribes*, COLO. RIVER BASIN WATER & TRIBES INITIATIVE, https://perma.cc/LLH2-QC7T (last visited Dec. 16, 2023).

25. The circumstances and issues described in this Note are factually and legally situational to the Navajo Nation. But importantly, water insecurity is just one problem that the Nation encounters. This Note does not speak for all Indians living in the Colorado River Basin, nor may it necessarily speak broadly for all Navajo people. Instead, this Note argues for a way to hold the United States accountable for its failure to ensure that the Navajo reservation is a sustainable, prosperous, and livable homeland for Navajo Indians, to uphold the trust doctrine, and respect Native sovereignty.

26. *Environmental Justice*, THE WHITE HOUSE, https://perma.cc/69YL-KH6V (last visited Dec. 16, 2023).

27. *Id.* (noting that through this Executive Order, President Biden launched "the most ambitious environmental justice agenda ever undertaken by the Federal Government.").

28. *See, e.g.*, *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, EPA, https://perma.cc/9H7S-TS7K (last updated Mar. 13, 2023).

management of the Colorado River and its facilities before the end of 2026.[29] The time to act is now: agencies should capitalize on the current administration's interest in EJ and address environmental injustice on the Navajo reservation by quantifying the Nation's water rights and articulating a plan to provide water to Tribal residents.

Using the Navajo water crisis as a case study in the failure of the courts to provide judicial recourse, this Note argues for the adoption of an EJ-plus framework to supplement the Indian trust doctrine. Within such a framework, an EJ-informed policy approach would be a floor from which Tribal-specific needs, characterized as 'plus factors,' would entitle greater federal action under the trust responsibility. Section I compares the traditional Navajo creation story and the dismal state of water on the reservation today. Section II describes the Nation's historical interaction with the federal government. Section III describes the trust doctrine, the Nation's *Winters* rights, and a contentious method of water quantification. Section IV chronicles the Nation's legal challenge at the Supreme Court in *Arizona v. Navajo Nation* (*Arizona III*). Section V provides an overview of the Colorado River Compact and the historic exclusion of Indians in the River's management. It also details the Interior's post-2026 scoping process to manage the river. Section VI discusses potential ways the federal government might solve the Navajo Nation's water crisis—including presidential, congressional, and administrative actions—and explains why administrative agencies are best suited to provide solutions. Section VI addresses the potential risks of moving away from judicial solutions. Section VII argues for the adoption of a modern EJ-plus lens to better inform the content of the trust doctrine. This Note concludes with final thoughts regarding the scope of this inquiry and shares preliminary considerations for future research.

I. WATER & CULTURE IN NAVAJO HISTORY

Water is sacred to the Navajo people. Their creation story exemplifies how they are spiritually connected to the land and its waters. Understanding this innate and religious bond to nature is necessary to fully appreciate the current water crisis and the Navajo perspective in the 1868 Treaty negotiations, explained *infra*, Section II.

A. The Role of Water in Navajo Culture and Oral Tradition

The role of land and water in Navajo religion and oral tradition contrasts starkly with the water insecurity Tribal members face on the reservation today. The Navajo creation story Diné Bahane' describes the journey of the Diné, or Holy People, through four worlds.[30] The first world, where the spirit people and

29. *Scoping – Colorado River Post 2026 Operations*, BUREAU OF RECLAMATION, https://perma.cc/H6LF-T9XX (last updated Dec. 7, 2023).

30. Aaron Mike, *Navajo Rising: An Indigenous Emergence Story*, AM. ALPINE CLUB (Oct. 3, 2023), https://americanalpineclub.org/news/2023/10/3/navajo-rising.

Holy People lived, was black and full of chaotic darkness.[31] It was there that both male and female Holy People were formed and started their journey. They then moved through the blue second world, "precipitated by their own transgressions," and emerged into the yellow third world, which contained great rivers.[32] There, "Female River …. crossed the land from north to south" and "Male River flowed east to west." The location where the rivers crossed is known as "Tó Almáozlí (Crossing of the Waters)."[33] Arriving in the fourth white world, the Diné assumed human form.[34] This is where Navajo live today.[35] Explicitly including water in the creation story situates its importance to the Navajo people.

Through their walk through the worlds, the Diné brought with them "deities, vegetation, and animals."[36] According to Navajo belief, the "First Man gathered soil from the mountains in the third world and used it to form the four main sacred mountains."[37] He placed the Four Sacred Mountains at the four cardinal directions.[38] He positioned four stones at their bases and blew on the stones (black, white, blue, and yellow) to create the first "hogan,"[39] or dwelling. Mount Blanca (White Shell Mountain) in southern Colorado represents the East.[40] Mount Taylor (Blue Bead Mountain), Northeast of Grants, New Mexico represents the South.[41] The San Francisco Peaks (Yellow Abalone Shell Mountain) near Flagstaff, Arizona represent the West.[42] Mount Hesperus (Obsidian Mountain) near Durango, Colorado represents the North.[43] These four mountains and their associated colors not only represent the boundaries of the Navajo's ancestral homelands, but also watch over the people.[44] Many Navajo consider them "nature's highest council."[45] Navajo Indians are spiritually connected to the land and the waters within their four mountains. This worldview is paramount to understanding the Navajo Nation's perspective in the 1868 Treaty negotiations.[46]

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31. JENNIFER NEZ DENETDALE, RECLAIMING DINÉ HISTORY, U. OF ARIZ. PRESS 135 (June 2007).
32. *Id*. at 135; *see also* Mike, *supra* note 30.
33. Mike, *supra* note 30.
34. *Id.*
35. *Id.*
36. *See id.* (explaining the Navajo and English names for the four sacred mountains: "Sis Naajini (Blanca Peak), Tsoozil (Mount Taylor), Dook'o'ooslid (the San Francisco peaks), and Diné Nitsaa (Mount Hesperus)").
37. DENETDALE, *supra* note 31, at 135.
38. Mike, *supra* note 30.
39. Harold Carey Jr., *The Navajo Four Sacred Colors*, NAVAJO PEOPLE (Jan. 7, 2015), https://perma.cc/55GB-WE78.
40. *Four Sacred Mountains*, NAT. HIST. MUSEUM OF UTAH, https://perma.cc/RMD5-8M5Z (last visited Dec. 16, 2023).
41. *Id.*
42. *Id.*
43. *Id.*
44. *See The importance of NAU's land acknowledgment*, N. ARIZ. UNIV. (Jan. 4, 2023), https://nau.edu/stories/land-acknowledgement/ (last visited Sept. 28, 2024).
45. *Id.*
46. *Infra*, Section III.

More detailed stories of the Fourth World refer to Male Rain as a black cloud who brings thunder and lightning.[47] Female Rain, or blue, yellow, and white clouds, is the gentle rain that waters the planet and sustains life.[48] Tonenili (Tó Neinilii), also called the Water Sprinkler, is the Navajo god of water who is responsible for rain. In oral tradition and the sand painting ceremony, the Water Sprinkler carries a jar of collected water by his side.[49] By sprinkling collected water from his jar in the direction of the Four Sacred Mountains, he creates rain. Additionally, in the traditional Navajo wedding ceremony, the bride and groom pour water on each other's hands to symbolize their new marriage.[50]

These stories show how essential water is to Navajo religious belief, oral tradition, culture, and custom. Rooting the forthcoming public health crisis and legal analysis in traditional narratives is vital. Navajo author Jennifer Nez Denetdale describes how during the traumatic colonization period, ancestors "relied on the traditional narratives for spiritual and physical renewal."[51] The stories are still told today and are a "vehicle for reaffirming community."[52] But today, the water described in those narratives is scarce.

B. Current Navajo Reservation Water Conditions and Impacts

The disparity in water access between white and Southwestern Indian communities is astounding. The Navajo reservation spans roughly seventeen million acres, or 27,413 square miles, in Arizona, Utah, and New Mexico.[53] It is the largest Indian reservation in the United States.[54] The Supreme Court has described the Navajo's ancestral homelands as "arid," reasoning that "[i]f the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries."[55] While three out of every one thousand white households lack plumbing, fifty-eight out of every one thousand Indian households lack plumbing.[56] Those residents must drive for miles to draw groundwater in jugs

47. Sandoval, Hastin Tlo'tsi hee (Old Man Buffalo Grass), *The Creation or Age of Beginning*, *in* NAVAHO INDIAN MYTHS 1, 10 (Aileen O'Bryan ed., Sam Akeah trans., Dover Books 1993) (originally published as SMITHSONIAN INST., BUREAU OF AM. ETHNOLOGY, THE DÎNÉ: ORIGIN MYTHS OF THE NAVAHO INDIANS (1956)).

48. *Id.*

49. Glenna Nielsen-Grimm, *Largest Navajo Pitch Basket*, NAT. HIST. MUSEUM OF UTAH (Dec. 21, 2016), https://perma.cc/T737-3CZJ.

50. Mika, *The Navajo Wedding Ceremony: A Beautiful and Sacred Event*, INDIAN COUNTRY EXTENSIONS (Sept. 30, 2022), https://perma.cc/68YD-JJQW.

51. DENETDALE, *supra* note 31, at 134.

52. *Id*.

53. *Administrative Boundaries*, INDIAN COUNTRY GRASSROOTS SUPPORT, https://perma.cc/RP4D-GEF9, (last visited Dec. 16, 2023).

54. *Id.*

55. *See* Arizona v. California, 373 U.S. 546, 598 (1963).

56. DIGDEEP & US WATER ALLIANCE, CLOSING THE WATER ACCESS GAP IN THE UNITED STATES: A NATIONAL ACTION PLAN 23 (2019), https://perma.cc/MBN8-ZXRT; *see also* Brief for DigDeep Right to Water Project and Utah Tribal Relief Foundation as Amici Curiae in Support of Respondents at 7, *Arizona III*, 599 U.S. 555 (2023), https://perma.cc/UVM8-96V9 [hereinafter DigDeep and UTRF Amici Brief].

and barrels, relying on hauled water for drinking, cooking, bathing, cleaning, and any other household needs.[57] Some people rely on unregulated wells and run the risk of consuming water contaminated by the 521 abandoned uranium mines located on the Nation.[58] The Environmental Protection Agency (EPA) considers unregulated drinking water sources as the greatest public health risk on the Nation.[59]

Water insecurity exacerbates existing public health disparities between the Navajo Nation and surrounding white communities.[60] The connection between water and public health is so vital that "the United Nations, several countries, and some U.S. states have recognized the human right to water."[61] For decades, public health experts have documented how water insecurity and lack of clean water and sanitation in Indian country give rise to high morbidity and mortality rates.[62] "Poor water quality has been associated with lower mental and social development in children,"[63] and "families in the water access gap are thirty times more likely to contract [waterborne] illnesses than those living with basic services."[64] Water insecurity contributes to other chronic health issues, including diabetes and obesity.[65]

This forces many reservation residents to prioritize water conservation over healthy food consumption, such as opting for less nutritious foods that do not require as much water to prepare.[66] Further, soda, juice, and other sugary beverages are easier to access and cheaper than potable water.[67] Consequentially,

57. *See* Laurel Morales, *Many Native Americans Can't Get Clean Water, Report Finds*, NPR (Nov. 18, 2019, 5:01 AM), https://perma.cc/6SHN-LP8Q.

58. *Id.*

59. *Id.*

60. *Fact Sheets: Disparities*, INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH AND HUM. SERVS. (Oct. 2019), https://perma.cc/6AD6-PLGQ (describing how American Indian and Alaska Native people "have long experienced lower health status when compared to other Americans," including decreased life expectancy and the suffering of a disproportionately high rate of disease, among other health disparities).

61. DigDeep and UTRF Amici Brief, *supra* note 56, at 23 (citing G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010); World Health Org., *National Systems to. Support Drinking Water, Sanitation and Hygiene: Global Status Report 2019*, at 48-55 (2019)); *see also* California Water Code § 106.3 (recognizing that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes").

62. DigDeep and UTRF Amici Brief, *supra* note 56, at 24.

63. *Id.* at 24-25 (citing Faissal Tarrass & Meryem Benjelloun, *The Effects of Water Shortages on Health and Human Development*, 132 PERSPECTIVES PUB. HEALTH 240, 241 (2012); Sara Nozadi et al., *Prenatal Metal Exposures and Infants' Developmental Outcomes in a Navajo Population*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 425 (2021)).

64. DigDeep and UTRF Amici Brief, *supra* note 56, at 24 (citing DigDeep, *Draining: The Economic Impact of America's Hidden Water Crisis* 39 (2002), https://perma.cc/QLA6-EA4M).

65. *Id.* at 25.

66. *Id.* (citing Heather Tanana et al., *Universal Access to Clean Water for Tribes in the Colorado River Basin*, WATER & TRIBES INITIATIVE 15 (2021)).

67. *Id.*

many Navajo children experience disproportionately high levels of childhood obesity.[68]

Reduced water access intensified the effects of the COVID-19 pandemic and exemplifies how water scarcity compounds existing inequities. Since water is a communally hauled resource, reservation dwellers struggled to meet proper social distancing and quarantine guidelines.[69] Many homes also lack indoor plumbing, increasing susceptibility to and deaths from COVID-19.[70]

Water insecurity also exacerbates existing economic disparities. First, lack of water economically burdens "individual and community resources" by forcing residents to spend enormous amounts of money and time hauling water to meet basic household needs.[71] Families hauling water must pay for gasoline for their cars, car maintenance, and barrels to hold the water. Moreover, the water itself is a commodity that must be purchased, and its price varies between sellers.[72] These efforts necessarily divert money from other household, personal, and professional expenses.

Second, water insecurity poses challenges for Navajo residents conducting business on the reservation. Water fuels virtually all industry sectors, ranging from farming to engineering to education.[73] In the Southwest, the Colorado River catalyzes the local economy, contributing to annual gross state product and income for all seven Colorado River Basin states.[74] The Navajo Nation's two top agricultural outputs are livestock and forage hay, which represent 21 percent and 67 percent of all agricultural sales and crop acreage, respectively.[75] Of course, both rely on water to grow. Therefore, water insecurity and reduced access to the Colorado River likely play a part in "lost gross product, employment, and income" for the Navajo Nation.[76]

As climate change progresses and desertification intensifies, the situation is set to worsen. The Southwest currently faces some of the driest conditions the

68. *Id.* (citing Dennis M. Styne, *Childhood Obesity in American Indians*, 16 J. PUB. HEALTH MGMT. & PRAC. 381, 381-87 (2010) (explaining how Navajo children "residing on the reservation suffer the highest rates of early childhood obesity" in the United States)).

69. *Id.* at 25-26 (citing Desi Rodriguez-Lonebear et al., *American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic*, 26 J. PUB. HEALTH MANAG. PRACT. 371 (2020) ("finding an association between lack of indoor plumbing and COVID-19 infection rates on reservations")).

70. *Id.*

71. *Id.* at 30.

72. *See id.* at 31 (citing OFF. OF THE PRESIDENT AND VICE PRESIDENT, E. AGENCY COUNCIL REP., PRESIDENT NEZ PROVIDES TESTIMONY IN SUPPORT OF CONGRESSIONAL BILLS THAT WILL DELIVER MORE CLEAN WATER TO NAVAJO COMMUNITIES (June 4, 2022)).

73. *Id.* at 30 (citing AM. SOC'Y CIV. ENG'RS, THE ECONOMIC BENEFITS OF INVESTING IN WATER INFRASTRUCTURE: HOW A FAILURE TO ACT WOULD AFFECT THE U.S. ECONOMIC RECOVERY 17 (2020)).

74. *See generally* TIM JAMES ET AL., W.P. CAREY SCH. OF BUS., ARIZ. STATE UNIV., THE ECONOMIC IMPORTANCE OF THE COLORADO RIVER TO THE BASIN REGION (2014), https://perma.cc/9P7H-57HA.

75. DigDeep and UTRF Amici Brief, *supra* note 56, at 30-31 (citing TATIANA DRUGOVA ET AL., *The Economic Impacts of Drought on Navajo Nation*, 52 J. FOOD DISTRIB. RSCH. 32 (2021)).

76. *Id.* at 30.

area has experienced in centuries due to a decades-long drought.[77] As population and agricultural outputs soar, competition for use of the region's water supply intensifies.[78] Yet the Colorado River, which supplies water to forty million people across the Southwest, is already overdrawn.[79] And the seven states party to the Colorado River Basin Compact have never considered the interests of the Navajo Nation in their negotiations, nor the interests of several other federally recognized and non-federally recognized Tribes in the Basin.[80]

II. HISTORY OF THE NAVAJO NATION'S RELATIONS WITH THE UNITED STATES

Understanding the Navajo reservation's creation and the Southwest's history of regional water management is crucial for understanding the present water crisis. Such complex, multifaceted histories can be told from many perspectives, but all too often, the Native perspective is neglected.

Indian Tribes are "unique [political groups] possessing… sovereignty over both their members and their [T]erritory."[81] As such, they often enter into treaties with the United States as sovereign Nations but are geographically within the boundaries of present-day America. Part A first explains the treaties relevant to the Navajo Nation water crisis, including the treaty that created the Navajo reservation. Part B describes the problematic treaty negotiation process. Finally, Part C clarifies how the 1868 Treaty should be interpreted, according to the federal Indian law canons of construction.

A. Overview of the Navajo Nation's Two Treaties

The Nation has two treaties with the federal government critical to the underlying dispute: the Treaty of 1849 and the Treaty of 1868.[82] The Treaty of 1849 placed the Nation "under the exclusive jurisdiction and protection of the . . . United States[,] . . . forever."[83] The 1849 Treaty instigated a plan to map out

77. Henry Fountain, *What Is a Megadrought?*, N.Y. TIMES (Aug. 19, 2021), https://www.nytimes.com/article/what-is-a-megadrought.html#:~:text=Much%20of%20the%20Southwest%20is,maintains%20its%20long%2Dterm%20grip.

78. *Id.*

79. Bruce Babbitt, *We Can Save the Colorado River*, HIGH COUNTRY NEWS (May 13, 2020), https://perma.cc/TH2M-5CQN.

80. *Colorado River Compact*, WATER EDUC. FOUND., https://perma.cc/L58S-TKHM (last visited Dec. 16, 2023).

81. United States v. Mazurie, 419 U.S. 544, 557 (1975). Note that *Mazurie* describes Indian tribes as possessing "attributes of" sovereignty in this quote; however, other cases articulate absolute tribal sovereignty in their holdings. *See* Worcester v. Georgia, 31 U.S. 515, 519 (1832).

82. Both treaties were signed post-Mexican American War. The Treaty of Guadalupe Hidalgo in 1848 formally ended the war and added approximately 525,000 miles of territory to the present-day American Southwest. *The Long Walk*, SMITHSONIAN NATIONAL MUSEUM OF THE AMERICAN INDIAN, https://perma.cc/4T62-CL3G (last visited Apr. 25, 2024). Following the culmination of the war, it was the policy of the United States to encourage white settlers to move out west towards California. Pro-settlement policies led to mass dispossession of Native land and violence, as Indians fought against American endeavors to take their land. *Id.*

83. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, art. I, Sept. 9, 1849, 9 Stat. 974 https://treaties.okstate.edu/treaties/treaty-with-the-navaho-1849-0583.

future boundaries for the Nation's reservation, designated as the Tribe's "permanent homeland."[84] The 1849 Treaty was "to receive a liberal construction, at all times and in all places . . . as to secure the permanent prosperity and happiness of [the Navajo people]."[85]

But resistance to colonial settlement persisted. Beginning in 1863, the U.S. Army embarked on a "scorched-earth campaign" to eradicate perceived Native insubordination.[86] Following brutal attacks designed to beat the Navajo into submission, thousands of Tribal members were rounded up and forced to walk 450 miles to the Bosque Redondo internment camp at Fort Sumner, New Mexico.[87] This march came to be known as the "Long Walk."[88] Navajos were imprisoned at Hweeldi, the Diné name for Bosque Redondo, from 1864 to 1868.[89] Both exiled and held hostage in this prison camp, the Navajo entered into a second treaty.[90]

To force the Navajo people to adopt an Anglo-American agrarian lifestyle, the 1868 Treaty formally delineated reservation boundaries and divided the land into allotments.[91] The United States agreed to buy 15,000 sheep and goats and 500 beef cattle for the Nation,[92] and give land, seeds, and other "agricultural implements" to each head of the family, so long as the Indians abandoned their semi-nomadic culture and become pastoralists.[93]

B. The 1868 Treaty's Inherently Problematic Negotiation Process

There are several problematic aspects of the 1868 Treaty. First, significant language barriers obscured communication between Navajo and federal

84. *Id.* at art. IX.

85. *Id.* at art. XI.

86. *See The Long Walk*, *supra* note 82 (detailing how Major General James H. Carleton sent Kit Carson to set fire to Navajo villages, killed farm animals, and demolished springs in an attempt to starve the Tribe); *see also* John Burnett, *The Navajo Nation's Own 'Trail of Tears,'* NPR (June 15, 2005), https://perma.cc/3QW5-LVJB (explaining how this violent campaign was meant to "solve" the "Navajo problem").

87. *See* Burnett, *supra* note 86 (describing the horrific circumstances of the Long Walk, such as the shooting of slow walkers and the drowning of Navajos at the Rio Grande River crossing); *see also Arizona III*, 599 U.S. at 560 (detailing how during the two decades immediately following the signing of the Treaty of 1849, the U.S. "forcibly moved" the Navajo people from their homelands to a "relatively barren area" in New Mexico called the Bosque Redondo Reservation").

88. Burnett, *supra* note 86.

89. *See Bosque Redondo*, SMITHSONIAN NAT'L MUSEUM OF THE AM. INDIAN, https://perma.cc/5LMJ-BEQM (last visited Apr. 25, 2024) (accounting the attempted forced assimilation of the Navajo people into Anglo-American culture, pursuant to the federal Indian assimilation policy of the nineteenth century).

90. *See generally* Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

91. *See* Brief for Diné Hatalii Association, Inc. as Amicus Curiae in Support of Respondents at 6, Navajo Nation v. Dep't of the Interior, 876 F.3d 1144 (9th Cir. 2017), https://perma.cc/JL3S-VHLM [hereinafter Diné Hatalii Amicus Brief].

92. Treaty Between the United States of America and the Navajo Tribe of Indians, art. XII, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

93. Treaty Between the United States of America and the Navajo Tribe of Indians, art. VII, June 1, 1868, 15 Stat. 668, https://perma.cc/7JHJ-9Q9M.

government negotiators. Second, the negotiation process failed to incorporate differing conceptions of water as property between the Navajo people and the federal government. Finally, the negotiation process did not account for Navajo law or cultural beliefs about water. This legal and cultural understanding is essential to fully appreciate how the Navajo understood the 1868 Treaty's meaning, and how the treaty should be interpreted today.

The 1868 Treaty was negotiated using two interpreters—one fluent in Navajo and Spanish, and another fluent in Spanish and English.[94] This trilingual negotiation process meant that much was, quite literally, lost in translation. Chief Barboncito, the head Navajo negotiator, relied on a shaky understanding of a promise to return "home" without clear understanding of the treaty's exact provisions.[95] However, historians and legal scholars agree that the Navajo negotiators bargained for "a return to their traditional homelands—to live within their four sacred mountains and their rivers and streams."[96]

In relying on the United States' promises of protection in exchange for peace, the signatories believed that a return home would also mean a return to water. Chief Barboncito referenced the Navajo creation story in his negotiations, explaining that "four mountains and four rivers were pointed to us, inside of which we should live, [and] that was to be our country."[97] This account of the treaty negotiations aligns with the legend retold in Section I. Chief Barboncito explained how the Navajo "Holy People" had instructed the Tribe to remain within the boundaries of the Rio Grande, the Rio San Juan, and the Rio Colorado. Accordingly, the detained Indians believed "their violation of this restriction was responsible for their [] suffering"[98] at Bosque Redondo.[99] The Navajo understood a promise of return to life within the boundaries of the rivers to include the right to access their waters.

Even today, the Navajo believe that water should be respected and "discussed with caution" because "No one can own it; No one can sell it; No one

94. Diné Hatallii Amicus Brief, *supra* note 91, at 7 (citing John L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. HIST. Q. 251, 261-66 (July 1, 1981) (describing "the dual translation process of negotiating the Reservation boundaries provisions of the 1868 Treaty, first from English to Spanish with one interpreter, James C. Sutherland; then from Spanish to Navajo via another interpreter, Jesus Arviso")).

95. *Id.* at 7, 13-14 (citing Kessel, *supra* note 94, at 261).

96. *Id.* at 7; *see also infra*, Section I.A. (detailing the Navajo's four sacred mountains and the cultural importance of water).

97. *Id.* at 22 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, With a Record of the Discussions that Led to its Signing, 2, Aug. 12, 1868 (1968) [hereinafter 1868 Treaty with Record of the Discussions]).

98. *Id.* at 13 (citing Katherine Marie Birmingham Osburn, *The Navajo at the Bosque Redondo: Cooperation, Resistance, and Initiative, 1864-1868*, 60 N.M. HIST. REV. 399, 407-08 (1985)).

99. This can be understood by laments regarding water quality in Bosque Redondo compared to water in Navajo land that was shared during the negotiations. *Id.* at 9 (citing Treaty Between the United States of American and the Navajo Tribe of Indians, With a Record of the Discussions that Led to its Signing, 3, Aug. 12, 1868 (1968) ("I thought at one time the whole world was the same as my own country but I got fooled . . . outside my own country we cannot raise a crop, but in it we can raise a crop almost anywhere, . . . we know this land does not like us neither does the water.")).

can buy it."[100] The concept of arguing over water is disrespectful and dishonorable.[101] Further, fighting over water "tarnish[es] traditional ceremonies" since only "pure water" is used to perform the Waterway ceremony.[102] This reverence for water as a collective resource underlies the collaborative nature with which water is hauled and shared today.[103]

The Navajo Nation Code also states that "water and the sacred mountains embody planning" and that "thinking is the foundation of planning."[104] In its brief before the Supreme Court in *Arizona v. Navajo Nation*, amicus counsel Diné Hatallii Association, Inc. argued how planning and critical thinking for the future are principles personified in "the Reservation itself," per the Chief's descriptions during the 1868 Treaty discussions.[105] This nuanced, spiritual, and conservation-focused conception of nature exemplifies the differences between Indigenous and white culture. Such mismatching of cultural beliefs also demonstrates how semantic misconceptions occur within negotiation, leading to devastating practical consequences.

C. Best Practices for Interpreting Treaties

Since the early twentieth century, the Supreme Court has consistently held that treaties between the United States and Tribes should be "interpreted liberally in favor of the Indians,"[106] and ambiguities should be "resolved in their favor."[107] Recently, the Supreme Court explained that cases involving Indian treaty interpretations "base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the [Tribes] at a significant disadvantage."[108] An understanding of the creation story and traditional cultural and legal principles informs how the Navajo signatories would have understood the treaties and the ways in which the United States would fulfill its promises.

Courts ordinarily apply specific canons of construction relating to Indian affairs during their interpretation of treaties or statutes enacted for the benefit or regulation of Indians.[109] The treaty interpretation canon instructs courts that

100. *Id.* at 22 (citing MIRANDA WARBURTON, WE DON'T OWN NATURE, NATURE OWNS US: THE CEREMONIAL AND ESOTERIC NATURE OF WATER IN THE LITTLE COLORADO RIVER BASIN AND DINÉ BIKEYAH 186 (July 1, 2020) (unpublished manuscript) (on file with author)).

101. *Id.*

102. *Id*. at 23.

103. As explained *infra*, Section I.

104. 1 N.N.C. NAVAJO NATION CODE ANN. tit. 1, § 201. (2010).

105. Diné Hatallii Association, Inc. Amicus Brief, *supra* note 91, at 22.

106. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999) (citing Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)).

107. *Id.* (citing Winters v. United States, 207 U.S. 564, 576-77 (1908)).

108. Wash. State Dep't of Licensing v. Cougar Den, Inc., 586 U.S. 347, 360 (2019).

109. *See, e.g.*, Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J. L. REFORM 267, 268 (2022) (outlining five general Indian canons of statutory construction, including "the canons of treaty interpretation, treaty abrogation, [T]ribal sovereign immunity, [T]ribal sovereignty, and Indian ambiguity"). The Indian law canons can be interpreted as akin to the Supreme Court's canons of interpretations that protect federalism concerns. *See* COHEN, *supra* note 4, § 2.02(2)

"[t]he circumstances surrounding the negotiation and execution" of Indian treaties should inform their interpretation.[110] Treaties must be interpreted "in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," and with exact treaty language "construed in the sense in which they would naturally be understood by the Indians."[111] The 1868 Treaty should therefore be read in light of the duress and trilingual process which the Navajo representatives negotiated under to simply return home to their land and its waters.

III. THE INDIAN TRUST DOCTRINE, *WINTERS* RIGHTS, AND THE PRACTICABLE IRRIGATED ACREAGE (PIA) STANDARD

The legal history of Tribal water rights is long and complex. But the nation-to-nation relationship and trust responsibility are core principles animating the current Navajo water crisis. Part A describes the historical underpinnings of the trust doctrine, one of the most central principles of federal Indian law. Part B describes how according to the famous *Winters* decision, Indian reserved water rights may prevail over appropriative rights within the first-in-time, first-in-right regime. Part C illustrates how the practicably irrigable acreage standard constrains Tribal reserved water rights for agricultural purposes within a reservation.

A. The Indian Trust Doctrine

The trust doctrine is a legally enforceable federal common law doctrine that establishes a moral and fiduciary obligation on the part of the federal government to protect and support the treaty rights, lands, assets, and resources of federally recognized Tribes.[112] Those duties include "moral obligations of the highest responsibility and trust . . . in the acts of those who represent it in dealing with the Indians."[113]

Early Supreme Court cases utilized concepts from international law to both further America's colonial agenda and entrench Native power in American jurisprudence.[114] For example, *Johnson v. M'Intosh* established the doctrine of discovery in American property law, which justified a common law restraint on alienation of Tribal land.[115] But the Court also found that Tribes had a "legal as well as a just ownership interest" in their land, in addition to the sovereign right

(citing Gregory v. Ashcroft, 501 U.S. 452 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)).

110. *See, e.g.*, Pawnee Indian Tribe of Okla. v. United States, 109 F.Supp. 860, 889 (Fed. Cl. 1953).

111. Herrera v. Wyoming, 587 U.S. 329, 345 (2019) (citations omitted) (internal quotations omitted).

112. Cohen's Handbook of Federal Indian Law § 5.05(1)(a) (2019); *see also Fact Sheet: American Indians and Alaska Natives – the Trust Responsibility*, U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. FOR NATIVE AMS., https://perma.cc/TEL2-JW2J (last visited Dec. 16, 2023).

113. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

114. *See* COHEN, *supra* note 4, § 5.04(3)(a).

115. Johnson v. M'Intosh, 21 U.S. 543 (1823).

to govern land use practices for those falling under their authority.[116] In *Cherokee Nation v. Georgia*, Chief Justice Marshall declared Tribes "domestic dependent nations."[117] He analogized Tribes to the "feudatory or tributary states of Europe," and described the federal-Tribal relationship as akin to the relationship of a "ward to his guardian."[118] *Cherokee Nation* set the foundation for recognizing the government-to-government relationship between Tribes and the federal government as a unique trust relationship with a "concomitant federal duty to protect [T]ribal rights to exist as self-governing entities."[119]

Finally, in the second *Cherokee* case, *Worcester v. Georgia*, Chief Justice Marshall likened the relationship between Tribes and the early U.S. government to the relationship between the U.S. and foreign nations, finding that the treaty was formed "on the model of treaties between the crowned heads of Europe."[120] Marshall also cited the trust doctrine, thereby entrenching the Indian law canons of construction in the government's obligation to support Tribal sovereignty.[121] Some even view Justice Marshall's anchoring of the canons of construction in Tribal sovereignty as an effort to reconcile the issues that the "nonconsensual inclusion" of Tribes in the newly-formed United States had introduced.[122]

The first issue with the trust doctrine is that while it recognizes Tribes as sovereign, it is also rooted in cultural racism and paternalism. The federal government has historically viewed Indian ways of life as inferior to that of white Americans. A 1977 Senate report of the American Indian Policy Review Commission described the purpose behind the trust doctrine as not only "to ensure the survival and welfare of Indian [T]ribes and people," but also to "raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society."[123] While well-intended, this definition demonstrates the inherent issue of treating Anglo-American settlements as the standard to which other societies should aspire.

A second issue arises from the fact that, although Native Nations are pre-constitutional sovereigns, Congress has placed most Tribal land and other property under the control of federal agencies.[124] Accordingly, courts have recognized that when Congress delegates to federal officials the power to manage Tribal land, their actions with respect to those resources must be "judged by the most exacting fiduciary standards."[125] Such resources include water.

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116. *Id.* at 574, 593.

117. 30 U.S. 1, 17 (1831).

118. *Id*.

119. *See* COHEN, *supra* note 4, § 5.04(3)(a).

120. Worcester v. Georgia, 31 U.S. 515, 550 (1832).

121. *See* Cohen's Handbook of Federal Indian Law § 3.01(2) (2019) (citing Worcester v. Georgia, 31 U.S. 515 (1832)).

122. *See id*., (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393-417 (1993)).

123. *Fact Sheet: American Indians and Alaska Natives – the Trust Responsibility*, *supra* note 112.

124. *See* COHEN, *supra* note 4, § 5.04(3)(a).

125. *Id.* (citing Seminole Nation v. United States, 316 U.S. 286, 297, & 297 n.12 (1942)).

Further, the Supreme Court has held that those dealings should "be judged by the most exacting fiduciary standards."[126] The fiduciary model of the doctrine was further articulated in *United States v. Mitchell*, where the Supreme Court likened the trust relationship to a private fiduciary relationship.[127] Professor Mary C. Wood describes the responsibility as a "sacred promise, made to induce massive land cessions, that the retained homelands would be protected to support [T]ribal lifeways and generations into the future."[128] Professor Wood's characterization reflects settler state colonial underpinnings, whereby the promise of homeland protection for lands retained by Tribes was an important exchange within the treatymaking process, through which the U.S. obtained vast lands in the present-day American Southwest.[129]

The trust responsibility's colonial beginnings perhaps explain why the early twentieth century Supreme Court deferred to the discretion of the federal government in choosing how to execute the duty of protection. Congress has often used the trust responsibility as a "sword" for the U.S. rather than a "shield" for Tribes.[130] Meaning, Congress has historically used the trust responsibility to further its own political agenda rather than to protect Tribal interests.[131] Through an EJ-plus lens, articulated in Section VII, the trust responsibility can be interpreted to include more obligations to protect Native homelands and environmental resources, including water.

B. The Navajo Nation's Winters *Rights*

Indian reserved water rights were first recognized by the Supreme Court in *Winters v. United States* in 1908.[132] "Under the *Winters* doctrine, when Congress reserves land [for an Indian reservation], Congress also reserves water sufficient to fulfill the purpose of the reservation."[133]

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126. *Id.*

127. United States v. Mitchell, 463 U.S. 206, 224, 226 (1983) ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.").

128. Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 368 (2003).

129. *See* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1224-27 (1975) (asserting that the trust obligation goes beyond a mere "moral obligation, without justiciable standards for its enforcement"); Nathan R. Margold, *Introduction* to Felix S. Cohen, Handbook of Federal Indian Law vii, xii (1942).

130. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 43 (West Pub. Co. 1981).

131. *See* Section VI.B for a greater explanation of *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

132. *See Winters*, 207 U.S. at 576-77.

133. Cynthia Brougher, *Indian Reserved Water Rights Under the Winters Doctrine: An Overview*, CONG. RSCH. SERV. (June 8, 2011), https://perma.cc/A5WG-LQSJ.

In *Winters*, the Court examined water rights created on the Blackfeet and Fort Belknap reservations in Montana.[134] At the time of the creation of the reservations, the United States had encouraged Indian assimilation into white culture by allocating individual parcels of land to develop.[135] Although the Indians had inhabited the entire Milk River drainage system since time immemorial, by the late 1890s, they found themselves competing for water usage with non-Native farmers who had settled upstream.[136] The BIA ultimately sued on behalf of the Tribes, contending that the Tribes had superior rights to the Milk River waters and that retaining the full flow of the river was "essential and necessary" to fulfill "the purposes for which the reservation was created."[137]

The Court held in favor of the Tribes, deciding the priority date of rights as that of the creation of the reservation. Reasoning that the intent of the Indians must have been to retain necessary water rights when they agreed to cede land to the United States, the Court found that water diverted by non-Natives upstream was not available for continued use. In that instance, the BIA responsibly exercised its role of trustee. Today, the federal government still considers *Winters* rights as "vested property rights for which the [United States] has a trust responsibility."[138] The federal government thus holds legal title to land and water in trust "for the benefit of the Indians."[139]

The Court further refined *Winters* with the primary purpose standard, under which water rights may only be reserved to the extent necessary to fulfill the primary purpose of a reservation.[140] For example, the Navajo reservation's primary purpose is to serve as a permanent home for Tribal members; under this standard, water may be reserved to the extent necessary to support a permanent homeland. Lower courts have also held that *Winters* rights extend beyond surface water to groundwater, though the Supreme Court has not yet addressed this question.[141] Therefore, groundwater on the Navajo reservation may also be reserved for the Tribe in order to support the purpose of the reservation.

The history of the Navajo Nation closely mirrors the facts of *Winters*. In both circumstances, the federal government developed policies seeking to transform the Indians from nomadic peoples to pastoralists. Both histories are rooted in the culturally racist ideology that nomadic living made Indians

134. *Winters*, 207 U.S. at 565, 567.

135. *See id.* at 576 (describing how since the creation of the reservation, the United States has "encourage[d]" Indians living on the reservation "to habits of industry" to "promote their civilization and improvement", and that "it was the policy of the government … to change those [nomadic] habits"); *see also infra* note 237.

136. *See id.* at 565-67.

137. *Id.* at 567.

138. Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223, 9223 (Mar. 12, 1990).

139. *Id.*

140. *See* Brougher, *supra* note 133, at 3.

141. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1273 (9th Cir. 2017); Catherine Schluter, Indian Reserved Rights to Groundwater: Victory for Tribes, for Now, 32 GEO. ENV'T L. REV. 729, 731-33 (2020) (recounting conflicting state court decisions regarding whether rights outlined in *Winters* extend to groundwater).

"uncivilized." But the *Winters* court went so far as to rule on the issue of water quantification in regard to the Fort Belknap treaty, whereas the Navajo court did not.[142] At the Ninth Circuit, the court reasoned that in enacting the 1868 Treaty, the U.S. "reserve[d] appurtenant water[,] then unappropriated to the extent needed to accomplish the purpose of the reservation."[143] The unquantified water rights of the Navajo Nation are considered an Indian Trust Asset (ITA).[144]

C. The PIA Standard

Decades after *Winters*, the Supreme Court in *Arizona v. California* approved a special master's decision regarding reserved water rights that quantified water based on its intended purpose.[145] Amidst the interstate water rights dispute, the special master endorsed the usage of the "practicably irrigable acreage" standard ("PIA"). This quantification method fixes the amount of state water Indian reservations receive as a reserved right to the acreage of the reservation that can be "feasibl[y]" irrigated from that water.[146] Continuing use of the PIA standard reflects the legacy of *Winters*, which tied reserved water rights to the agricultural purposes of creating the reservation.[147]

But in 2001, the Arizona Supreme Court expanded the accepted quantification measurement for determining water rights on Tribal lands. In *In re Gila River*, the court rejected the PIA standard out of a concern that it could "treat [T]ribes inequitably based on their geographic location."[148] The court reasoned that the PIA standard does not reflect a shift away from agricultural lifestyles on many reservations today, and counting every potentially irrigable acre posed a "risk" of "an overabundance of water" on some reservations.[149]

Instead of the PIA standard, the court offered several factors to consider in water rights quantification, including: 1) a Tribe's history and culture, including "[w]ater uses that have particular cultural significance"; 2) "the [T]ribal land's

142. *See Winters*, 207 U.S. at 575-78. Justice McKenna described how the case turned on the Treaty of 1888, which created the Fort Belknap Reservation. The Court reasoned that, although it was up for debate as to whether the Indians ceded their waters in addition to their lands to enter into agreement, the "rule of interpretation" of Indian treaties is that ambiguities will be "resolved from the standpoint of the Indians." *Id.* at 576. Therefore, the Court chose to support the interference that would support the purpose of the treaty, which was to transform the Indians from nomadic people into pastoralists. Since the lands were "practically valueless" without irrigation, the Court found it impossible to believe that the Indians would have agreed to cede the land if they understood themselves to also be ceding the water rights. *Id.* at 576-78.

143. Navajo Nation v. U.S. Dep't of the Interior, 26 F.4th 794, 801 (9th Cir. 2022), rev'd sub nom. *Arizona III*, 599 U.S. 555 (2023) (citing Cappaert v. United States, 426 U.S. 128, 138 (1976); *Winters*, 207 U.S. at 576).

144. Diné Hatallii Amicus Brief, *supra* note 91, at 9-10 (citing *Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*, 3-96 (Oct. 2007)).

145. *California*, 373 U.S. at 599-601.

146. *Id*. at 601.

147. *See generally Winters.*

148. In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source, 35 P.3d 68, 78 (Ariz. 2001).

149. *Id.* at 78.

geography, topography, and natural resources"; 3) the Tribe's "current economic station" and the proposed economic development to the extent it involves a need for water; 4) "past water use on a reservation"; and 5) the Tribe's "present and projected future population."[150] An understanding of the PIA standard and factors potentially replacing that quantification measure is vital to understand the scope of the Navajo Nation's unqualified reserved water rights and how such water can be quantified in the future. For example, the Navajo certainly tied reserved water rights to agriculture in their opposition brief filed before the Supreme Court.[151] But *In re Gila River*'s finding that the quantity of water reserved must satisfy both present and future needs of the reservation further supports the Navajo Nation's legal and moral claim under the trust doctrine.[152]

IV. ARIZONA V. NAVAJO NATION (ARIZONA III)

Amidst the water crisis, the Navajo Nation sued the federal government in 2003 to compel the Secretary of the Interior to assess the Nation's water needs on its reservation, develop a plan to secure the needed water, and manage the Lower Colorado River to avoid harming the Nation's unquantified water rights.[153] The Nation cited the 1868 Treaty that established the reservation as positive law creating a "permanent home" for the Nation.[154] They argued that the "permanent home" language meant that the United States agreed to secure water for the Nation and that the treaty language imposed a federal fiduciary duty.[155] Also citing the 1868 Treaty's requirement that the U.S. supply seeds and "agricultural implements" for three years, the Nation argued that the express provisions necessarily implied that the U.S. also had an affirmative duty to secure water for those agricultural materials.[156] Additionally, the Nation contended that federal control over their reserved water rights aligns with the view that the U.S. retains a trust obligation to the Navajo Nation.[157]

Three states—Arizona, Colorado, and Nevada—and several stakeholders intervened. They perceived a threat to the water allocations previously decided in *Arizona v. California*, which assigned water from the Lower Colorado River to Arizona, California, Nevada, and five Indian Tribes.[158] In *Arizona v. California*, Navajo Nation was among the twenty-five Tribes represented by the federal government. There, the Supreme Court limited allocations to the River's

150. *Id*. at 79-81.

151. *See* Brief of Respondent Navajo Nation in Opposition Filed at 6, No. 21-1484, *Arizona III*, 599 U.S. 555 (2023) (No. 21-1484) (explaining how the Court of Appeals held that, by establishing a reservation as a "permanent homeland suitable for farming," those treaty provisions "promised a Nation a right to sufficient water" under the *Winters* doctrine).

152. *In re Gila River*, 35 P.3d at 77.

153. *See Arizona III*, 599 U.S. at 558-63.

154. *Id.* at 567.

155. *Id.* at 567-69 (citing Arizona v. California, 460 U.S. 605, 615 (1983)).

156. *See id.* at 560.

157. *See id*. at 555 (syllabus) (explaining that the Navajo asserted that the U.S.'s control over the reserved water rights "supports the view that the United States owes trust duties" as well).

158. *California*, 373 U.S. at 564-65.

main stream (excluding its tributaries), reasoning that the Boulder Canyon Project Act[159] "dealt exclusively with mainstream water."[160] Instead, the claims brought on behalf of the Nation in *California* concerned unqualified rights to the Little Colorado River, a tributary of the Colorado River that crosses a portion of the Navajo Reservation.[161] Thus, the Navajo were not granted rights to the Lower Colorado mainstream.[162]

The litigation spanned two decades while the Navajo's water scarcity problem continued to worsen.[163] In 2022, the Ninth Circuit Court of Appeals held that the federal government has a fiduciary duty to the Navajo Nation and remanded the case with instructions to the District Court to "fully consider the [breach of trust] claims."[164] Arizona, Colorado, Nevada, and various water districts within those states filed a petition for certiorari, challenging the lower court's jurisdiction over the Nation's complaint and the Tribe's claim that the U.S. must quantify the Nation's Colorado River water. Separately, the federal defendants filed another petition for certiorari regarding the Ninth Circuit's holding that a "fiduciary duty exists." The Court granted both petitions and consolidated the cases before hearing oral argument in March 2023.

In 2023, the Supreme Court held five-to-four in the consolidated cases of *Arizona v. Navajo Nation* and *Navajo Nation v. U.S. Department of the Interior* that the federal government can only incur a fiduciary duty to a Tribe if it expressly accepts that duty via treaty, statute, or regulation. Writing for the majority, Justice Kavanaugh found that the United States does not have a judicially enforceable duty to the Navajo Nation because the 1868 Treaty "contains no language imposing a duty on the United States to take affirmative steps to secure water for the Tribe."[165] His reasoning relied on *United States v. Jicarilla Apache Nation*, which held that to assert such a duty, a Tribe must establish that "the text of a treaty, statute, or regulation impose[s]" that duty on the U.S.[166] Justice Kavanaugh further held that the U.S. owes judicially enforceable duties to a Tribe "only to the extent it expressly accepts those

159. 45 Stat. 1057 codified at 43 U.S.C. §§ 617-619(b) (1928).

160. Rita Maguire and Nicole Klobas, *The Supreme Court's Decision in Arizona v. Navajo Nation: A Tale of Scarce Water and Treaty Rights in the Southwest*, AM. BAR ASS'N (Nov. 1, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2023-2024/november-december-2023/supreme-courts-decision-in-arizona-v-navajo-nation/ (last visited Dec. 16, 2023) (citing *California*, 373 U.S. at 567-75).

161. *See California*, 373 U.S. at 567-75.

162. *See id.*

163. The complaint was dismissed twice by the U.S. District of Arizona for lack of subject matter jurisdiction, and twice the Ninth Circuit remanded the case. *Id.* In 2017, the Ninth Circuit affirmed the lower court's dismissal of the complaint's original NEPA claims but held that the Nation's complaint properly stated a breach of trust claim premised on federal reserved rights pursuant to *Winters*, treaties with the United States, and the Secretary's "pervasive control" over the Lower Colorado River. *Id.*

164. Navajo Nation, 26 F.4th 794, 804 (9th Cir. 2022).

165. *Arizona III*, 599 U.S. at 555 (citing United States v. Navajo Nation, 537 U.S. 488, 506 (2003)).

166. *Id.* at 565-66 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 173-74, 177-78 (2011)).

responsibilities."[167] In other words, Justice Kavanaugh viewed any affirmative duty, even quantification of water rights or construction of water delivery infrastructure, would be an expansion of the 1868 Treaty. He reasoned that "Indian treaties cannot be rewritten or expanded beyond their clear terms."[168]

In response to the Nation's *Winters* rights argument, Justice Kavanaugh reasoned that *Winters* only recognizes the federal government's implicit reservation of water from groundwater or rivers that "border, cross, underlie, or are encompassed within the reservation."[169] Therefore, even if the 1868 Treaty had imposed an affirmative duty on the U.S. to provide water to the Nation, that duty would only apply to water sources within or directly next to the Navajo reservation. Because the 1868 Treaty did not explicitly create any affirmative duty, Justice Kavanaugh held that the Nation's *Winters* claim was without merit.[170] This holding should be interpreted narrowly to only encompass the specific request for injunctive relief that the Supreme Court struck down. Expanding the holding would further endanger future Navajo claims to water rights.

But Justice Kavanaugh misunderstood the Nation's request. He believed that the Nation sought to recognize affirmative duties *beyond* mere water rights quantification. The United States argued that a ruling in favor of the Navajo would force the federal government to not only assess and quantify the Nation's water rights, but also to build water delivery infrastructure. "Just as the 1868 treaty didn't impose on the United States a duty to build roads or bridges, or to harvest timber, or to mine coal, the 1868 treaty didn't impose on the United States a duty to construct pipelines, pumps or wells to deliver water."[171] This misunderstanding of the Nation's narrow ask of the Court ultimately doomed the case.

In contrast, Justice Gorsuch's dissent offered a more historically informed opinion of how the Navajo would have interpreted the 1868 Treaty from its true context. The Nation simply sought to compel the United States to determine the water necessary to "fulfill the promise[s] made to them" in the 1868 Treaty.[172] The majority recognized neither the relevant violence leading up to the signing of the 1868 Treaty, detailed *infra*, Section II, nor the historic, economic, cultural, and religious importance of water for the Navajo people, detailed *infra*, Section I. In failing to uphold the trust responsibility within the context of the 1868 Treaty negotiations, Justice Kavanaugh broke from both precedent and the

167. *Id.* at 564 (quoting *Jicarilla*, 564 U.S. at 177).

168. *Id*. at 565 (quoting Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)).

169. *Id.* at 560-61 (citing Winters v. United States, 207 U.S. 564, 576 (1904)).

170. *Id.* at 567.

171. Becky Sullivan, *The Supreme Court wrestles with questions over the Navajo Nation's water rights*, NPR (Mar. 20, 2023), https://perma.cc/CCP8-5JUS.

172. *Arizona III*, 599 U.S. at 594 (Gorsuch, J., dissenting) (citing the Navajo's Response Brief to the Court).

Indian canons of construction.[173] Instead, the majority focused on what a positive ruling would mean for the federal government.

The Supreme Court's decision concerns the judicial enforceability of the Indian trust doctrine writ large in analogous situations where specific treaty language does not exist. Justice Kavanaugh reasoned that absent a Congressionally created conventional trust relationship with a Tribe "as to a particular trust asset," the Supreme Court will not "apply common-law trust principles" to deduce obligations absent from the text of a treaty, statute, or regulation.[174] This is worrisome given the role that federal common law has played in Indian law. Since Tribal governments predate the creation of the Anglo-American legal system, federal common law has been made freely in the field of federal Indian law, perhaps more so than in other legal fields.[175] Justice Kavanaugh's ruling flatly ignores this tradition. It is therefore unclear how the trust doctrine can be employed in analogous situations to hold the U.S. accountable, absent the existence of specific treaty language.[176] Considering the ongoing uncertainty, this Note asserts that the best federal institutions to enforce the trust doctrine and provide the Navajo with redress are administrative agencies.[177]

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173. *See supra*, Section II.C.

174. *Arizona III*, 599 U.S. at 565-66 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 178 (2011)).

175. This is out of respect of Native sovereignty since North American Tribes existed and governed themselves before the creation of the United States and its legal system. American diplomacy and rule of law therefore incorporated the existence of pre-constitutional sovereigns. Professors Seth Davis, Eric Biber, and Elena Kempf refer to this paradigm as the historical international law "model of treaties." Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PENN. L. REV. 549, 553 (Feb. 2022). In 1775, prior to the American Revolution, the Second Continental Congress of the thirteen American colonies met with speakers from the Lupwaaeenoawuk, the Great Council of the western Delawares, the Haudenosaunee Confederacy, the Shawnee Nation, the Ottawa Nation, and the Wyandot Nation. *Id.* at 551-52. Then in the fall of 1778, three Tribal representatives from the Delaware Nation again met with agents of the "United States of North-America" to negotiate a treaty. *Id.* at 552 (citing Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13). The Delawares "sought a military alliance" and "the promise of mutual assistance and protection from the United States" in exchange for declaring Delaware's support and allowing the "free passage for American troops" through Delaware territory. *Id.* at 552 (citing Richard D. Pomp, *The Unfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 924 & n.93 (2010)). This treaty, known as the "Treaty of Fort Pitt," acknowledged the Delawares as a "nation" and "pledged the parties to a mutual 'confederation' between 'states.'" *Id.* (citing Treaty with the Delawares, arts. IV & V). Just over fifty years later, in *Worcester v. Georgia*, the Marshall Court referenced the history of U.S. treaties with Tribes in its holding that "Georgia could not legislative over the lands of the Cherokee Nation, a sovereign nation." *Id.* at 553 (citing Worcester v. Georgia, 31 U.S. at 549 (1832)). Federal common law therefore has been made expansively, more so on other areas of law, because of the distinct nation-to-nation relationship between the United States and sovereign Tribes. This relationship is rooted in an international relations understanding.

176. Requiring specific treaty language is a textualist argument. Given the makeup of the current Supreme Court and the conservative justices' propensities for accepting textualist arguments, Indian law scholars and litigants should understand what textualism means for which Tribes can and cannot bring trust doctrine claims. Depending on relevant treaty language, some Tribes will be able to bring claims and others potentially won't. This inherently creates inequality amongst federally recognized Tribes and widens the gap even more so between federally recognized and non-federally recognized Tribes.

177. Further argued *infra*, Sections VI-VII.

V. THE COLORADO RIVER COMPACT OF 1922 AND ITS ONGOING MANAGEMENT

178

Lawsuits are not the sole mechanisms by which the Nation can quantify its water rights. Compacts, settlements, and congressional and presidential actions offer solutions. But historically, these avenues have proven ineffective for providing water to the Nation. Tribes were excluded from the Colorado River Compact.[179] Tribal water settlements fell short and even federal reclamation projects authorized by Congress did not translate into usable, "wet" water for the Navajo. But the needs of the Navajo Nation and other Tribal stakeholders can be included in future Compact management.

The Colorado River Compact of 1922 ("the Compact") divided the river into the Upper Basin (Colorado, New Mexico, Utah, and Wyoming) and the Lower Basin (Arizona, California, and Nevada). The division lay at Lee Ferry,

178. *Tribal Water Rights Overview*, Navajo Nation Water Rights Comm'n, https://nnwrc.navajo-nsn.gov/Public-Education/Tribal-Water-Rights-Overview (last visited Jan. 12, 2025).

179. Colorado River Compact (1922), https://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf (last visited Jan. 21, 2025).

Arizona.[180] Pursuant to federal law, Reclamation manages the basins' water.[181] The Compact allotted annual consumptive use of 7.5 million acre-feet ("MAF") to both basins "in perpetuity."[182] The Law of the River—the rules, regulations, laws, treaties, and other binding agreements that control the river's waters—governs the Colorado River watershed.[183] The 1963 Supreme Court decision in *Arizona v. California* further established several important elements of the Law of the River.[184]

Arizona v. California confirmed that Congress designated the Secretary of the Interior as the Water Master for the Lower Basin,[185] authorizing the federal government to deliver all water below the Hoover Dam.[186] The Water Master has "sufficient power . . . to direct, manage, and coordinate" the complex network of water uses in the entire Lower Basin. Often, the Water Master is tasked with administering a coordinated management plan that considers the various conflicting needs of the people and institutions of all Lower Basin states.[187] Importantly, Secretary Debra Haaland, a member of the Pueblo of Laguna, is the first Native woman confirmed as a cabinet secretary.[188] Under her leadership as Water Master, Tribes have reason to hope that their objections[189] will be listened to.[190]

The states failed to consult with Tribes during the creation of the Compact, and lawmakers wrote the Law of the River with erroneous hydrological predictions. Lawmakers allocated water using hydrologic data that indicated annual river flow at Lee Ferry as 16.4 MAF, but the flow fluctuates greatly, between 4.4 million to more than 22 MAF annually.[191] Today, the river and its

180. CONG. RSCH. SERV., MANAGEMENT OF THE COLORADO RIVER: WATER ALLOCATIONS, DROUGHT, AND THE FEDERAL ROLE Introduction (2024), https://crsreports.congress.gov/product/pdf/R/R45546/24 (last updated Sept. 7, 2022).

181. *Id.*

182. *Colorado River Compact*, *supra* note 80.

183. *Navajo Water Rights Overview*, NAVAJO NATION WATER RIGHTS COMM'N, https://perma.cc/J74L-23S3 (last visited Apr. 26, 2024).

184. *See, e.g.*, *California*, 373 U.S. 546 at 585-86 (granting the Secretary of the Interior the authority to apportion surpluses and shortages among Lower Basin states).

185. CONG. RSCH. SERV., MANAGEMENT, *supra* note 180, at Introduction.

186. *Id.*

187. *Supreme Court Clears the Way for the Central Arizona Project*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/3TS3-TK7V (last visited Dec. 16, 2023).

188. *Secretary Deb Haaland*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/366N-SWF3 (last visited Apr. 26, 2024).

189. *See* Michael Elizabeth Sakas, *Historically Left out of Colorado River negotiations, 20 tribes urge Interior Secretary Haaland to include their voices*, CPR NEWS (Nov. 25, 2021), https://perma.cc/L7RQ-KAQQ (detailing the complaints of the twenty Tribes in the Colorado Basin, all urging Secretary Haaland to include Native voices in the upcoming negotiations).

190. *See, e.g.*, Secretary Haaland's recent visit to the Grand Canyon, where she and other federal officials met with Tribal leaders to discuss the creation of the Baaj Nwaavjo I'tah Kukevi Grand Canyon National Monument. *Secretary Haaland highlights locally led conservation efforts in visit to Grand Canyon Region*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/ALA4-D36Y (last updated May 22, 2023). During her visit, Secretary Haaland met with members of the Grand Canyon Tribal Coalition regarding their endeavors to safeguard the land's cultural and historic value to local Tribes. *Id.*

191. *Colorado River Compact*, *supra* note 80.

tributaries are overdrawn by over a MAF annually, despite water use reduction efforts.[192] The federal government now pays farmers, cities, and Tribes in California, Arizona, and Nevada for voluntary water cuts.[193] Secretary Haaland has called the Southwest's current drought "one of the most significant challenges facing our country."[194] While each state that is party to the Compact has specific allocations, the Compact's only reference to Indian water rights is a single sentence that "nothing in the document should be understood to affect the United States government's obligations to [T]ribal water rights."[195]

Such a bare-bones statement regarding Tribal water rights is laughably inadequate. Parties participating in the original Compact negotiations divided the water without Tribal consultation. Indeed, Indians could not even vote at the time the Compact was negotiated.[196] By the time American society acknowledged Indian voices, it was too late for them to meaningfully join the discussion. The federal government must rectify the historic and ongoing structural injustice of intentionally excluding Tribal interests and needs in the Compact.

The world that Native Nations operate in today is vastly different from when the Compact was negotiated. Although the Interior has reiterated its commitment to ensuring that all peoples in the basin receive adequate assistance and support to build resilient and sustainable communities, it is hard to imagine how Tribal interests can be considered without revising the Colorado River Compact.

A. Indian Water Rights Settlements

In its effort to fulfill the trust responsibility, the federal government prioritizes the advancing of decreed Tribal water rights through Indian water rights settlements. Since 1990, the Interior's policy regarding undetermined water rights has been to resolve such rights through negotiated settlements instead of litigation. Quantification involves "identifying the amount of water to which users hold rights within the existing systems of water allocations in various areas in the West."[197] Settlements formally document Tribal water rights on paper and facilitate the funding of water delivery infrastructure.[198] Reaching

192. Babbitt, *supra* note 79. Additionally, the Colorado River Basin has historically crossed into Mexico, but the original Compact failed to include Mexico in its original allocations. Later, the United States committed 1.5 MAF of the river's annual flow to Mexico through the Mexican Water Treaty of 1944. *See* Treaty Between the United States of America and Mexico, Signed Feb. 3, 1944, Ratified Nov. 8, 1945, Proclaimed Nov. 27, 1945. This only adds to the over-allocation problem.

193. Ella Nilsen, *Biden administration outlines plan to pay for Colorado River water cuts as crisis looms*, CNN (Oct. 12, 2022), https://perma.cc/6HZH-EUC5 (explaining how the Inflation Reduction Act's $4 billion in drought relief funds is primarily focused on encouraging water use reduction in California, Arizona, and Nevada).

194. *Id.*

195. *Colorado River Compact*, *supra* note 80.

196. It wasn't until the Snyder Act of 1924, which granted citizenship to Indians born in the United States, that Indians could partake in the Fifteenth Amendment's guarantee to right to vote. *Voting Rights for Native Americans*, LIB. OF CONG, https://perma.cc/3KCK-E6EP (last visited Apr. 26, 2024).

197. CHARLES V. STERN, CONG. RSCH. SERV., INDIAN WATER RIGHTS SETTLEMENTS 2 (2023).

198. *Id.*

settlement is critical to enshrining water rights and procuring water distribution, especially since Tribal declaration of water rights is often met with hostility from states, which commonly view Tribal water rights as a threat to existing state allocations made according to the concept of prior appropriation.[199]

The settlement negotiation process is lengthy and involves many stakeholders besides the Tribe and federal government, such as states, water districts, and private users. Congress must approve a settlement prior to implementation. Settlements are funded in various ways through discretionary funding authorizations, direct, or mandatory spending.[200] President Biden's 2021 Bipartisan Infrastructure Law provides more than $13 billion to Tribal communities and supplements the Reclamation Water Fund.[201] Of that total, $2.5 billion funds the execution of the Indian Water Rights Settlement Completion Fund, which, in turn, established the Indian Water Rights Settlement Fund within the Infrastructure Investment and Jobs Act (P.L. 117-58).[202] The process to reach a settlement carries high transaction costs for all those involved but yields potentially high welfare for both Tribes and the federal government.

While an imperfect process, settlements serve as a meeting of the minds between stakeholders to allocate water rights and resources in a tangible way. Indian water rights litigation is costly for all parties and can potentially take several decades to resolve. Further, litigation often fails to secure palpable "wet water" for Tribes.[203] Courts more often award "paper water" rights at the culmination of litigation. In other words, Tribes may be awarded a legal claim to water without the financial resources necessary to actually construct water delivery infrastructure.[204] Since Tribal public health and economic prosperity depend on acquiring wet water, reaching a settlement is a good way to reduce uncertainty surrounding water rights.

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199. Under the system of prior appropriation, the water right holder who is first in time to make "beneficial use" of the water holds senior priority status. *See* 1-11 WATERS AND WATER RIGHTS § 11.04(a) (LexisNexis 2009). Users who make "beneficial use" later have junior priority. *See id.* In accordance with the *Winters* doctrine, many Tribal water rights were impliedly reserved by the Tribe with a date corresponding to the date of the establishment of the Tribe's reservation, through treaty. *See Winters*, 207 U.S. at 576-77. This often means that Tribal water rights carry a priority date that is older, and accordingly more senior, than most water rights perfected under state law. Tribal water rights thus may be viewed, and often are viewed, as a threat to state water rights systems. *See, e.g.*, *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 286 (Wyo. 1992) (Cardine, J. concurring in part) ("The reserved right looks backward for priority purposes to the establishment date of the reservation. Thus, reserved rights escape many of the limitations imposed by the prior appropriation system. Since they are in derogation of this system, by which all other appropriators must live, their scope should be carefully limited to avoid undue prejudice to those who receive their rights under state law."), cited in Taylor Graham, *Resolving Conflicts Between Tribal and State Regulatory Authority Over Water*, 112 CAL. L. REV. 101 (2024).

200. STERN, *supra* note 197, at 10.

201. *Interior Department Welcomes Significant Progress for Indian Water Rights Settlements*, U.S. DEP'T OF THE INTERIOR (Jan. 5, 2023) https://perma.cc/TSG3-KQLH.

202. *Id.*

203. STERN, *supra* note 197, at 2.

204. *Id.* at 2.

The Navajo Nation has reached settlements for water from the San Juan River in New Mexico and Utah, both of which draw from the Colorado River's Upper Basin.[205] The Northwestern New Mexico Rural Water Projects Act (Navajo-Gallup Water Supply Project / Navajo Nation Water Rights), P.L. 111-11 of 2009 resulted in 535,5330 acre-feet of water per year awarded to the Nation.[206] Then, in 2020, the Navajo-Utah Water Rights Settlement, P.L. 116-260, resulted in an additional 81,500 acre-feet annually.[207] Together, these settlements have cost the federal government nearly $1.2 billion.[208] But the Nation has yet to reach agreement with Arizona and the federal government for water rights from the Colorado River's Lower Basin.

With the size of the Navajo reservation, these settlements fail to meet the Nation's needs. In addition to the transaction costs previously discussed,[209] some Indians object to settlements' perceived certainty, arguing that settlements require Tribes to "speculate about their future water needs and then set that speculation in concrete."[210] Further, settlement negotiations often raise further inquiry over whether to allow for the "marketing, leasing, or transfer of [T]ribal water."[211] Water transfer itself raises further questions since some Indians repudiate water transfer from a religious and cultural perspective.[212] All these relevant inquiries add to the transaction costs and draw out negotiations. Given the vast economic, public health, and human rights concerns on the Navajo reservation, there ought to be a more concrete, efficient means to adjudicate Tribal water rights. The generally applicable framework proposed in Section VII is aimed at more equitably and efficiently structuring settlement decision making processes.

B. Central Arizona Project Water Reserved for Tribes

In 1968, President Johnson signed the Colorado River Basin Project Act, which authorized Reclamation to construct the Central Arizona Project (CAP). The system would provide for 1.5 MAF of Arizona's allotted water to be delivered to the most populated areas of the state and reduce the use of groundwater. A study commissioned by the CAP at Arizona State University found that Colorado River water delivered by the CAP supported Arizona's gross state product with $2 trillion in economic benefits since water deliveries

205. *Id.* at 7-8.

206. *Id.* at 7.

207. *Id.* at 8.

208. *See id.* at 7-8 (stating that the 2009 settlement in New Mexico cost $984.1 million, while the 2020 settlement in Utah cost $210.4 million, making the combined sum $1,194.5 million).

209. Including, but not limited to, congressional approval, federal funding availability, and the time and costs associated with lengthy negotiations processes.

210. DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 81, 85 (Tucson, AZ: Univ. of Ariz. Press, 2002).

211. STERN, *supra* note 197, at 15.

212. *See* MCCOOL, *supra* note 210 (explaining the belief that water is "fundamentally attached to [T]ribal life and identity").

began.[213] The CAP's water delivery supply is vital for maintaining Arizona's economic output and employment. However, the CAP created a system of unequal water distribution for federally recognized Tribes.

Fourteen of the twenty-two federally recognized Tribes in Arizona have either fully resolved, adjudicated, or partially resolved water rights claims.[214] Several of them receive water from the CAP system.[215] The 2004 Arizona Water Settlements Act allocated 67,000 acre-feet for settlements. Of this total, 33,107 acre-feet remain to fund future settlements since the White Mountain Apache received 23,782 acre-feet, 6,411 acre-feet were reserved for the Navajo Nation, and 4,000 acre-feet were granted to the Hualapai Tribe in its pending settlement.[216] Although 6,411 acre-feet were reserved for the Navajo on paper, the Nation is among several Native Nations with currently unresolved settlement negotiations under the CAP.[217]

Without a fully resolved CAP settlement in Arizona, the Navajo Nation cannot access the CAP's critical reserved water, funding, or infrastructure support mechanisms. The reservation is also located far North of the CAP service areas, which terminate on the outskirts of Phoenix.[218] Despite the Nation's 6,411 acre-feet reserved, the CAP has not built out infrastructure to facilitate water access for the Nation. While intended to support Tribes, CAP ultimately fails to support Navajo welfare, leaving the Nation to contend with another potential dead end.

C. Ongoing Bureau of Reclamation Scoping and Future Environmental Impact Statement Development

In June of 2023, the seven states that share the Colorado River struck a deal to temporarily cut water use to avert dangerously low water levels in Lake Mead.[219] California, Arizona, and Nevada agreed to reduce water consumption, and the deal was comparatively uncomplicated to attain because some users are being compensated through the Inflation Reduction Act (IRA) in exchange for not accepting water.[220] But federal IRA funding is only set to last through

213. *See CAP Economic Impact*, CENT. ARIZ. PROJECT, https://perma.cc/VM6D-EQHR (last visited Dec. 16, 2023), (explaining that GSP is akin to gross domestic product for the United States writ large and represents the dollar value of all goods and services produced in the region).

214. *Tribal Water Rights*, CENT. ARIZ. PROJECT, https://perma.cc/2KLG-4L23 (last visited Dec. 16, 2023).

215. *Id*.

216. *Id*.

217. *Id*.

218. *See CAP Allocations*, CENT. ARIZ. PROJECT, https://perma.cc/8PHG-E6R8 (last visited Dec. 16, 2023).

219. A. Martínez & Luke Runyon, *Colorado River states are ready to work on a longer term deal to share water*, NPR (June 9, 2023) https://perma.cc/7QTP-4387.

220. *Id.*

2026.[221] Currently, Reclamation is leading a multiyear process to draft a new operating plan for the Colorado River that will regulate the river for decades.[222]

Climate change has warped the river's hydrology, leading to drier conditions. The system must be operated more sustainably in the future to distribute water amongst all basin state users, which will require a more nuanced understanding of future climatic conditions and supply and demand. This understanding is shared by Camille Calimlin Touton, Commissioner of the Bureau of Reclamation, who stated that the river's management plan "needs to be adaptable to a future with unpredictable climate conditions."[223] Moreover, there is broad consensus that the thirty Native Nations in the basin cannot be excluded from negotiations since Tribes' legal rights to water must be considered.[224]

On June 16, 2023, Reclamation published a Notice of Intent to prepare an Environmental Impact Statement (EIS) in the Federal Register, thereby initiating a sixty-day public scoping period.[225] Reclamation requested public scoping documents concerning a myriad of issues that the agency should consider in the River's post-2026 operations and management.[226] Reclamation received 24,290 scoping submittals and commented on a broad range of matters for the post-2026 process and EIS analysis.[227] Sixteen Tribes and Tribal entities, including the Navajo Nation, submitted comments.[228]

In response to Tribal requests that Reclamation better include Tribes in the decision-making process, Reclamation established the Federal-Tribes-States Group. The group's express purpose is to "promot[e] equitable information sharing and discussion among the sovereign governments in the Basin." Reclamation also offered opportunities for basin stakeholders to learn about the underlying concepts needed to participate effectively in the "development of alternatives."[229] This is a good step towards meaningful inclusion of Tribal leaders moving forward. But given the narrow information-sharing purview of the group, there is no apparent intent to rectify Navajo Nation's water apportionment to date.

Reclamation anticipates that the draft EIS will be completed by the end of 2024 and will be available for public comment.[230] Reclamation anticipates that

221. *Id.*

222. *Scoping – Colorado River Post 2026 Operations*, *supra* note 29.

223. Alex Hager, *New Colorado River rules will be hard to agree on. A new report shows just how tricky it could be*, KUNC (Oct. 19, 2023), https://perma.cc/S9LU-KGFD.

224. Martínez & Runyon, *supra* note 219.

225. *Scoping – Colorado River Post 2026 Operations*, *supra* note 29.

226. *Id.*

227. *Id.*

228. *Scoping – Summary of the Federal Register Notice Input Received*, U.S. BUREAU OF RECLAMATION, https://perma.cc/S7Z9-M2BE (last visited Dec. 16, 2023).

229. *Alternatives Development*, U.S. BUREAU OF RECLAMATION, https://www.usbr.gov/ColoradoRiverBasin/post2026/alternatives/index.html (last visited Mar. 10, 2025).

230. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, SCOPING REPORT FOR POST-2026 COLORADO RIVER RESERVOIR OPERATIONS ES-2 (2023) https://www.usbr.gov/ColoradoRiverBasin/documents/post2026/scoping/Post2026Operations_ScopingReport_October2023_508.pdf.

a final EIS will be available in late 2025, followed by a Record of Decision in early 2026. According to Reclamation, the post-2026 process must finish prior to the development of the 2027 Annual Operating Plan for the Colorado River Reservoirs.[231] As explained in Section VII, the Navajo Nation can use upcoming administrative opportunities to achieve water security and corrective justice.

VI. MOVING AWAY FROM THE COURTS TO FIND REDRESS

Courts have failed to provide the Navajo Nation with redress. Considering water's vast public health, economic, and cultural importance explained *supra*, Section I, another institution must ensure justice and dignity prevail in Indian Country.

This Section evaluates potential actions that the federal government could take, including executive orders by the President, congressional action, and action by administrative agencies. It concludes that federal agencies, specifically Reclamation and the BIA, are the best institutions to make effective change because they hold strong agency expertise regarding Colorado River Basin disputes and Indian affairs.

A. Executive Orders

The President could issue an executive order concerning the trust doctrine. But such orders are generally not judicially enforceable. Early executive orders were issued for a wide variety of purposes, including the "withdrawal of public lands for Indian use," "for the erection of lighthouses," and "supplementing acts of Congress."[232] But until President Roosevelt approved the Federal Register Act in 1935, requiring presidential proclamations and executive orders to be published in the Federal Register,[233] executive orders were released without enumeration and were treated somewhat informally by the presidents.

Presidents have exercised power through executive orders by declaring martial law, enforcing the laws of the United States, and removing executive officers.[234] But Congress limits presidential power, so neither the president nor an agency head[235] acting at the directive of an executive order may infringe upon a statutory provision.[236] Further, case law regarding instances of government enforcement to uphold an executive order is sparse.[237]

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231. *Id.*

232. *Id.* at 44 (citing United States v. Midwest Oil Co., 236 U.S. 459, 470 (1915)).

233. *Id.* at 46 (citing 49 Stat. 501 (1953), 44 U.S.C. § 305 (1935)).

234. *Id.* at 50.

235. *Id.* (citing Wolsey v. Chapman, 101 U.S. 755 (1879)) ("[A]n act of a department head, within the field of his jurisdiction, is considered in law to be an act of the president, even though there has been no specific written delegation from the president, and even though only presidential action is authorized.").

236. *Id.* (citing Kendall v. United States, 12 Pet. 524 (1838), United States v. Guy Capps, Inc., 204 F.2d 655 (4th Cir. 1953)).

237. *Id.* at 53 (citing United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); and United States v. Carpenter, 113 F. Supp. 327 (E.D.N.Y. 1949), as "[s]ome cases in which the government was forced to take the initiative").

Two notable executive orders relate to EJ. In 1994, President Clinton directed federal agencies to recognize and confront the disproportionately high and adverse public health or environmental effects of agency actions on minority and low-income populations, "to the greatest extent practicable" and authorized by law, with E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.*[238] E.O. 12898 also compelled agencies to develop EJ implementation strategies and to "promote nondiscrimination in federal programs that affect human health and the environment."[239] Then in April 2023, President Biden encouraged the federal government to double down on those commitments outlined in E.O. 12898 and deliver on EJ goals to communities across the country with E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*.[240] Both executive orders exemplify the executive branch's soft power commitments to EJ. But such statements are inherently limited in implementation because they are not legally binding.

Further, both executive orders failed to spur federal action for the Navajo Nation. Water security is indisputably a public health and environmental issue, especially as climate change progresses.[241] Tribes are certainly EJ communities. They have borne a significant brunt of environmental harm since the creation of the United States. The Navajo Nation has specifically sought relief for decades, making it an ideal recipient of EJ-related support. Yet, executive orders have failed to provide redress to the Nation and there may be limits to what the President can demand in an E.O.

If President Biden were to issue an E.O. tomorrow that said the executive branch was committed to ensuring that the Navajo Nation received its portion of the Colorado River, then in theory, federal officials or administrative agencies would have to act to effectuate those directions. But executive orders can also be challenged as invalid exercises of the President's constitutional authority.[242] Furthermore, the President who issues the E.O. can revoke it, or an incumbent President can invoke the E.O. of his predecessor, making executive orders unstable.[243] But apart from the issue of enforceability, it is politically infeasible to hope that President Biden would issue such an order, especially as the upcoming elections draw this attention elsewhere. Therefore, executive orders regarding quantification of the Navajo Nation's water rights are likely neither effective nor timely methods of ensuring Navajo water rights.

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238. *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA, https://perma.cc/39WW-QSA6 (last visited Dec. 16, 2023).

239. *Id.*

240. *Id.*

241. As explained *supra*, Section I.

242. *General FAQs on Executive Orders*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/.

243. *Id.*

B. Congressional Actions

Although Congress also owes moral and fiduciary duties to Native Nations under the trust doctrine, no court has ever enforced such a duty.[244] In fact, Congress has abused its plenary power under its Indian affairs duties to *undermine* Tribal rights.[245] Congress's duty is one of moral and political obligation, which is unreliable.

First, the Supreme Court has historically declined to review nefarious Congressional actions with respect to Tribes. In fact, Congress's power to regulate commerce with Tribes is not curtailed by a requirement that all legislation further the trust responsibility.[246] For example, in *Lone Wolf v. Hitchcock*, the Supreme Court held that Congress' plenary power empowered it to allot Tribal lands on the Kiowa-Comanche-Apache reservation, despite an earlier treaty requiring the Tribe's consent for any distribution of land.[247] The Court reasoned that merely because Congress had the freedom to act "urgently," it could not be required to obtain Tribal consent. Disturbingly:

> Plenary authority over the [T]ribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.[248]

The Court's apparent holding that "Indian claims challenging congressional and executive branch decisions on Indian affairs were not subject to judicial review" exemplifies the Court's "extreme deference" granted to federal Indian affairs policies in the nineteenth century.[249]

Second, Congress has historically used the trust responsibility as a "sword" to further its own political agenda rather than a "shield" to protect the interests of Native Nations.[250] Given Congress' settler colonial policy agenda in the nineteenth century, the *Lone Wolf* Court's presumption that Congress was acting

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244. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 39-40 (West Pub. Co. 1981).

245. Three Supreme Court cases, commonly known as the 'plenary power trilogy,' articulated the extent of congressional and executive power over "Indian affairs . . . lands, and even . . . lives—almost always without the consent of Indian people or Indian nations." Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court,* AM. BAR ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/. These foundational cases, including Ex parte Crow Dog, 109 U.S. 556 (1883); United States v. Kagama, 118 U.S. 375 (1886); and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), furthered the exploitative and culturally destructive policy goals of Congress in the nineteenth century—namely, to dispossess Native peoples of their land and resources and to stifle, if not destroy, their cultures.

246. *Lone Wolf*, 187 U.S. at 564-65.

247. *Id.*

248. *Id*.

249. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court,* AM. BAR ASS'N (Oct. 01, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/ (interpreting *Lone Wolf's* holding).

250. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 43 (West Pub. Co. 1981).

in good faith is optimistic, if not misguided. The 1887 General Allotment Act led to a huge loss of Native land by encouraging non-Native landowners to enter and hold title to land originally set aside for Indian reservations. Under the Act, the United States surveyed reservations and divided them into individualized parcels of land. Some parcels were assigned to individual Indians before "surplus" lands were sold to non-Native settlers. The General Allotment Act therefore resulted in a "checkerboarding" of reservation land, another example of Congress wielding its power to hurt Tribes rather than to protect Tribal sovereignty.[251]

Finally, it is infeasible to believe that Congress will pass effective legislation anytime soon. Congress has the power to pass a statute mandating that all federally recognized Tribes be granted the water they are owed under *Winters*. But passing such a statute is unlikely due to political opposition. Although members of Congress are federal actors, representatives are ultimately beholden to the wishes of their constituents, and state water interests ultimately conflict with Native water rights. Especially under the appropriative rights scheme in the West, the senior rights-holding status of Tribes inherently threatens current statewide water allocations. Perhaps recently elected Native American, Alaska Native, and Native Hawaiian representatives in the House will give Native communities more of a voice directly on the House floor.[252] But ultimately, the Navajo Nation has spoken out regarding its water insecurity for decades, and Congress has looked the other way.[253] Further, given the vast variety of concerns Congress faces daily and the sluggish pace with which Congress acts, even if Congress does act, it will move slowly.

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251. *See* John P. Lavelle, *Chapter 16: Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of Montana v. United States*, in INDIAN LAW STORIES 539 (Carole E. Goldberg, Kevin K. Washburn & Phillip P. Frickey eds., 2011), cited in Taylor Graham, *Resolving Conflicts Between Tribal and State Regulatory Authority Over Water*, 112 CAL. L. REV. 101 (2024) (describing the Act as "a revolutionary federal policy geared at breaking up reservations into a multitude of separate Indian-owned parcels (or allotments) and permitting white settlers to purchase the remaining so-called 'surplus' lands").

252. *See* Jaclyn Diaz, *U.S. Congress reaches a milestone in Indigenous representation*, NPR (Sept. 20, 2022), https://perma.cc/PNB3-CDJA (detailing Representative Mary Peltola's September 2022 win in the House, confirming her as the first Alaska Native and woman elected to the House for Alaska. At the time, Rep. Peltola was one of six Indians serving as representatives in the House).

253. *See, e.g.*, Lux Butler, *Senators urged to step up after Supreme Court ruling on Navajo water rights*, CRONKITE NEWS (Sept. 27, 2023), https://perma.cc/AF5U-XPNU. In September of 2023, Navajo Nation Council Speaker Crystalyne Curley testified before the Senate Indian Affairs Committee that lack of water access is first and foremost a human rights issue and that *Arizona v. Navajo Nation* was about understanding what water the government has been holding in trust for the Navajo. In the same hearing, Heather Tanana, testifying for the NGO, Universal Access to Clean Water for Tribal Communities Project, noted that the Navajo were not asking for an expansion of their rights, but simply quantification. *Id.* The fact that these women had to repeat such a watered-down version of the obligations under the trust doctrine exemplifies Congress's failure to respond to the crisis.

C. Administrative Agencies

Administrative agencies are the best institutional actors to provide recourse that upholds the trust responsibility. Plus, the Supreme Court has demonstrated a willingness to hold federal agencies accountable for breaches of the trust relationship. For example, in *United States v. Mitchell* (*Mitchell II*), members of the Quinault Nation sued the United States for damages for mismanagement of forest resources.[254] The Supreme Court held that a trust duty arose from statutes and regulations that expressly authorized or directed the Secretary of the Interior to manage forests on Indian lands.[255] Then, in *United States v. White Mountain Apache Tribe*, it held the United States was subject to a fiduciary duty to maintain and preserve Fort Apache, since the Interior held the fort in trust "for the benefit of the Tribe" on whose reservation it was located.[256]

Mitchell II and *White Mountain Apache Tribe* establish precedent for instances where the Supreme Court has held the Interior accountable for breaches of the trust responsibility. However, one must also note that these cases are distinct from the present Navajo context. The federal timber management statutes and regulations upon which the *Mitchell II* respondents based their money claims explicitly gave the United States full trustee responsibility.[257] The Court found that through a regulatory scheme that "addressed virtually every aspect of forest management," the federal government assumed "full responsibility" to "manage Indian resources and land" for the benefit of the Quinault Nation.[258] Therefore, Interior's fiduciary obligations "mandat[ed] compensation . . . for damages sustained."[259] But the Navajo Nation lacks specific treaty, statutory, or regulatory language regarding water that it could reference in an analogous damages claim.

Similarly, in *White Mountain Apache*, the Act stating that the government held the Fort for the benefit of the Tribe went beyond a "bare trust" since it expressly defined a fiduciary relationship.[260] Thereafter, the United States took advantage of its authority to utilize the Fort and occupied or made use of it daily. The fact that the property occupied by the government was "expressly subject to a trust" supported the inference that "an obligation to preserve the property improvements was incumbent on the [g]overnment as trustee."[261] *White Mountain Apache* is perhaps the most axiomatic example of a trustee (the Interior) holding something (the Fort) in possession for a beneficiary (the Tribe). Unfortunately, the Navajo Nation has no comparable water delivery infrastructure that the Interior holds expressly in trust for the benefit of the Nation.

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254. *Mitchell II*, 463 U.S. at 207.
255. *Id.* at 225-28.
256. 537 U.S. 465, 484 (2003).
257. *Mitchell II*, 463 U.S. at 224.
258. *Id.* at 220, 224.
259. *Id.* at 226.
260. 537 U.S. at 465.
261. *Id.* at 467.

But aside from special instances, the courts are overall most likely to uphold the trust responsibility in cases involving administrative agencies. In being held accountable by the judicial branch, the executive branch necessarily constrains its own discretion. But agencies already limit their discretion through the passing of regulations. If anything, this demonstrates how much more trust we should have in federal agencies to carry out what is morally right and legally owed. Federal agencies are therefore the most appropriate institutions to provide redress to the Navajo Nation.

Trusting federal agencies involves moving away from judicial solutions, which carries inherent risk. Federal agencies are creatures of statute, without the power to make federal common law. This means that agencies do not typically act pursuant to common law doctrines since their authority is derived from statutes. Agencies enforce rules and regulations they promulgate by conducting investigations to monitor compliance. Some agencies can pursue formal legal action for alleged violations of the rules, regulations, or statutes.[262] But agencies cannot typically pursue matters that are outside the statute's scope in an administrative proceeding, nor can they impose new procedures or penalties that statutes do not provide for. The separation of powers between the agencies and courts means that Reclamation and the BIA are somewhat limited in their ability to enforce the trust doctrine through rules or regulations.[263] But Reclamation, the BIA, and Interior, in general, could and should use their statutory authority to act in alignment with the trust doctrine's requirements.

Reclamation's mission, "to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public,"[264] accords with the trust doctrine. Reclamation can understand the trust doctrine as a tool to achieve its goal of serving the interests of the American people, including Indians. Reclamation also seeks to "embrace a culture of respect for people through [its] own ethical behavior."[265] To act ethically in the face of historically disastrous treatment of Native peoples in the

262. For example, EPA has the authority to file enforcement actions against violators of many federal statutes, including Clean Water Act § 303(d) and Clean Air Act § 209.

263. The Bureau of Reclamation derives its power from the Reclamation Act of 1902, which halted speculation of land and authorized the government to construct irrigation infrastructure to develop arid land in the western United States. Then in 1982, the Reclamation Reform Act increased the land ownership allocation for most landowners and began charging full-cost pricing for use of Reclamation irrigation water. *See generally* Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261. Other regulations concerning acreage limitation rules and regulations may be found at 43 C.F.R. §§ 426-28. *See generally About Us – Mission*, U.S. BUREAU OF RECLAMATION, https://perma.cc/UVZ6-RBA7 (last visited Dec. 16, 2023). Additionally, Article 1, Section 8 of the U.S. Constitution articulates Congress' powers over Indian affairs, "to regulate commerce with foreign nations, and among the several States, and with Indian tribes." The BIA was established in 1824 by then-Secretary of war John C. Calhoun in order to oversee and carry out the federal government's trade and treaty relationships with Tribes. The BIA was given statutory authority by the act of July 9, 1832 (4 Stat. 564, Chap. 174). Then in 1848, the BIA was transferred to the new Department of the Interior. *See generally Mission Statement*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://perma.cc/7VBV-ZF29 (last visited Dec. 16, 2023).

264. *About Us – Mission*, U.S. BUREAU OF RECLAMATION, https://perma.cc/UVZ6-RBA7 (last visited Dec. 16, 2023).

265. *Id.*

United States would be to fully embrace the trust doctrine and uphold its legality through agency action.

Similarly, the BIA's mission is to "enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives."[266] As the principal federal agency acting on behalf of Native peoples, the BIA is indisputably charged with protecting the trust doctrine. The BIA even has an office dedicated to this role. The Office of Trust Services assists Tribal governments and allottees in "managing, protecting, and developing . . . trust lands and natural resources," as well as furthering the "stewardship of [Indian] cultural, spiritual, and traditional resources."[267]

Interior's overarching mission is to "conserve[] and manage[] the Nation's natural resources and cultural heritage for the benefit and enjoyment of the American people" and to "honor[] the Nation's trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities to help them prosper." Its mission statement explicitly names and reaffirms the trust responsibility, demonstrating the respect afforded to the trust doctrine.

Moreover, agencies have broad discretion under their governing statutes. Although parties can challenge the validity of agency discretion or the circumstances in which agencies employ their discretion, the legislative and judicial branches often defer to executive power and relative subject matter expertise within federal agencies.[268] Administrative law's broad deference to agencies could change as the major questions doctrine evolves.[269] Although how the major questions doctrine might shape how agencies implement the trust responsibility is outside the scope of this Note, there is reason to believe that these agencies can act within the bounds of the still-developing doctrine.

In *West Virginia v. EPA*, the Court relied on the major questions doctrine, which provides that in certain "extraordinary" cases, administrative agencies must have "clear congressional authorization" to make decisions of "vast economic and political significance."[270] The Court did not provide a specific test for what constitutes an extraordinary case. But it discussed factors to look for, such as whether an agency relies on ambiguous statutory text to claim a significant expansion of power and whether the agency lacks subject matter

266. *Mission Statement*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://perma.cc/7VBV-ZF29 (last visited Dec. 16, 2023).

267. Office of Trust Services, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://perma.cc/4V5M-HGV (last visited Dec. 16, 2023).

268. Skidmore v. Swift & Co., 323 US 134, 140 (1944) (explaining that courts should determine the amount of deference to give an agency depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

269. *See generally* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

270. *See* THE MAJOR QUESTIONS DOCTRINE, CONG. RSCH. SERV. (2022), (last updated Nov. 2, 2022).

expertise.[271] This broad doctrine needs further clarification. But it surely increases the scope of challenges that could be brought against an agency.

The states that rely on the Colorado River will likely argue that any agency action allocating water to the Navajo Nation will have "vast economic and political significance" since that water allocation will necessarily divert water away from their state. However, there is reason to believe that any agency action in this context is both less economically significant than that in *West Virginia* and more explicitly authorized by existing statutory authority and Supreme Court precedent.[272]

VII. ARTICULATING A MODERN FEDERAL RESPONSIBILITY DOCTRINE USING AN ENVIRONMENTAL JUSTICE LENS

Inherent Tribal sovereignty is a core guiding principle within federal Indian law.[273] The U.S. federal government historically recognized pre-constitutional Tribal sovereignty.[274] Nevertheless, Tribes do not have absolute authority within the jurisdiction of their territories; rather, Tribes are "subject to the overarching authority and jurisdiction of the federal government."[275] This Section asserts

271. *See* West Virginia v. EPA 597 U.S. 697, 723-34 (2022).

272. Any Interior action including the Navajo Nation in the development of long-term Colorado River management guidelines is dissimilar from the circumstances in *West Virginia*. That case challenged EPA authority on the dramatic expansion of renewable energy, which the Court characterized as a major departure from the way America's economy is run. But here, there would be no dramatic change. In fact, there is sufficient legislative authority from *Winters* that is over 100 years old backing up the case's holding, that when Congress reserves land for a reservation, it also reserves water sufficient to fulfill the purposes of the reservation. 207 U.S. at 576-57. Therefore, the Interior should include the Nation in discussions that will implicate its water rights. Quantifying the Nation's water rights would require resources from the Interior, but the national economy would not be drastically remade, as it purportedly would have been had EPA triumphed in *West Virginia*. Just over 140,000 people live on the Navajo reservation. *Navajo Nation*, CENSUS REPORTER, https://censusreporter.org/profiles/25200US2430R-navajo-nation-reservation/ (last visited Sept. 28, 2024). A quantification of rights to the Colorado River, and the water diversions thereafter, would improve the lives of all those people. Quantification and meaningful inclusion of Native voices in the post-2026 management will also bolster the region's economy. While the seven states that are party to the Compact will likely argue that diverting water to the Navajo will necessarily reduce water allocated to the states, changing who has access to water in Navajo country will not remake the economy of the entire nation. Finally, in *West Virginia*, the Court found that EPA attempted to regulate against the coal industry, something that only Congress could decide. Similarly, here, the states could argue that the Interior is taking an action that only Congress can authorize. But at its core, the Compact is a simple contract between states. Unlike a regulation, the states included in the Compact can negotiate and reach an agreeable set of terms. This situation differs from the Court's view of EPA's renewable Clean Power Plan that was struck down in *West Virginia*. Instead, the Interior will simply uphold its trust responsibility, which has been enshrined in federal common law for over a hundred years.

273. *See* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASS'N (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/ (noting that "Indian [N]ations retain inherent sovereign powers, subject to divestiture only be agreement or by Congress").

274. As fully explained *supra*, Section IV.

275. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 2 (1995) (citing Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195

how the trust relationship is broken and proposes an environmental justice lens that could be used to repair it. Administrative agencies should apply an environmental justice-plus framework when making decisions that impact Tribes.

A. The Broken Trust Doctrine

Tribes are pre-constitutional, "distinct, independent political communities."[276] Therefore, certain rights are accorded to federally-recognized Native Nations out of an understanding that such Tribes signed treaties reserving rights to self-governance, among other conditions. In 1924, the government granted citizenship to all Indians born in the United States, subjecting them to its laws, authorities, and rights. But Tribal members also have dual citizenship to their respective Nations. Out of respect for Native sovereignty, Indians enjoy certain "usufructuary rights," like hunting, fishing, and gathering rights, that are property rights.[277] Such resource rights, together with Tribal sovereignty, self-determination, and self-governance, are core principles of Indian cultural and economic autonomy.

Despite Tribal sovereignty, the trust doctrine assigns the U.S. federal government as the trustee in a relationship with Indians, who are beneficiaries. As discussed in Section III, this trust doctrine has historically been used to marginalize the independence and dignity of Tribes. The Supreme Court has described Tribes as "wards of the nation . . . *dependent* on the United States," who "from their very weakness and helplessness . . . there arises the duty of protection."[278] This is a culturally racist premise from which courts have historically understood the obligations of the federal government, necessitating a modern reframing of the doctrine.

Federal land control is the legacy of an outdated, racist presumption that Indians are incapable of managing their own lands. Justice demands that a modern perspective govern new policies because an originalist conception of the trust doctrine can be wielded problematically. Established in 1824, the Bureau of Indian Affairs is responsible for the administration and management of 68.5 million surface acres and 57 million acres of subsurface minerals estates held in trust by the United States for Indian Tribes and Alaska Natives.[279] Just over 94 percent of all BIA-recognized land is held in trust.[280] Despite this huge

(1984)); s*ee also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Tribes have been implicitly divested of authority to prosecute crimes committed by non-Indians within their territories).

276. *See* Worcester v. Georgia, 31 U.S. 515, 519 (1832).

277. The 'usufruct' concept is a temporary right to use and enjoy the property of another, without changing the character of that property, under Roman-based legal systems. The term never made it into English common law, although certain general similarities can be found in the common law concept of estate. *Usufruct*, BRITANNICA, https://perma.cc/T7U6-9MFR (last visited Dec. 16, 2023).

278. United States v. Kagama, 118 U.S. 375, 384-85 (1886).

279. *BIA Land Area Totals for US Native Lands*, NATIVE LAND INFO. SYS., https://perma.cc/9V8W-99E5 (last visited Dec. 16, 2023).

280. *Id.*

responsibility, there is little transparency or accountability regarding the BIA's execution of its trustee responsibilities.[281] Lack of Tribal autonomy over land and resources within the land means that Tribes can have little, if any, control over managerial decisions. This risks their lands' long-term sustainability and economic viability. Homeownership, natural resource management, and business development on Indian lands are thus "severely hinder[ed]" by government oversight.[282]

Differing understandings of the trust doctrine make it difficult to determine the exact moral and fiduciary obligations of the federal government. The U.S. Constitution contains no explicit description of a fiduciary relationship to Indians, but it does articulate the congressional power to regulate commerce with the Indian Tribes in Art. I, § 8, cl. 3, the presidential power to make treaties in Art. II, § 2, cl. 2, and the congressional power to make regulations governing the territory belonging to the United States, Art. IV, § 3, cl. 2.[283] The court interprets these powers to authorize the federal government's role as a trustee.[284]

In the broadest sense, the relationship includes "legal duties, moral obligations, understandings and expectancies" ensuing from the complicated relationship between Tribes and the federal government.[285] In the narrowest sense, the relationship "approximates that of a trustee and beneficiary," with the trustee subject in some ambiguous degree to legally enforceable responsibilities.[286] As explained *supra*, Section VI, the degree to which courts

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281. *Id.*

282. *Issues*, INDIAN LAND TENURE FOUND., https://perma.cc/H3Q5-Z3JT (last visited Dec. 16, 2023).

283. William C. Canby, Jr., *The Special Relationship Between the Federal Government and the Tribes, in* AMERICAN INDIAN LAW IN A NUTSHELL 40-41 (West Pub. Co. 1981).

284. *Id.* at 41.

285. *Id.* at 39.

286. *Id*. In light of differing understandings of the trust relationship, lessons from private fiduciary law can provide useful insight. For example, singer and pop culture icon Britney Spears' conservatorship dispute highlighted how trustees can improperly manage the finances, business decisions, and personal affairs of those the conservatorships are meant to protect. A conservatorship relationship is where a conservator is appointed by a court to manage a person's affairs who is "unable to handle them due to their mental capacity, age, or physical disability." *Conservatorship*, LEGAL INFO. INST., https://perma.cc/GN8E-BY59 (last visited Dec. 16, 2023). Spear's arrangement authorized her father to control her estate and her financial affairs, as well as her person. The conservatorship barred Spears from making and exercising a variety of intimate life choices, including who to date and how to decorate her home. Liz Day, Samantha Stark, and Joe Coscarelli, *Britney Spears Quietly Pushed for Years to End Her Conservatorship*, N.Y. TIMES (published June 22, 2021, updated Nov. 2, 2021), https://perma.cc/2JCZ-VKY8 (last visited Apr. 28, 2024). In 2019, Spears told the court that she had felt "forced by the conservatorship into a stay at a mental health facility" and "to perform against her will." *Id.* Spears' attorney cited her father's "potential self-dealing" in connection with Spears' estate assets as reasons for the conservatorship's prompt termination. Joe Coscarelli, *Britney Spears: End Conservatorship, But Remove My Father First*, N.Y. TIMES, (published Sept. 22, 2021, updated Nov. 12, 2021), https://perma.cc/HRY4-PNTH (last visited Apr. 28, 2024). Then in 2021, Judge Penny terminated the conservatorship. *Id.* While there are key differences between a private conservatorship and the Indian trust doctrine, the underlying premise is similar. Under both a private conservatorship and the trust doctrine relationship, the conservatee and beneficiary are considered incapacitated and unable to handle their own financial or daily life responsibilities. Just as Spears' court found that the father failed to advocate and act in accordance with Britney's best interest, the Supreme Court failed to advocate on behalf of the Navajo

are willing to enforce the trust responsibility in part depends upon the branch of government involved.

B. Adopting an Environmental Justice Lens to Reframe the Trust Doctrine

Due to either express intention or methodical disregard, communities of color and economically impoverished communities have historically borne the brunt of the worst environmental harms in this nation. The EJ movement gained traction with the Civil Rights Movement of the 1960s out of the recognition that systemic racism and colonialism fostered the systemic inequalities that persist today.[287] EPA defines EJ as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[288] EPA says that EJ will be "achieved" when everyone enjoys "the same degree of protection from environmental and health hazards" and "[e]qual access to the decision-making process to have a healthy environment in which to live, learn, and work."[289]

Past U.S. policies and actions, particularly Native land dispossession and forced migration, have burdened Tribes more with environmental harms than other groups of people. According to researchers from Yale University, Colorado State University, and the University of Michigan, Native Nations have lost 98.9 percent of historical land since European settlers began colonizing the continent.[290] Further, 42.1 percent of Tribes have no federal- or state-recognized present-day Tribal land base, and many Tribes were forced onto new lands shared by multiple Nations despite cultural differences or historic rivalries.[291] The

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Nation and provide the Tribe with water quantification, which would be in its best interest. The court ultimately found that Spears' conservatorship was no longer needed, thereby releasing her of its control. But the Supreme Court's decision does not uproot the entire trust relationship between the federal government and the Navajo Nation; it merely shows how broken the trust is.

287. *Environmental Justice*, EPA, https://perma.cc/JPR8-BEKW (last visited Dec. 16, 2023) (citing the Memphis Sanitation Strike of 1968, which advocated for fair pay and better working conditions for Memphis garbage workers; investigated by Rev. Dr. Martin Luther King, Jr., this was the first time Black Americans mobilized a national, broad-based group to oppose environmental injustices).

288. *Id.*

289. *Id.*

290. JUSTIN FARRELL ET AL., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE 578, 578 (2021) DOI: 10.1126/science.abe34943.

291. *Id.*; *see also, e.g.*, the history of the Modoc Nation, the Nation of my ancestors. The Treaty of Council Grove, signed in October of 1864, terminated the rights of the Modoc, Klamath, and Yahooskin Band of Snake Indians and established a joint reservation in Oregon. In exchange for peace, the Modocs agreed to cede their lands to the United States government and live alongside the Klamath, their traditional enemy. But the combination of conflict amongst the Modocs and Klamaths and failure to receive adequate provisions they had agreed to receive in the Treaty led a band of Modocs to leave the reservation. Captain Jack's band returned to homelands in the Lost River area of Northern California and requested a separate Modoc reservation. But the federal government refused. Instead, the Commissioner's Office of Indian Affairs directed a military order to return the "defiant Modoc" to the shared reservation in Oregon, "peacefully if you can, forcibly if you must." The Battle of Lost River started the Modoc War, much of which was fought on the rocky terrain of what is now the Lava Beds National Monument at Tulelake, CA. During the nearly eight-month Modoc War, Captain Jack's band of no more than sixty men fought over a thousand U.S. soldiers. The Modoc lost only six men by direct combat while the U.S. Army suffered forty-

study's migration analysis indicates that present-day reservations are generally far from historical homelands, averaging a distance of 150 miles.[292] Further, from 1944 to 1986, nearly thirty million tons of uranium ore were extracted from Navajo lands under leases with the Nation; EPA is still cleaning up the abandoned mines.[293] For the foregoing reasons and many more, the Navajo Nation, as well as many other Tribes, are indisputably EJ communities.

The thirty federally recognized Tribes in the Colorado River basin are some of the western United States' oldest water users, many of whom operate in the Lower Basin. Yet, these Nations have historically been excluded from high-level policy discussions regarding water management amongst the various stakeholders. Today, the federal government can create a more equitable and sustainable management system for the Colorado River that will use EJ principles to provide content to the trust doctrine. As part of the post-2026 scoping process and beyond, Interior must engage with Tribes more meaningfully than it has in the past. One option is to treat Tribes akin to states. Treating Tribes akin to states will achieve *equality*—rather than formal *equity*—since Interior would give the same resources and opportunities for engagement to all relevant stakeholders in the basin.

Treating Tribes as states would not achieve full equity since many Native Nations lack the administrative capacity that states have. Many Native Nations also lack the economic resources, sheer labor force, and technical expertise that state governments have. Assuming that providing the same procedural opportunities for all stakeholders in the basin will lead to the same outcomes is equity-blind optimism. Additionally, Tribes must catch up to the level of engagement that states have enjoyed in the Compact for decades. Interior should consider ways to account for lost time by accelerating Tribal consultation methods.

Interior could draw inspiration from successful Tribal co-management schemes to facilitate meaningful Navajo Nation participation. For example, the Columbia River Inter-Tribal Fish Commission (CRITFC) is widely viewed as a success in building Tribal capacity to participate effectively in the management

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five casualties, including General E.R.S. Canby, the sole U.S. General to lose his life in an Indian War. The war cost the federal government half a million dollars; today, that would be roughly $8,500,000. Had the federal government created the separate Modoc reservation, it would have cost only $10,000, or $180,000 in present currency. The war ended on June 1, 1873, when Captain Jack and five other warriors, Schonchin John, Black Jim, Boston Charley, Barncho, and Slolux, became the only Indians in American history to be tried by a Military Commission for war crimes. Captain Jack, Schonchin John, Black Jim, and Boston Charley were hanged. Barncho and Slolux were imprisoned for life at Alcatraz Island. 155 Modoc were then forcibly transported by train in cattle cars about 2,000 miles from Fort Klamath, Oregon to Oklahoma. 153 survived the journey. *See generally History*, MODOC NATION, https://perma.cc/EDR5-TLL4 (last visited Dec. 16, 2023).

292. Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE (2021), DOI: 10.1126/science.abe34943.

293. *Navajo Nation: Cleaning Up Abandoned Uranium Mines*, EPA, https://perma.cc/KNC7-5ZX4 (last visited Dec. 16, 2023).

of the Columbia River.[294] Salmon is of the utmost historic, cultural, and environmental significance to the Tribes along the Columbia River.[295] Salmon is one of the "First Foods" "honored" in Tribal ceremonies.[296] Salmon also supports the health of Pacific Northwest ecosystems, a fact acknowledged in Native tradition and backed by science today.[297] The CRITFC therefore combines Indigenous and western ideologies to effectively manage the Columbia River. Interior should study the CRITFC model and apply what lessons it learns to the Colorado River's management.

Finally, it is also worth considering whether, as trustee, the Interior should provide special funding for Tribes to participate in Compact processes. One in four Indians endure poverty, with a median income of approximately two-thirds that of non-Hispanic whites.[298] Indian communities continue to face structural barriers to achieving economic security, largely due to the legacy of land dispossession, removal, forced assimilation, violent oppression, and unkept trust obligations. Chairman Don Beyer of the Joint Economic Committee in the Senate describes how such disparities "contribute to intergenerational poverty and deprivation."[299] Plus, Native Nations have less funding to finance competing public health, economic, cultural, and educational priorities. Interior can support Tribal prosperity by listening and appropriately responding to the Tribes that have identified water scarcity as a top priority, such as the Navajo.

Justice Kavanaugh's finding of no judicially enforceable obligation owed to the Navajo Nation should not leave agencies to believe there is no responsibility at all. The key underlying message is that the courts are unlikely to provide the much-needed remedy, which is a more robust trust responsibility. But failure of the courts does not keep federal agencies from providing just and expedited recourse. In this way, the executive branch both can and should articulate a more robust trust doctrine, which includes both procedural and substantive measures. Given the timing of the post-2026 scoping process, the time is ripe.

C. An "EJ-Plus" Administrative Solution

An EJ-informed policy approach should be a baseline from which trust doctrine obligations can be fulfilled. But the specific needs of individual Native communities, characterized as 'plus factors,' are also entitled to greater action

294. *See generally The Columbia Estuary*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://perma.cc/7MD2-8ZTF (last visited Dec. 15, 2023).

295. *Tribal Salmon Culture*, COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, https://perma.cc/JPZ6-T63P (last visited Dec. 15, 2023).

296. *Id*.

297. *Id*.

298. Adam Crepelle, *Federal Policies Trap Tribes in Poverty*, AM. BAR ASS'N (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/federal-policies-trap-tribes-in-poverty/.

299. Chairman Don Beyer, *Native American Communities Continue to Face Barriers to Opportunity that Stifle Economic Mobility*, JOINT ECON. COMM. DEMOCRATS, https://perma.cc/4L9A-5QPX (last visited Apr. 26, 2024).

because of the trust responsibility. Such plus factors could include (at a baseline) cultural claims, religious claims, and Native legal concepts that work to support those claims. The framework as articulated in this Note is intentionally broad to account for changing priorities over time and circumstance. This is because of the dynamic nature of federal-Tribal relations and evolving Tribal concerns. Importantly, the EJ-informed trust doctrine advocated for in this Note does not water down the nation-to-nation relationship or reconceptualize the entire trust responsibility; rather, the proposed framework adds more content to the existing doctrine.

The water crisis on Navajo Nation should be understood not only as an EJ issue, but also as a situation in which the federal government must act above and beyond to fulfill its trust obligations. By considering plus factors that are unique to specific EJ communities, Reclamation and the BIA can better employ an EJ lens to argue for and implement projects that will achieve restorative justice. For example, cultural claims have historically been excluded from EJ issues. These vital practices, such as the Navajo wedding ceremony involving water, described *supra*, Section I, ought to be respected and protected. The federal government can also begin repairing the trust responsibility by investing resources in understanding Indigenous connections between ecological sanctity and the law. Such connections can then inform future Tribal consultation. Traditional Navajo law regarding balance and harmony,[300] as well as traditional Navajo sustainability concepts, could be additional plus factors that should be respected and upheld under the scope of future U.S. federal administrative actions. Perhaps one day, such co-mingling of the Anglo-American and Native legal systems could even be analyzed together to bolster Tribal consultation in environmental scoping.

Moreover, as explained *supra*, Section I, water is central to the Navajo creation story and present-day religious ceremony and tradition. Water is vital to the Nation not only from a human rights, public health, and economic perspective, but also from a cultural and religious perspective. Therefore, another plus factor could be the importance of water in religion and oral tradition.

Developing long-term guidelines for the Colorado River should be approached through the EJ-plus lens. The ongoing management and future negotiations within the Compact should include procedurally and substantively equitable ways for the Navajo Nation and other Tribes to contribute and negotiate.

Reclamation's scoping document and the creation of the Federal-Tribes-States Group, with the goal of "promoting equitable information sharing and discussion among the sovereign governments in the Basin,"[301] is procedurally a good start. The public comment period following the release of the completed

300. *See generally* Diné Hataalii Amicus Brief, *supra* note 91 (explaining how Navajo law incorporates cultural beliefs regarding balance and disharmony).

301. SCOPING REPORT FOR POST-2026 COLORADO RIVER RESERVOIR OPERATIONS, *supra* note 230, at ES-1.

draft EIS, anticipated by the end of 2024, is another successful procedural mechanism. The EIS will likely discuss where water will be taken. Then, future determinations will be made regarding which stakeholders are granted how much water. Indeed, Reclamation anticipates "several opportunities for government-to-government consultations with Tribal entities having entitlements to or contracts for Colorado River water, and with those that may be affected by or have interests in the proposed federal action."[302] Recognition of stakeholders other than Tribes with decreed water rights is a good starting point.

But Interior still misses a substantive EJ-plus analysis that is important to articulate. The U.S. is legally and morally obligated to recognize and fulfill trust responsibilities to the Navajo. The Supreme Court has failed to provide redress. Given the judiciary's failure, the myriad plus factors identified under the EJ-plus lens and the ongoing harm to the Navajo people resulting from water scarcity, the Interior should quantify the Nation's water rights.

Importantly, Tribes are governmental and political entities, not racial groups. This has been the keystone federal Indian law principle embedded in American jurisprudence for centuries. Over a century of legal developments regarding the status of Tribes preceded the Supreme Court's 1977 decision in *Morton v. Mancari*, which explicitly recognized the political classification principle.[303] As explained *supra*, Tribal members are dual citizens of the United States and of their federally recognized Tribe. The suggested EJ-plus framework is therefore a race-blind proposal that should withstand constitutional challenges.[304]

This Note uses the development of long-term guidelines for managing the Colorado River as an example of a set of decisions that should be approached through the EJ-plus lens. This necessarily requires the executive branch and Congress to work together. Congress holds infrastructure funding, and federal agencies can provide and implement the EJ-plus framework. Perhaps then,

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302. *Id.* at 4.

303. Chief Justice John Marshall was the first American judge to articulate the existence of a "unique legal relationship" between the federal government and Indian Tribes, as established through treaties. *Letter from Andrew Huff to Robert T. Coulter*, INDIAN L. RES. CTR., at 2 (May 3, 2018), https://perma.cc/7FSZ-RRH7. Marshall's reliance on the Indian Commerce Clause also distinguished Tribes from foreign nations, denominating them as "domestic dependent nations," in *Cherokee Nation v. Georgia*, explained more fully *supra*. *Id*. Marshall's formulation of the special relationship supported the duty to safeguard Tribal self-determination. *Id*. But from the late 1800s to 1934, the federal government used its "plenary power" to pursue policies aimed at the destruction of Tribes as distinct political entities (e.g., in 1887, Congress passed the General Allotment Act, which resulted in catastrophic loss of Indian lands, and during this time the federal government also managed Tribes and their Reservations with bureaucratic paternalism). *Id*. at 3. It was not until 1934, with Congress' passing of the Indian Reorganization Act, in which the principal of Indian self-determination positively rerouted. *Id*. at 3-4. Then, "the policy of support for Indian self-government found legal support in Felix Cohen's seminal *Handbook of Federal Indian Law*, published in 1942." *Id*. Cohen, like Marshall, "grounded the federal legal relationship with [T]ribes primarily in the treaty-making power of Congress and the Executive." *Id*. at 4. Thirty years later, *Morton* "anchored the federal-tribal relationship in the Constitution and imbued it with Marshall's concept of a "duty of protection" shielding Tribal self-government. *Id*. at 7.

304. As in other constitutional cases regarding Native Nations, the appropriate level of scrutiny applied is rational basis.

Congress should and could publicly announce that it will disapprove of current Colorado River Compact management to incentivize negotiating an updated Compact. Congressional disapproval of the Compact is risky, as it could result in political stalemate, leaving all stakeholders in the Basin without a clear path forward. But such public disapproval, absent adoption of the proposed EJ-plus framework, potentially offers a higher degree of freedom in terms of incorporation of Tribal interests into the Compact writ large.

CONCLUSION

This Note focused on the Navajo Nation's unqualified right to divert water from the Colorado River, the decreed rights of the Nation versus undecreed rights, and how administrative agencies can employ an EJ-plus lens to provide the Nation with administrative solutions. Administrative agencies are at risk of capture by politically motivated officials. Although acting on environmental justice issues is always the morally right thing to do, the second Trump presidency and conservative control of all three governmental branches put environmental justice as a politically popular concept at risk. The time is therefore now, and the Interior should not allow this chance to demonstrate the importance of EJ to pass it by.

The EJ-plus framework proposed in this Note could apply outside of the water context and may be used to provide recourse for other crises on the Navajo Nation, other Tribes, and in the broadest sense, all Indians. The *Winters* doctrine cannot resolve water scarcity issues for all Tribes, especially Tribes that lack federal recognition. This Note applied the proposed EJ-plus framework in a situation that has more clarity than others: the case study of the Navajo Nation, which is a federally recognized Tribe with a reservation and some unquantified, undecreed water rights. But the EJ-plus lens could and should be applied elsewhere.

The Navajo water insecurity issue is one example from which to apply the EJ-plus lens more broadly. There is huge diversity amongst Indigenous communities, so each Nation is entitled to being understood on an individual basis, both procedurally and substantively, under an EJ-plus lens. Native peoples have historically been viewed as a monolith. This harmful narrative perpetuates culturally racist and misunderstood federal policies that neglect tangible, long-term Tribal needs.

Additionally, future research on water quantification should include an analysis of the ecological integrity of the Colorado River. Climate change warps the Colorado River's hydrology with drier conditions.[305] The system must operate more sustainably in the future, and that will take a more nuanced understanding of supply and demand within the basin at large. Water quantification is typically based on human consumption, not what is most sustainable for the environment or for the flora and fauna living in the Colorado

305. *See* Fountain, *supra* note 77.

River. The health of the River is another important element that must be part of the ongoing and future discussions of the River's management, especially as climate change progresses.

The Navajo and Indians writ large have uniquely suffered at the hands of the federal government. The combined history of land dispossession, historical revisionism, loss of culture, forced assimilation, and present water crisis is impactful and begs for recourse. Viewed in this light, adopting the proposed EJ-plus lens means understanding the federal Indian trust responsibility as an affirmative duty to correct past harms and protect both ecologically vital and culturally significant natural resources for generations to come.

How Can a Mandatory Right-to-Repair Address the Global E-Waste Problem?

Chloé F. Smith[*]

There are now more mobile phones than people in the world, and e-waste is one of the largest growing waste streams. Focusing on the tail end of the material life cycle of e-products, this Note raises issues regarding e-waste pollution including how the global trade of this hazardous waste creates informal economies that can be harmful to human health and the environment. The international community has addressed the global e-waste trade since the 1990s, with an international agreement called the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Although signed by the United States, the Convention has not been ratified by Congress and is therefore not binding law. This Note proposes a domestic policy measure that could reduce the amount of e-waste created: the right-to-repair with a repairability index. This policy gives potential consumers for electronic devices a score based on how repairable an item is on a scale from one to ten, thus encouraging consumers to repair their electronic goods before recycling them. Inspired by a French policy, this proposal is one solution to the global e-waste problem.

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INTRODUCTION

Electronic waste (e-waste) is one of the fastest-growing waste streams on Earth today.[1] The United States generated 15,873 million pounds of e-waste in 2022, making it the second largest e-waste-generating nation, behind only China.[2] This is not surprising given that manufacturers unsustainably produce electrical and electronic equipment ("EEE" or "e-products") by practicing planned obsolescence[3] and encouraging consumers to buy the latest model of their EEE regardless of necessity.[4] This is the case with many devices including smartphones, laptops, and audio equipment.[5] Mobile phones[6] are of particular interest because of their small size and numerosity.[7] In fact, there are now more mobile phones than people in the world.[8]

What happens to these phones when the battery runs out or if they will not turn on? Or when a new model is released? How many readers of this Note have a box languishing in their homes labeled "electronics"–filled with devices like mobile phones, laptops, iPods–due to concerns of whether they will be disposed of diligently? Some recycle their devices in appropriate facilities, while others discard them in the trash.[9] When such e-products become waste, they can pose a

1. *Overview: Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, U.N. ENV'T PROGRAMME [UNEP], https://basel.int/Implementation/Ewaste/Overview/tabid/4063/Default.aspx (last visited Apr. 9, 2024).

2. CORNELIS P. BALDÉ ET AL., GLOBAL E-WASTE MONITOR 2024 120-135 (2024), https://api.globalewaste.org/publications/file/297/Global-E-waste-Monitor-2024.pdf.

3. *See* Will Kenton, *What Is Planned Obsolescence? How Strategy Works and Example*, INVESTOPEDIA (Dec. 27, 2022), https://www.investopedia.com/terms/p/planned_obsolescence.asp (defining planned obsolescence as "a strategy of deliberately ensuring that the current version of a given product will become out of date or useless within a known time period. This proactive move guarantees that consumers will seek replacements in the future, thus bolstering demand.").

4. *See* Rebecca Picciotto, *Black Friday shoppers spent a record $9.8 billion in U.S. online sales, up 7.5% from last year*, CNBC (Nov. 25, 2023), https://www.cnbc.com/2023/11/25/black-friday-shoppers-spent-a-record-9point8-billion-in-us-online-sales-up-7point5percent-from-last-year.html (reporting that individuals are buying more electrical and electronic goods than ever before; *e.g.*, $9.8 billion USD were spent in the United States during Black Friday sales, with electronics, TVs, and smartwatches among the best-selling categories of products); *see also* Seth Doane, *The tragic cost of e-waste and new efforts to recycle*, CBS NEWS (Nov. 26, 2023), https://www.cbsnews.com/news/the-tragic-cost-of-e-waste-and-new-efforts-to-recycle (reporting that Americans upgrade their mobile phones every two-and-a-half years on average).

5. *Id.*

6. While there is a difference between mobile phones and smartphones, these terms are used interchangeably throughout this Note.

7. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 32 (explaining that these devices have valuable components, and their collection is therefore prioritized by compliant e-waste managers). However, collection and recycling rates for these items are lower than for other equipment (larger items such as monitors or refrigerators). *Id.*

8. Felix Richter, *Charted: There Are More Mobile Phones Than People in the World*, WORLD ECON. FORUM (Apr. 11, 2023), https://www.weforum.org/agenda/2023/04/charted-there-are-more-phones-than-people-in-the-world, (stating that in 2022, there were more than 8.58 billion mobile subscriptions in use compared to a 7.95 billion global population).

9. Their small size makes it easier for a consumer to throw smartphones and laptops in the trash. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 32; Alana Semuels, *The World Has an E-Waste Problem*, TIME (May 23, 2019), https://time.com/5594380/world-electronic-waste-problem.

significant risk to the environment and human health–whether the heavy metals or plastic components are burnt, releasing hazardous gases into the air, or leeched into the soil and water when disposed of in landfills. For example, severe air, water, and soil pollution occurred in the infamous "recycling sites," or rather e-waste dump sites, in Agbogbloshie, Ghana,[10] which were subsequently demolished in 2021.[11] In such places, communities rely on informal labor markets for disassembling devices to resell valuable metals and other materials.[12] The management of e-waste is a global problem because most communities and countries do not want to have landfills[13] or simply lack the resources and technology to dispose of their e-waste in an "environmentally and sound manner"–four crucial words in international legislation.[14] The trade of e-waste is also a lucrative business in the informal economies around developed countries' dumpsites and beyond.[15] However, due to the cost of recycling and treatment in developed countries, developing countries continue to receive illegal e-waste and house dumpsites, creating environmental injustices for nearby communities.[16]

In Part I, this Note provides a description of e-waste. It proceeds by highlighting some of the major environmental and social negative externalities of e-waste. Part II then explores what international agreements exist to deal with such problems and highlights some limits. Part III looks at innovative existing policies that address e-waste issues by presenting the right-to-repair movement and two policy proposals that exemplify it. First is the French national policy of a repairability index, particularly for small IT and telecommunication equipment, mobile phones, and laptop computers. The second is a proposed federal act establishing a U.S. right-to-repair, including a repairability index and a mandatory federal Anti-E-Waste Act.

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10. Chris Carroll, *High-Tech Trash*, NAT'L GEO. (Jan. 2008), https://www.crserecycling.com/pdf/High-Tech-Trash.pdf; *see also* Peter Yeung, *The Toxic Effects of Electronic Waste in Accra, Ghana*, BLOOMBERG (May 29, 2019) https://www.bloomberg.com/news/articles/2019-05-29/the-rich-world-s-electronic-waste-dumped-in-ghana.

11. Grace Alkese et al., *Ghana: Agbogbloshie – a Year After the Violent Demolition*, ALLAFRICA, (July 21, 2022), https://allafrica.com/stories/202207220004.html; *see also* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 64 (noting that funding from the German Development Bank is contributing to the establishment of a sustainable e-waste recycling system); *but see* Oladele A. Ogunseitan, *The Environmental Justice Agenda for E- Waste Management*, 65 ENV'TL SCI. & POL'Y FOR SUSTAINABLE DEV. 15, 21 (2023) (stating that such demolition has destabilized migrant workers and affected the efforts of local environmental justice advocates to prevent environmental pollution).

12. *See infra* I. C. 1. B; *see generally*, CORNELIS P. BALDÉ ET AL., *supra* note 2, at 63-67.

13. This mentality is lovingly called "NIMBY," or "Not in My Back Yard." *See generally* Peter D. Kindler, *NIMBY*, BRITANNICA, https://www.britannica.com/topic/NIMBY (last visited Nov. 21, 2024).

14. *See infra*. II. A.

15. CORNELIS P. BALDÉ ET AL., *supra* note 2, at 55 ("informal e-waste businesses have proliferated in many nations to address the growing e-waste issue" and suggesting that e-waste is a valuable secondary source of metals).

16. *See infra* I. C.

I. E-WASTE: VALUABLE RESOURCES WITH NEGATIVE EXTERNALITIES

A. The Meaning of E-Waste

Rapid technological evolution, paired with rising demand among consumers for high-tech products, has generated increasing consumption of electronic equipment.[17] E-waste, or EEE, refers to "[a]ny household or business item with circuitry or electrical components and a power or battery supply."[18] It is sometimes called waste electrical and electronic equipment (WEEE) if the original owner has disposed of it as refuse with no intention of further utilization.[19] Each jurisdiction has its own definition of e-waste with varying categories, such as those with versus without an electrical part.[20] In the United States, the Environmental Protection Agency (EPA) considers e-waste to be "a subset of used electronics," and EPA "recognizes the inherent value of these materials that can be reused, refurbished or recycled to minimize the actual waste that might end up in a landfill or improperly disposed in an unprotected dump site either in the US or abroad."[21]

Unlike the European Union (EU),[22] the United States does not have a uniform federal mandatory e-waste law.[23] Furthermore, part of the difficulty of regulating and controlling e-waste is precisely due to the lack of a common definition of what materials should be considered e-waste.[24] E-waste may be called electronic scrap (e-scrap),[25] since it can include other metals of interest

17. Md Tasbirul Islam et al., *A global review of consumer behavior towards e-waste and implications for the circular economy*, 316 J. CLEANER PROD. 1, 1 (2021).

18. SOLVING THE E-WASTE PROBLEM (STEP), SOLVING THE E-WASTE PROBLEM WHITE PAPER: ONE GLOBAL DEFINITION OF E-WASTE 4 (U.N. Univ. pub., June 3, 2014), https://www.step-initiative.org/files/_documents/whitepapers/StEP_WP_One%20Global%20Definition%20of%20E-waste_20140603_amended.pdf [hereinafter STEP]; *see also* CORNELIS P. BALDÉ ET AL. *supra* note 2, at 20 ("[b]atteries and other electricity storage are not EEE, and most legislation globally recognizes them as separate waste streams, mainly because they require different end-of-life treatment.").

19. CORNELIS P. BALDÉ ET AL., *supra* note 2, at 19.

20. The EU defines e-waste as electrical and electronic equipment "including all components, sub-assemblies and consumables which are part of the product at the time of discarding." The Directive covers the following six categories of electrical and electronic equipment: (i) temperature exchange equipment; (ii) screens and monitors; (iii) lamps; (iv) large equipment (any external dimension more than 50 cm), such as household appliances, information technology and telecommunications equipment, and electrical and electronic tools; (v) small equipment (no external dimension more than 50 cm), such as household appliances, luminaires, musical equipment and toys; and (vi) small information technology and telecommunications equipment (no external dimension more than 50 cm). *See* Council Directive 2012/19, art. 2, O.J. (L. 197) 38, 42-43 (discussing waste electrical and electronic equipment, or "weee").

21. *Cleaning Up Electronic Waste (E-Waste)*, EPA, https://www.epa.gov/international-cooperation/cleaning-electronic-waste-e-waste (last updated Nov. 13, 2024).

22. *See generally* O.J. (L. 197) 38, *supra* note 20; *see also* Council Directive 2011/65, O.J. (L. 174) 88 (discussing the restriction of the use of certain hazardous substances in electrical and electronic equipment).

23. *See* STEP, *supra* note 18, at 4; *see also* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 69.

24. *See, e.g.*, Qinrun Zhang, *China's Policy and Finding Ways to Prevent Collapse in WEEE Processing in the Context of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 21 INT'L ENVT'L AGREEMENTS 698, 694–710 (2021).

25. INT'L LAB. OFF., DECENT WORK IN THE MANAGEMENT OF ELECTRICAL AND ELECTRONIC WASTE (E-WASTE) 1 (Apr. 2019) (ILO) 1 (2019) [hereinafter ILO E-WASTE ISSUE PAPER].

(copper, gold, indium, palladium, rare earth elements, etc.).[26] Plastic makes up a large amount of mobile phones and computer monitors—even the keyboard that is being used to type this Note. Plastic pollution intertwines with e-waste pollution and adds complexity due to the mixture of hazardous heavy metals, plastics, and the additives they contain (e.g., flame retardants and plasticizers).[27]

E-waste can be hazardous waste[28] due to intermediate inputs during manufacturing.[29] E-waste may be contaminated with mercury, lead, cadmium, or polychlorinated biphenyl (PCB), or may contain components such as accumulators and other batteries, PCB capacitors, mercury switches, glass from cathode-ray tubes (CRTs), and other activated glass.[30] For this Note, the author will use EPA's definition of e-waste.

B. The Economic Value of E-Waste

Consumers highly value mobile phones and laptops as digital tools for economic production and social connection. However, most consumers may not realize the ecological monetary value of their physical devices. As mentioned, e-scrap[31] contains materials of strategic value including precious metals[32] that can be recovered and recycled.[33] They can reduce pressure on scarce natural resources, minimize overall environmental footprint, and be a beneficial source of secondary raw material.[34] According to the Global E-waste Monitor 2024, the economic value of the metallic components within global e-waste reached approximately ninety-one billion USD in 2022, whereas e-waste management generated twenty-eight billion USD worth of secondary raw materials from this total.[35] The e-waste management market is likely to grow due to financial

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26. Kerry Lotzof, *What is e-waste and what can we do about it?*, NATURAL HIST. MUSEUM, nhm.ac.uk/discover/what-is-ewaste-and-what-can-we-do-about-it.html (last visited Nov. 22, 2024).

27. *See generally* Asanda Mtibe et al., *Sustainable valorization and conversion of e-waste plastics into value-added products*, 40 CURRENT OP. GREEN & SUSTAINABLE CHEM. 1 (2023) https://doi.org/10.1016/j.cogsc.2023.100762.

28. *See* Marisa D. Pescatore, *The Environmental Impact of Technological Innovation: How U.S. Legislation Fails to Handle Electronic Waste's Rapid Growth*, 32 VILL. ENV'T L.J. 115, 126-27, 140 (2021) (defining hazardous waste in the United States).

29. E-waste can also contain a variety of chemicals from the manufacturing of chips and semiconductors, including volatile organic compounds. *See* KESHAV PARAJULY ET AL., FUTURE E-WASTE SCENARIOS 13 (2019), https://ewastemonitor.info/wp-content/uploads/2020/11/FUTURE-E-WASTE-SCENARIOS_UNU_2019.pdf.

30. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 125, Art. I [hereinafter Basel Convention].

31. *See* ILO E-WASTE ISSUE PAPER, *supra* note 25, at 1.

32. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 14.

33. WHERE ARE WEEE IN AFRICA? FINDINGS FROM THE BASEL CONVENTION E-WASTE AFRICA PROGRAMME (ADVANCE VERSION, SECRETARIAT OF THE BASEL CONVENTION 9 (2011) [hereafter WHERE ARE WEEE IN AFRICA?].

34. *Id*.

35. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 14 (explaining that precious reclaimed resources include copper (valued at nineteen billion USD), gold (fifteen billion USD), and iron (sixteen billion USD). These metals can be effectively extracted with high recycling rates utilizing existing e-waste processing techniques. This suggests that enhancing collection efficiency could significantly boost current

incentives and environmental concerns.[36] The market was valued at $49.88 billion in 2020 and is projected to almost triple to $143.87 billion by 2028.[37] Consequently, when an e-product stays in a drawer at home, valuable natural resources are wasted. Electronic refuse recovery and reuse policies therefore may drive economic value. There already exists a labor market for recyclers around the world.[38]

Economic assessments opine that e-waste management today has economic benefits[39] but also costs.[40] Estimates say that the overall annual economic monetary cost of e-waste management is thirty-seven billion USD worldwide.[41] The main costs are negative environmental externalities passed on to people and the planet from lead and mercury emissions, plastic leakages, and contributions to global warming.[42]

C. Negative Externalities of E-Waste: Harm to Human Health and the Environment

1. E-Waste Creates Informal Toxic Economies

a. Injustice in Developing Countries

E-waste is known to be one of the fastest growing hazardous waste streams.[43] Therefore, proper infrastructure for recovering and recycling these e-products is essential.[44] Additionally, globalization has made hazardous wastes more mobile.[45] Industrialized countries, which trade the most, have more stringent waste management regulations.[46] Nevertheless, studies show that gaps in trade and regulations between industrialized and less industrialized countries have narrowed drastically over the last twenty years.[47] Least developed countries

value reclamation rates. Most losses of value occur as a result of landfilling, incineration, or substandard treatment).

36. Arabella Ruiz, *Latest Global E-Waste Statistics And What They Tell Us*, THE ROUND UP, https://theroundup.org/global-e-waste-statistics (last updated Apr. 15, 2024).

37. *Id.*

38. *See infra C 1 b.*

39. *E.g.*, the recovery of metals.

40. *E.g.*, e-waste treatment and hidden externalized costs for society.

41. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 14 (explaining that seventy-eight billion USD are externalized costs to the population and to the environment plus ten billion USD associated to the cost for treatment of e-waste minus the benefits of twenty-three billion USD of monetized value of avoided greenhouse gas emissions and twenty-eight billion USD worth of recovered metals brought back to the circular economy).

42. *Id*.

43. TACKLING INFORMALITY IN E-WASTE MANAGEMENT: THE POTENTIAL OF COOPERATIVE ENTERPRISES, INTERNAT'L LABOR OFF. 5 (2014).

44. *See also* Doane, *supra* note 4 (reporting that imprecise methods of recycling produce more toxic waste that leach into the earth and pollute the river, the ocean, and the fish in Accra).

45. Shiming Yang, *Trade for the Environment: Transboundary Hazardous Waste Movements After the Basel Convention*, 37 REV. POL'Y RSCH, 733, 713-38 (2020).

46. *Id*.

47. *Id*.

are the least engaged with hazardous trade yet are more vulnerable to waste trafficking.[48] They have struggled to enforce international agreements such as the Basel,[49] Bamako,[50] and Waigani[51] Conventions.[52] African countries in particular experience limited institutional capacity, causing them to suffer from the illegal dumping of hazardous wastes, like in the aforementioned e-waste site in Agbogbloshie, Ghana.[53] The inspection of waste shipments, enforcement of trade restrictions, and handling of hazardous waste already in the country is harder due to limited infrastructure.[54] Many less developed countries do not have a national hazardous waste definition nor domestic regulations to control them.[55] These nations may deliberately refrain from disclosing hazardous waste imports to conceal violations of trade prohibitions.[56] Insufficient technological, economic, and institutional capabilities have constrained these nations, resulting in a persistent inability to effectively enforce regulations in this area.[57] While a large amount of e-waste does land in industrialized countries, the remainder flows into or through developing countries, damaging public health and causing environmental pollution.[58]

While the drafters of international agreements assumed that developed countries dump e-waste in developing countries, recent studies suggest that developing countries have also generated significant e-waste domestically.[59] Today, e-waste is transported amongst developing countries or emerging economies,[60] and increasingly so since China banned its e-waste imports under the National Sword Program.[61] Yet, many developing nations maintain the necessary infrastructure and competencies for appliance reuse and

48. *Id*. at 730.

49. *See generally* Basel Convention, *supra* note 30.

50. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements of Hazardous Waste within Africa, *opened for signature* Jan. 30, 1991, 30 I.L.M. 773 [hereinafter Bamako Convention]. The Bamako Convention entered into force on April 21, 1998, by thirty-one countries on the African continent as a response to Article 11 of the Basel Convention, encouraging parties to enter multilateral agreements on hazardous waste. *See* Bamako Convention: Parties, https://www.informea.org/en/treaties/bamako-convention/treaty-parties, (last visited Apr. 5, 2024); *see also id.* art. 11 ¶ 5.

51. The Convention to Ban the importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement of Hazardous wastes within the South Pacific Region (the "Wagani Convention") entered into force the October 21, 2001. *See Waigani Convention*, SECRETARIAT OF THE PAC. REGIONAL ENVT'L PROG., https://www.sprep.org/convention-secretariat/waigani-convention (last visited Apr. 6, 2024).

52. *See* Shiming, *supra* note 45, at 733.

53. *Id*.; *see also* Carroll, *supra* note 10; Yeung, *supra* note 10.

54. *Id*. at 731; *see also* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 64 (explaining that in January 2023, an organized crime group was caught smuggling over eleven million lbs. (331 containers) of e-waste from the Canary Islands to Ghana, Mauritania, Nigeria, and Senegal).

55. *See* Yang, *supra* note 45, at 731.

56. *Id*.

57. *Id*.

58. *Id.*

59. *See* ILO E-WASTE ISSUE PAPER, *supra* note 25, at 7.

60. *Id*.

61. *See* Zhang, *supra* note 24, at 694.

refurbishment.[62] Nevertheless, the global problem of e-waste remains inequitable, mainly affecting developing or emerging economies.

b. Informal Labor Market Working Conditions

Globally, only 22.3 percent of the e-waste generated (equivalent to an average of seventeen pounds per capita per year) was documented as collected and recycled in an environmentally sound manner.[63] Estimates from the International Labor Organization (ILO) state that solid waste management and recycling has provided work for nineteen to twenty-four million people worldwide.[64] Oftentimes this work is not monitored by governments nor reflected in labor statistics.[65] The lack of proper waste management in developing countries has created a large-scale labor market with recyclers working in dire conditions around the world.[66]

The ILO mapped how informal e-waste value chains differ between Argentina, India, and Nigeria and found similarities in how the work is structured and organized. First, distributors buy new and used e-products domestically or from overseas and sell them to consumers directly (individual, public, or corporate consumers).[67] Other collectors buy or collect e-products or scavenge dumps for e-waste.[68] These scavengers, many belonging to disadvantaged groups or minorities, operate in unsafe conditions due to the rudimentary management of e-waste resulting in high exposure to toxic substances.[69] The repairs and refurbishments extend the lifetime of the new and used e-products that they sell for reuse.[70] They also generate e-waste from the equipment that cannot be repaired.[71] According to the ILO, they are among the best-organized actors in this value chain since they specialize in refurbishing specific types of equipment.[72] They manually segregate the equipment that cannot be repaired into marketable components and materials.[73] Then, the recyclers employ techniques such as incineration, chemical extraction, and smelting to transform discarded e-waste into reusable raw resources, which are then supplied to manufacturers as secondary inputs.[74] Finally, downstream vendors purchase the usable e-waste components for resale.[75]

62. *See* ILO E-WASTE ISSUE PAPER, *supra* note 25, at 8; *see also* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 64-67.
63. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 10.
64. *See* ILO E-WASTE ISSUE PAPER, *supra* note 25, at 10.
65. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 31.
66. *Id.* at 35.
67. *See* ILO E-WASTE ISSUE PAPER, *supra* note 25, at 8-10.
68. *Id.* at 9.
69. *Id.* at 9, 16.
70. *Id.*
71. *Id.* at 9-10.
72. *See id.* at 10.
73. *Id.*
74. *Id.* at 9.
75. *See id.* at 9.

Not only does this informal market lead to localized environmental health and environmental pollution, but such material recovery lacks efficiency. The informal e-waste market, although profitable for some, creates many negative externalities for laborers and affected communities. However, it is important to note that policies to reduce e-waste commodities could put informal laborers out of work and lead to further poverty and injustices.[76] E-waste reduction policies should consider parallel job creation programs which seek to reduce negative health and environmental safety effects while minimizing the economic harms to informal laborers.

2. The Harms of Mismanaged E-Waste

a. Impacts on Human Health

When discarded in landfills, e-waste can leach into the soil and water. When burnt, e-waste emits toxic emissions, often heavy metals, which cause significant problems for the environment and human health. Some e-waste contains brominated flame retardants (most of which are found in screens and monitors),[77] which are endocrine-disrupting substances.[78] Endocrine-disrupting chemicals interfere with the body's hormones.[79] Per- and polyfluoroalkyl substances (PFAS)[80] and dioxins[81] are two examples of chemicals that may disrupt the endocrine system.[82] In developing countries, it is common for informal recyclers to handle and process e-waste.[83] Without infrastructure for environmentally sound e-waste management,[84] e-waste may instead be processed through manual removal and open burning sites.[85] This practice

76. Ogunseitan, *supra* note 11, at 19-21.

77. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 50 ("The recycling of plastic containing brominated flame retardants represents a major challenge because of the cost of separating the plastic containing the retardants from other plastics.").

78. WHERE ARE WEEE IN AFRICA?, *supra* note 33, at 3.

79. *Endocrine Disruptors*, NAT'L INST. ENVT'L HEALTH SCIS., https://www.niehs.nih.gov/health/topics/agents/endocrine (last visited Nov. 22, 2024).

80. *Id.* ("Per- and polyfluoroalkyl substances (PFAS) are a large group of chemicals used widely in industrial applications, such as firefighting foam, nonstick pans, paper, and textile coatings.").

81. *Id.* ("Dioxins are a byproduct of certain manufacturing processes, such as herbicide production and paper bleaching. They can be released into the air from waste burning and wildfires.").

82. *Id*.

83. *See, e.g.*, Yeung, *supra* note 10 (reporting on the toxic effects of e-waste in Agbogbloshie, Ghana); *see also* Doane, *supra* note 4 (stating that tens of thousands of people sift through mountains of e-waste in Ghana).

84. WHERE ARE WEEE IN AFRICA?, *supra* note 33, at 3.

85. *See* Doane, *supra* note 4.

releases toxins (such as mercury[86] and lead[87]) into the environment which then bioaccumulate in human tissue.[88] Informal workers and surrounding populations of such sites have been found to have polycyclic aromatic hydrocarbons (chemicals that occur naturally in coal, crude oil, and gasoline) in their bodies, resulting in "carcinogenic, non-carcinogenic, mutagenic, genotoxic, neurotoxicity and endocrine disruption and neonatal issues."[89] They may also have respiratory tract problems, other diseases such as malaria, or physical injuries resulting from the dangerous work conditions.[90]

The World Health Organization (WHO) states that children are the most vulnerable to physical health harms as well as to experiencing negative learning and behavior outcomes.[91] Children are often involved in waste picking and may serve as cheap labor because their dexterity enables them to take apart small items.[92] For such manual dismantling, plastic chipping, and melting, workers must use acid and other chemicals and techniques that release polluting fumes into the atmosphere.[93] This work is generally carried out without adequate personal protective equipment.[94] While air pollution most directly impacts informal e-waste recycling workers, the air can also be polluted for thousands of miles, including in the food markets[95] of neighboring cities.[96]

b. Impacts on the Natural Environment

Hazardous practices, such as open burning or using mercury to extract gold, contaminate air, soil, and water, and endanger biodiversity.[97] Pollutants derived from e-waste, particularly heavy metals, resist natural decomposition and can

86. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 50 ("New provisions on how to treat [mercury] are set out in the Minamata Convention on Mercury, which was adopted in 2013 and entered into force in 2017. A milestone for chemical safety, the Convention has since been amended to include (when alternatives are available) the phasing out of certain uses of mercury by 2025, including for compact fluorescent lamps and satellite propellant."); *see generally Minamata Convention on Mercury - Text and Annexes*, UN ENVT'L PROGRAMME, https://minamataconvention.org/en/resources/minamata-convention-mercury-text-and-annexes (last visited, Apr. 5, 2024).

87. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 14.

88. Thomas Maes & Fiona Preston-Whyte, *E-waste it wisely: lessons from Africa*, 4 SN APPLIED SCI. 1, 5 (2022).

89. *Id*.

90. *Id.*

91. *Electronic waste (e-waste)*, WORLD HEALTH ORG., https://www.who.int/news-room/fact-sheets/detail/electronic-waste-%28e-waste%29 (last updated Oct. 1, 2024).

92. *Id*.

93. Sarker M. Parvez et al., *Health Consequences of Exposure to E-waste: An Updated Systematic Review*, 5 LANCET PLANET HEALTH e905, e920 (2021); *E-Waste & its Negative Effects on the Environment*, ELYTUS, https://elytus.com/blog/e-waste-and-its-negative-effects-on-the-environment.html (last visited Jan. 20, 2025).

94. *Id.*

95. Yeung, *supra* note 10 (reporting on the health risks that enter the food chain, which is problematic when the Agbogbloshie area in Ghana has one of the largest food markets in the city of Accra).

96. *Id.*; *see* Doane, *supra* note 4.

97. Parvez et al., *supra* note 93.

persist indefinitely in ecosystems.[98] Soil can be contaminated when e-waste is improperly disposed of in regular landfills or illegally dumped.[99] The leaching of heavy metals (lead, arsenic, cadmium, etc.) may then contaminate groundwater and crops.[100] Chemicals released into ponds, rivers, and streams can acidify the water, harming marine and freshwater organisms miles away and impacting drinking water.[101] The health impacts can extend catastrophically across wildlife and humans.[102] And this is without accounting for the polluting impacts of both large-scale and artisanal mineral mining needed for e-product production.[103]

c. Recycling and Fire Hazards

While the circular economy[104] incentivizes recycling, not all recycling is positive.[105] Recycling facilities in the United States and Canada use large machines to crush waste.[106] While recyclers try to get rid of lithium batteries before products enter the crusher, some small e-products such as smartphones, air-pods, and smartwatches still end up in the machine.[107] This occurs even as EPA publicly advises individuals not to put items with lithium-ion into household garbage or recycling bins.[108] The dissembling process is made more difficult as many manufacturers now glue smartphones together.[109] Lithium-ion batteries that enter the crusher can self-ignite as they release energy under pressure, potentially setting fire to surrounding materials.[110] According to a 2018

98. *Id.*

99. *See* ELYTUS, *supra* note 93.

100. *Id.*

101. *Id*.

102. *Id*.

103. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 50. The authors encourage "[u]rban mining (i.e. the extraction of resources from waste instead of the Earth's crust)" because through e-waste recycling, 1,984 billion pounds of ore were not excavated during primary mining and 114 billion pounds of CO2 equivalent emissions were avoided." *Id.*

104. Defined by the European Parliament as being a "model of production and consumption, which involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products as long as possible." *See Circular Economy: Definition, Importance and Benefits*, EUROPEAN PARLIAMENT (May 24, 2023), https://www.europarl.europa.eu/topics/en/article/20151201STO05603/circular-economy-definition-importance-and-benefits.

105. Dropping a device at a recycling station does not guarantee safe disposal. Many recycling companies sell it to brokers who ship the device to the developing world, where enforcement of environmental laws is weak. *See* Carroll, *supra* note 10.

106. Basel Action Network, *Our Right to Repair: An Update from the Front Lines*, YOUTUBE (Sept. 12, 2021), https://www.youtube.com/watch?v=ghUEU8a8N6s [hereinafter Basel Action Network, *Right to Repair*].

107. Ciara Nugent, *Why Recycling Plants Keep Catching on Fire*, TIME (Apr. 13, 2023), https://time.com/6271576/recycling-plant-fire-indiana.

108. *Frequent Questions on Lithium-Ion Batteries*, EPA, https://www.epa.gov/recycle/frequent-questions-lithium-ion-batteries (last visited Apr. 5, 2024); *see generally* AN ANALYSIS OF LITHIUM-ION BATTERY FIRES IN WASTE MANAGEMENT AND RECYCLING, EPA (July 2021), https://www.epa.gov/system/files/documents/2021-08/lithium-ion-battery-report-update-7.01_508.pdf.

109. *See* Basel Action Network, *Right to Repair*, *supra* note 106.

110. *See* Nugent, *supra* note 107.

California Product Stewardship Council survey, 40 percent of fires at the state's waste management facilities were triggered by lithium-ion batteries.[111] These fires put recyclers at risk, are costly, contribute to air pollution, and can also result in biodiversity loss.[112] Nonetheless, recycling e-waste is a complex and expensive process, with many ripple effects addressed in this Note.

E-waste creates informal toxic economies that are harmful to health and the environment. While this Note only begins to address the negative externalities of EEE, the fabrication, use, and disposal of such consumer products each creates high environmental impacts. Mining critical resources for production requires land, water, and energy. It also brings negative socioeconomic impacts, such as public health hazards and human rights abuses,[113] including child labor.[114] Additional waste and pollution are generated when raw materials for e-products are extracted, manufactured, transported, distributed, and sold.[115] A mobile phone generates 80 percent of its total greenhouse gas emissions from extraction and production of raw materials, while only 14 percent from use and 1 percent from end-of-life treatment.[116] The lifecycle of a mobile phone therefore has a high environmental impact that goes beyond the scope of the problems related to e-waste.[117] Yet tackling the end-of-life treatment of such a device is an important step in limiting overall negative impact.

II. HOW INTERNATIONAL LAW HAS ADDRESSED E-WASTE POLLUTION

The issues highlighted above are not new to e-waste and recycling specialists. In fact, the international community signed an infamous international treaty over thirty years ago covering and criminalizing the trade of hazardous waste: the Basel Convention. The United States holds status as a signatory and observer state to this agreement, as a member party of the Organization for Economic Co-operation and Development (OECD).

A. The Basel Convention

The United Nations Environmental Program's (UNEP) Basel Convention was adopted on March 22, 1989 in Basel, Switzerland, and entered into force on May 5, 1992.[118] There are 191 parties to the Basel Convention, including the United States, which signed on March 22, 1990, but to this day has not ratified

111. FIRE INCIDENT RESULTS 4/9/18, CAL. PROD. STEWARDSHIP COUNCIL (2018), https://www.calpsc.org/_files/ugd/ad724e_312a645a03374a038119f5e7790dc79a.pdf.

112. *Id.*

113. *See, e.g., Powering Change of Business as Usual*, AMNESTY INT'L (Sept. 12, 2023) https://www.amnesty.org/en/latest/news/2023/09/drc-cobalt-and-copper-mining-for-batteries-leading-to-human-rights-abuses.

114. *See* Feza Tabassum Azmi, *The Little Hands of Labour Behind your Smartphone*, THE WIRE (June 16, 2021), https://thewire.in/rights/child-labour-unicef-mines-amnesty-international-ilo.

115. *See* ILO E-WASTE ISSUE PAPER, *supra* note 25, at 7.

116. *Id.*

117. *Id*.

118. *See* UNEP, *supra* note 1.

the treaty.[119] The Convention's overarching goal is to protect human health and the environment from the dangers posed by transboundary movements of hazardous waste.[120] It was originally created to prevent developed countries from disposing hazardous waste in developing countries, where regulation and enforcement mechanisms were lacking.[121]

The Basel Convention contains soft and hard law provisions.[122] The soft law provisions are non-binding obligations on the countries and are considered one of the most important contributions of the Basel Convention.[123] The soft law provisions call for: (1) national self-sufficiency in waste management,[124] (2) minimizing all forms of transboundary movement of hazardous waste and other waste,[125] (3) minimizing the generation of hazardous and other waste,[126] and (4) ensuring environmentally sound management of produced waste.[127] In contrast, the hard law provisions define and control certain wastes,[128] such as hazardous waste according to (1) Annexes I, III, and VIII of the Basel Convention; and (2) the national law of the country involved in the trade scenario; Annex II controls other wastes, including plastics.[129]

Controls on hazardous and other waste trade occur according to a prior informed consent (PIC) procedure.[130] The PIC procedure forms the heart of the Basel Convention control system.[131] It essentially allows the importing country

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119. *Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, BASEL CONVENTION, https://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx#enote1 (last visited Mar. 10, 2024).

120. Basel Convention, *supra* note 30, art. 2 ¶ 8.

121. Basel Convention, *Overview*, (last visited Mar. 10, 2024), https://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx.

122. Basel Action Network, *Responding to the New Basel Convention Rules on Plastic Waste Exports/a forum for Recyclers*, YOUTUBE (Jan. 12, 2021), https://www.youtube.com/watch?v=0lPOP9hNWT8 [hereinafter Basel Action Network, *Plastics*].

123. *Milestones*, BASEL CONVENTION, https://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx (last visited Mar. 10, 2024).

124. Basel Convention, *supra* note 30, art. 4 ¶ 2(b).

125. *Id.* art. 4 ¶ 2(d).

126. *Id.* art. 4 ¶ 2(a).

127. *Id.* art. 4 ¶ 8.

128. *Id.* art. 1.

129. *See* Basel Action Network, *Plastics*, *supra* note 122.

130. Basel Convention, *supra* note 30, art. 6. It is based on four key stages: (1) notification; (2) consent and issuance of movement document; (3) transboundary movement; and (4) confirmation of disposal. *See Controlling transboundary movements*, BASEL CONVENTION, https://www.basel.int/Implementation/Controllingtransboundarymovements/Overview/tabid/4325/Default.aspx (last visited Oct. 28, 2023).

131. However, the recycling industry criticizes the PIC due to high costs and delays for importers and exporters. *See* Hannah Carvalho, *What Recyclers Can Learn from the 2022 Basel Convention Conference*, RECYCLED MAT. ASSOC. NEWS (July 22, 2022), https://www.isrinews.org/what-recyclers-can-learn-from-the-2022-basel-convention-conference; *see also* Basel Action Network, *Update from the COP15 on Basel Meeting in Geneva*, YOUTUBE (June 22, 2022) https://www.youtube.com/watch?v=_PnjW4AoV6o [hereinafter Basel Action Network, *COP15*] (stating that it can take months or even years to process PIC and that nothing is digitized); *see also* Marissa Heffernan, *BAN Director gives his take on recent Basel amendment*, E-SCRAP NEWS (June 30, 2022), https://resource-recycling.com/e-scrap/2022/06/30/ban-director-gives-his-take-on-recent-basel-amendment; *see also* UNEP/CHW.15/9 (July 26-30, 2021), https://www.brsmeas.org/20212022COPs/MeetingDocuments/tabid/8810. But a new

to make informed choices about receiving any waste.[132] There are also controls through individual jurisdictions that can decide to prohibit imports.[133] And, parties may enter into separate agreements with non-parties, like the United States, on the condition that these arrangements maintain or exceed the environmentally sound management of hazardous waste and other waste as required by the Basel Convention.[134] The United States has a bilateral agreement with Canada[135] and can trade with the other non-parties of the Basel Convention.[136] The United States acts as an observer in the conference of the parties (COP) and participates in technical working groups.[137]

The United States is therefore not compelled to have federal legislation on hazardous waste and to this day, still does not have any mandatory federal law on e-waste.[138] Indeed, it only has the Resource Conservation and Recovery Act (RCRA),[139] which regulates e-waste disposal by only placing restrictions on the disposal of CRT.[140] RCRA is otherwise largely ineffective for safely processing e-waste due to exemptions and exclusions built into the regulation. Neither RCRA nor any other federal hazardous waste law[141] cover products such as laptops or cell phones.[142] Businesses can avoid liability for pollution by sending

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"e-PIC" process is being currently discussed led by the private sector. Indeed, at COP-15 in 2022, a formal decision was passed to create the digital prior informed consent procedure and assemble a working group. Additionally, a new review of this Article gathers practical experiences of e-waste exports from low and middle-income industries, which the Basel Action Network believes is useful to consider during these updates. *See, e.g.*, *Practical Experiences with the Basel Convention: Challenges, Good Practice and Ways to Improve Transboundary Movements of E-Waste in Low and Middle Income Countries* 9 (2022), https://www.step-initiative.org/files/_documents/publications/PREVENT-StEP_Practical_Experiences_Basel%20Convention_discussion-paper%202022.pdf.

132. Any trade without this procedure is a criminal act under international law. *See* Basel Convention, *supra* note 30, art. 9. However, there are no consequences for authorities who fail to process the paperwork, which creates room for ambiguity. *See* Heffernan, *supra* note 131.

133. Basel Convention, *supra* note 30, art. 4 ¶ 1. As another example, consider China's 2018 ban on e-scrap imports. *See* Zhang, *supra* note 24, at 694.

134. *Id.* art. 11 ¶ 1.

135. Agreement Between Canada and the United States Concerning the Transboundary Movement of Hazardous Waste, Can.-U.S., Oct. 28, 1986, 32 I.L.M. 289, 297-98.

136. E.g., South Sudan, Haiti, etc.

137. Basel Convention, *supra* note 30, art. 15 ¶ 6.

138. *See* Kammy Lai, *E-Waste Regulation Under the RCRA*, GEO. WASH. J. ENERGY & ENV'T L. (Nov. 26, 2011), https://gwjeel.com/2011/11/26/e-waste-regulation-under-the-rcra.

139. 42 U.S.C. § 6901 *et seq.* (1976).

140. CRTs exported for reuse are exempt from notification and consent protocols, while those destined for recycling must comply with these requirements. However, at the export stage, it is impossible to distinguish between CRTs intended for reuse versus recycling. Consequently, enforcement authorities must depend on the exporter's declaration regarding the purpose of the shipment. DAVID HUNTER ET AL., INT'L L.& POL'Y 965 (6 ed. 2006); *see also* JEFFREY GABA, *Exporting Waste: Regulation of the Export of Hazardous Wastes from the United States*, 36 WM & MARY ENV'T L. & POL'Y REV. 403, 434-35 (2012).

141. For example, the Toxic Substance Control Act (TSCA) of 1976 provides EPA with authority to require reporting, recordkeeping, and testing, and to enforce restrictions relating to six chemical substances (PCBs, asbestos, radon, lead, formaldehyde, mercury) that may be contained in e-products. *Toxic Substances Control Act (TSCA) and Federal Facilities*, EPA, https://www.epa.gov/enforcement/toxic-substances-control-act-tsca-and-federal-facilities (last updated July 26, 2024).

142. HUNTER ET AL., *supra* note 140, at 965.

used e-products for reuse and recycling.[143] Such products are considered a commodity (as opposed to hazardous waste) since they are sold before the disassembling process, creating a major loophole in U.S. regulation.[144]

B. Two Limits to the Basel Convention

1. The Repairable Claim Loophole in the Technical Guidelines on E-Waste

Tons of hazardous wastes are sent to low income countries, most of it getting past customs under the pretense of being fixable.[145] Indeed, as much as the circular economy encourages repair, reuse, and recycling, a major loophole in the Basel Convention is found in Article 32(b) of the technical guidelines on transboundary movements of electrical and electronic waste and used electrical and electronic equipment ("the Technical Guidelines").[146] It suggests any "broken untested or working equipment that is claimed to be destined for failure analysis, repair or refurbishment can fall outside of the scope of the Basel [C]onvention, without requiring any Basel controls as long as the export arrangement meets five minimal requirements."[147] This creates a loophole because these requirements are not enough to ensure that e-waste is properly and safely disposed of, regardless of whether some components are reused or recycled.

The Technical Guidelines, particularly regarding the distinction between waste and non-waste under the Basel Convention, were adopted by the Parties to the Basel Convention at COP-12 on June 23, 2015 "on an interim" basis.[148] According to the Basel Action Network (BAN), an NGO specializing in this matter, these incomplete and unfinished Technical Guidelines were not decided as a result of an agreement.[149] Several parties voiced their strong disagreement with the document due to issues regarding the transboundary movement of used electronics, specifically those destined for repair and refurbishment.[150] However,

143. Lai, *supra* note 138.

144. *See generally* Jeremy Knee, *Guidance for the Awkward: Outgrowing the Adolescence of State Electronic Waste Laws*, 33 ENVIRONS ENV'T L. & POL'Y J. 157, 162 (2009) (discussing the shortcomings of RCRA); *see also* Pescatore, *supra* note 28, at 126-27.

145. *See also* Doane, *supra* note 4.

146. *Previously Adopted Technical Guidelines*, BASEL CONVENTION, https://www.basel.int/Implementation/Publications/TechnicalGuidelines/tabid/2362/Default.aspx (last visited Apr. 7, 2024).

147. The five requirements can be summarized as follows: "(1) the trader must claim that the nonfunctional electronic equipment is being exported for failure analysis or repair, (2) the exporter needs to sign a contract with importing country partner asserting environmentally sound management, proper management of residuals, and make a final report, (3) the exporter must make a declaration that none of the equipment within the consignment is defined as or considered to be waste in any of the countries involved in the transport, (4) ensure that each piece of equipment is individually protected against damage, (5) document is [needed] to accompany the shipment as to the origin and nature of the equipment the existence of contract and declaration." Basel Action Network, *COP15*, *supra* note 131.

148. UNEP/CHW.12/5/Add.1/Rev.1, 23 June 2015.

149. BASEL ACTION NETWORK, THE RESPONSIBLE GUIDELINE ON TRANSBOUNDARY MOVEMENTS OF USED ELECTRONIC EQUIPMENT TO PROMOTE AN ETHICAL CIRCULAR ECONOMY UNDER THE BASEL CONVENTION 1 (Apr. 25, 2019).

150. *Id.* at 1-3.

there were strong lobbies from industry, hardware manufacturers representatives, and the EU.[151] The repairable claim loophole thus came into effect.

As a result, the main prior informed consent procedure is not applied to such used e-products destined for repair and refurbishment.[152] There are no legal frameworks or controls to ensure that exporters abide by the requirements.[153] Moreover, the shipments are rarely controlled at the borders, putting the burden on receiving countries to ensure compliance.[154] The repair activities happen as contracts between individuals or companies and are governed by civil and contractual law without involving the Basel Convention's binding regulation.[155] This violates the intent of the Basel Ban Amendment,[156] which came into force on December 5, 2019, to prohibit the export of hazardous wastes from member states of the OECD, and Liechtenstein to all other countries.[157]

The good news is that at COP-15 in 2022, twenty-two developing Parties demanded a reform of paragraph 32(b) of the Technical Guidelines. The EU and others also suggested adding an entry into Annex IV (used to define "waste") for preparation for reuse, such as repair and refurbishment. According to the Basel Action Network, this is a good policy to ensure that environmentally sound management takes place.[158] It would also prevent bad actors from avoiding the Basel Convention's framework and ensure legitimate trades using the prior informed consent procedures.[159] Hopefully, in the near future, e-products will no longer need to be traded for reuse or repair,[160] in particular if states adopt right-to-repair legislation.[161]

2. Illegal Trade of E-Waste Despite Basel Convention Article 9

While there is little data on illegal e-waste trade, estimates from the EU-funded Countering WEEE Illegal Trade[162] found that approximately a third of all WEEE was legitimately reported to authorities as gathered and treated across Europe in 2012.[163] As discussed, WEEE can be valuable on the black market,[164]

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151. *Id.*

152. *See* Basel Action Network, *COP15*, *supra* note 131.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See The Basel Convention Ban Amendment*, BASEL CONVENTION, https://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx (last visited Apr. 7, 2024).

157. *Id.*; *see also* Basel Convention, *supra* note 30, art. 4A.

158. *Id.*

159. *Id.*

160. The noteworthy caveat being that each party to the Basel Convention regulates e-waste domestically prior to any trade—if at all.

161. *See infra*.

162. *Periodic Report Summary 2 - CWIT (CWIT - Countering WEEE Illegal Trade)*, EU COMM'N, https://cordis.europa.eu/project/id/312605/reporting (last updated June 8, 2016).

163. *Id.*

164. *See* Yeung, *supra* note 10 (noting that illicit e-waste dumping is lucrative and far cheaper than proper recycling).

attracting opportunistic individuals and criminal business networks.[165] Countering WEEE Illegal Trade reported that the EU exported 1.3 million tons of undocumented e-waste, and even more was mismanaged and illegally traded.[166]

The Basel Action Network and the Massachusetts Institute of Technology conducted a two-year investigation by placing 200 geolocating tracking devices inside televisions, computers, and other e-waste that they dropped all over the United States at recyclers, electronic take-back programs, and donation centers.[167] The results of the investigation found that a third of the tracked devices went overseas, traveling to Canada, Mexico, Thailand, China, Hong Kong, etc.[168] The investigation tracked six of seventeen CRT monitors being smuggled from California to China.[169] The same organization drafted subsequent reports that discovered more illegal exports of e-waste from Australia, Canada, and the EU,[170] despite Art. 9 ¶ 1 of the Basel Convention criminalizing traffic of hazardous waste.[171] Furthermore, e-waste shipments continue to circumvent the Basel and Bamako Conventions in Africa's most active ports of Durban, South Africa, Bizerte, Tunisia and Lagos, Nigeria. For over a decade, the Basel Convention Conference of the parties have called for more financial support and collaboration to combat the illegal e-waste trade, in vain.[172]

C. Organization for Economic Co-operation and Development

While the United States has not ratified the Basel Convention[173] and is therefore not bound by its provisions, it is a member of the Organization for Economic Co-operation and Development (OECD)[174] along with thirty-seven

165. EU COMM'N, *supra* note 162.

166. *Id*.; *see also* ILO E-WASTE ISSUE PAPER, *supra* note 25, at 8.

167. DISCONNECT: GOODWILL AND DELL, EXPORTING THE PUBLIC'S E-WASTE TO DEVELOPING COUNTRIES, THE E-TRASH TRANSPARENCY PROJECT, BASEL ACTION NETWORK 7 (2016).

168. *Id.*

169. *Id*.

170. *e-Trash Transparency Project*, BASEL ACTION NETWORK, https://www.ban.org/trash-transparency (last visited Apr. 7, 2024).

171. Basel Action Network, *Right to Repair*, *supra* note 106 ("Illegal traffic is defined as a transboundary movement of hazardous wastes: (a) without notification pursuant to the provisions of the Convention to all States concerned; (b) without the consent of a State concerned; (c) through consent obtained by falsification, misrepresentation or fraud; (d) that does not conform in a material way with the documents; or (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes in contravention of the Convention and of general principles of international law, shall be deemed to be illegal traffic.").

172. HUNTER ET AL., *supra* note 140, at 965.

173. Implementing legislation is required before the President can ratify the treaty. The United States signed the Basel Convention in 1990, and the Senate gave its advice and consent to ratify in 1992. *See Frequent Questions on International Agreements on International Agreements on Transboundary Shipments of Waste*, EPA, https://www.epa.gov/hwgenerators/frequent-questions-international-agreements-transboundary-shipments-waste#basel (last visited Apr. 7, 2024) [hereinafter EPA, *International Agreement FAQs*].

174. *Id*. (explaining that OECD is an international organization with a goal to achieve "sustainable economic growth, employment, and an increased standard of living, while simultaneously ensuring the protection of human health and the environment").

other member countries.[175] As a member, the United States is bound by the OECD's decisions. On March 30, 1992, the OECD passed a decision that applies to transboundary movements of waste destined for recovery operations between OECD member countries.[176] This agreement[177] aims to provide a framework for such countries to control the transboundary movement of recoverable waste in an environmentally sound manner.[178] The agreement is intended to facilitate the trade of such waste and minimize the possibility that such waste will be abandoned or handled illegally.[179] It provides a tiered level of control with green and amber[180] as the two categories of waste.[181]

Therefore, unlike the Basel Convention, which covers all transboundary movements of hazardous waste for recovery or disposal, the OECD agreement covers only a subset of such waste "sent for recovery" between the OECD member countries participating in the OECD convention.[182] Yet, since the United States is part of the OECD, it can legally trade recoverable waste with other member parties. Nevertheless, trading e-products for recovery seems like an international compromise that could be the source of the issues raised in this Note and the continued illegal trade of e-waste.

D. Takeaways from the International Agreements and Implications on the United States

Because the United States is an OECD member, and other OECD member states are part of the Basel Convention, many provisions of the treaty, notably the PIC procedure on transporting hazardous waste, affect the United States. Additionally, there are repair/reuse/recovery loopholes in both the Basel Convention and the OECD policy, making it difficult to trace what kind of e-waste actually is traded. There are several different notions of hazardous and non-hazardous waste on the international level, and with so few controls, it is almost expected that illegal trade occurs. Nevertheless, international cooperation is necessary to address the environmental and public health threats from e-waste pollution and to set rules for exporting and importing e-waste.[183] International law can ensure minimum standards are in place to protect the public health of

175. *Countries*, ORG. ECON. CO-OPERATION & DEV., https://www.oecd.org/en/countries.html (last visited Apr. 7, 2024).

176. *Decision of the Council C(92)39/Final Concerning the Control of Transfrontier Movements of Waste Destined for Recovery*, ORG. ECON. CO-OPERATION & DEV., https://www.oecd.org/env/waste/guidance-manual-control-transboundary-movements-recoverable-wastes.pdf, (last visited Apr. 7, 2024).

177. This has been amended several times since 1992 and generally considers any changes that the Basel Convention has incorporated after a conference of the parties. *See* EPA, *International Agreement FAQs*, *supra* note 173.

178. *Id*.

179. *Id*.

180. *Resource efficiency and circular economy*, ORG. ECON. CO-OPERATION & DEV., https://www.oecd.org/env/waste/guidance-manual-control-transboundary-movements-recoverable-wastes.pdf (last visited Mar. 27, 2024).

181. *See* EPA, *International Agreement FAQs*, *supra* note 173.

182. *Id*.

183. HUNTER ET AL., *supra* note 140, at 900-01.

importing countries.[184] Furthermore, the Basel Convention led many countries to create, revise, and/or enact regulation governing the import and export of hazardous waste,[185] after which the quality and enforcement of national legislation is crucial for their success.[186]

Now, this Note will analyze existing policies that could be strengthened or introduced on the federal or state level. Amongst the many policies to combat the e-waste problem (extended producer responsibility,[187] e-waste recycling or collection rate targets[188], advance recycling fee,[189] take-back policies,[190] and electronic bonus cards[191]), this Note focuses on one idea growing in popularity in the United States and internationally: the right-to-repair.

III. WILL THE RIGHT-TO-REPAIR POLICY TACKLE THE E-WASTE PROBLEM?

A. The Right-to-Repair Is a Key Circular Economy Policy

Implementing a circular economy approach to e-waste enables viewing disregarded devices as valuable assets that, when handled appropriately, can sustain incomes, create job opportunities, facilitate technological access, promote technical advancements, transfer expertise, and supply capital to produce second-hand commodities with recovered materials.[192]

The right-to-repair is a key element of the circular economy now being discussed worldwide.[193] The "circular economy" replaces the traditional linear

184. *Id*.

185. It also enabled parties to create a multistakeholder public-private partnerships like the Partnership For Action on Computing Equipment (PACE) and the Mobile Phone Partnership Initiative (MPPI) that produced guidelines on sound management of used and end-of-life computing equipment, respectively mobile phones. *See PACE Guidelines, Manual and Reports*, BASEL CONVENTION, https://www.basel.int/Implementation/TechnicalAssistance/Partnerships/PACE/PACEGuidelines,ManualandReports/tabid/3247/Default.aspx, (last visited Mar. 26, 2024); *Mobile Phone Partnership Initiative (MPPI)*, BASEL CONVENTION, https://www.basel.int/Implementation/TechnicalAssistance/Partnerships/MPPI/Overview/tabid/3268/Default.aspx (last visited Mar. 26, 2024).

186. CORNELIS P. BALDÉ ET AL., *supra* note 2, at 42.

187. *Id.* at 69.

188. *Id.* at 31.

189. California uses this model for covered electronic devices—a video display device, containing a screen greater than four inches, measured diagonally—where consumers, when purchasing the product, pay retailers a fee, which goes into a fund supporting state-wide e-waste management. *See e.g.*, CAL. PUB. RES. CODE §§ 42460 *et seq.* (West); *see also Covered Electronic Waste (CEW) Recycling Program*, CALRECYCLE, https://calrecycle.ca.gov/Electronics/CEW (last visited Mar. 26, 2024).

190. *See generally* Feifei Shan et al., *Comparison of three E-Waste take-back policies*, 242 INT'L J. PROD. ECON. 1 (2021).

191. *See generally* Tetiana Shevchenko et al., *Understanding Consumer E-Waste Recycling Behavior: Introducing a New Economic Incentive to Increase the Collection Rates*, 11 SUSTAINABILITY 1 (2019).

192. ILO E-WASTE ISSUE PAPER, *supra* note 25, at 3.

193. The right-to-repair is seen as a key step for the EU to achieve a circular economy by 2050. *See Right to repair: the EU's actions to make repairs more attractive*, EU PARLIAMENT, https://www.europarl.europa.eu/topics/en/article/20220331STO26410/why-is-the-eu-s-right-to-repair-legislation-important (last updated Apr. 24, 2024); *see also Circular Economy: Definition, Importance and Benefits*, EU PARLIAMENT, https://www.europarl.europa.eu/topics/en/article/20151201STO05603/circular-economy-definition-importance-and-benefits (last updated May 24, 2023).

model of "extract, make, use and dispose" and includes recycling, repair, rental, and remanufacture.[194] Embracing the circular economy reduces material extraction, energy consumption, and waste generation.[195] Repairing a smartphone, for instance, keeps as much of the "embodied energy" as possible in each product.[196] In other words, it retains the total energy consumed throughout the device's lifecycle, from raw material extraction to manufacturing, transportation, and assembly.[197]

The circular economy can also be a source of job creation that could result in net job gains. The International Labor Organization estimated that embracing a circular economy would create six million new employment opportunities worldwide.[198] Building a reuse and repair economy can also create local jobs.[199] Cities across the United States (Austin, Portland, Cleveland), the United Kingdom, Kenya, and the EU have implemented programs that make repair and reuse an easy, affordable, and attractive alternative to buying new products.[200] For example, initiatives in West African countries train workers in mobile phone repair, in turn providing a marketable technological employment opportunity.[201] Initiatives like these drive economic growth and community self-reliance.

European cross-country public opinion surveys find that approximately two-thirds of surveyed citizens in the EU would prefer to repair their products than buy new ones.[202] Additionally, the European Environmental Bureau found that prolonging the operational lifespan of all washing machines, portable computers, vacuum cleaners, and smartphones in the EU by an additional twelve months would save four million tons of carbon dioxide annually by 2030.[203] With such findings, the right-to-repair seems like a win-win solution to limit the generation of e-waste production and safeguard the environment and human health.

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194. INT'L LABOR OFF., WORLD EMPLOYMENT AND SOCIAL OUTLOOK 2018: GREENING WITH JOBS 37 (2018), https://www.ilo.org/wcmsp5/groups/public/—-dgreports/—-dcomm/—-publ/documents/publication/wcms_628654.pdf.

195. *Recycling isn't the Answer; It's the Last Resort*, IFIXIT, https://www.ifixit.com/Right-to-Repair/Recycling, (last visited Apr. 7, 2024).

196. *Id*.

197. *Id*.

198. *See* INT'L LABOR OFF., *supra* note 194.

199. C40 Cities Climate Leadership Group & C40 Knowledge Hub, *How to Grow Your City's Reuse and Repair Economy,* C40 KNOWLEDGE HUB (Oct. 2022), https://www.c40knowledgehub.org/s/article/How-to-grow-your-city-s-reuse-and-repair-economy?language=en_US.

200. *Id*.

201. *See* CORNELIS P. BALDÉ ET AL. 2024, *supra* note 2, at 64.

202. EUROPEAN COMM'N, BEHAVIOURAL STUDY ON CONSUMERS' ENGAGEMENT IN THE CIRCULAR ECONOMY 50 (2018), https://trinomics.eu/wp-content/uploads/2018/10/CHAFEA2018-Behavioural-study-on-consumer-engagement-in-the-circular-economy.pdf.

203. *France Seeks to Reduce E-waste and Boost Culture of Repair*, WASTE360 (Feb. 9, 2021), https://www.waste360.com/e-waste/france-seeks-to-reduce-e-waste-and-boost-culture-of-repair.

1. A Movement Led by Consumers for Consumers

The right-to-repair movement is led by consumer activists who wish for the resources to repair products they have bought. One of the goals of the movement is to make the necessary tools and product design information accessible to individuals and repair shops. The right-to-repair movement also seeks to allow consumers to customize their products with software and to encourage repair-friendly designs.[204] Repair advocates contend that consumers keep their products longer when repairs are easier.[205] The movement has also entered the space of e-waste and smartphones.[206] This movement has urged tech companies to provide resources to revive and repair electronic devices.[207] Encompassed here is the idea that consumers should have the right to repair a product they purchased from the manufacturer by selecting a repair service of their choice.[208]

Advocates for the right-to-repair maintain that manufacturers are increasingly locking up independent repairers through specialized patented hardware, restricting information to service manuals, and not giving access to replacement parts.[209] They call for information to be shared with the tools and knowledge so that a consumer can independently decide how to repair a broken object.[210] Some even consider the right-to-repair a "fundamental human right."[211] While categorizing it as a human right may be far-fetched for certain industries, restricting this privilege results in an increasingly monopolized repair industry and higher consumer expenses. Proponents also contend that such limitations contradict sustainable practices.[212]

Regarding electronic products, advocates also suggest that repair service providers should be housed by recycling centers, because recyclers have the appropriate knowledge to disassemble and often refurbish products. Workers can also resell the refurbished products.[213] Despite these benefits, companies, manufacturers, and politicians have opposed right to repair measures because of certain concerns, discussed below.[214]

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204. Simo Elalj, *What Is the Right to Repair Movement and Why It Matters*, REFURBME (Oct. 17, 2023), https://www.refurb.me/blog/the-right-to-repair-movement-all-you-need-to-know (last visited Apr. 7, 2024).

205. Luyi Yang et al., *Research: The Unintended Consequences of Right-to-Repair Laws*, HARV. BUS. REV. (Jan. 19, 2023), https://hbr.org/2023/01/research-the-unintended-consequences-of-right-to-repair-laws; *see generally* Chen Jin et al., *Right to Repair: Pricing, Welfare, and Environmental Implications*, 69 MGMT. SCI. 1017, 1036 (2022).

206. Yang et al., *supra* note 205.

207. Irene Calboli, *The Right to Repair: Recent Developments in the USA*, WIPO MAG. (Aug. 2023), https://www.wipo.int/wipo_magazine_digital/en/2023/article_0023.html.

208. *Id.*

209. *We Must Secure Our Right to Repair Everything We Own*, IFIXIT, https://www.ifixit.com/Right-to-Repair (last visited Feb. 23, 2024).

210. *Id.*

211. Cody Godwin, *Right to Repair Movement Gains Power in US and Europe*, BBC NEWS (July 7, 2021), https://www.bbc.com/news/technology-57744091.

212. Calboli, *supra* note 207.

213. *See* Basel Action Network, *Plastics*, *supra* note 122.

214. *See infra* III. A.4.

2. The Right-to-Repair in the United States

The Biden White House defines right-to-repair as "the right to fix something you own when it breaks—either by yourself or by taking it to an independent repair shop."[215] Doing so helps extend the use of products.[216] In 2023 EPA affirmed that a right-to-repair goes hand in hand with environmental laws when affirming its support to the National Farmers Union, who strongly support federal legislation that would ensure farmers and independent mechanics have equitable and affordable access to repair farm equipment.[217]

Considered a key pillar of "Bidenomics," the right-to-repair lowers costs, gives consumers more choice on where and how to get devices fixed, and increases economic competition.[218] It also increases opportunities for small businesses.[219] President Biden endorsed this policy in his Executive Order on Promoting Competition on July 9, 2021.[220] In April 2023, the Federal Trade Commission (FTC) promoted "efforts to expand consumer choices and competition when it comes to repairing products."[221] The FTC declared that it "[stands] ready to work with legislators, either at the state or federal level, to ensure that consumers and independent repair shops have appropriate access to replacement parts, instructions, and diagnostic software."[222]

This federal endorsement is part of a larger gain in momentum for the movement nationwide.

3. The Right-to-Repair Is Gaining Momentum in State Legislatures

At least forty states have introduced some form of right-to-repair legislation.[223] In the past year, four states enacted a right-to-repair law: New

215. *Readout of the White House Convening on Right to Repair*, THE WHITE HOUSE (Oct. 25, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/25/readout-of-the-white-house-convening-on-right-to-repair [hereinafter THE WHITE HOUSE, *Convening*] (last visited Mar. 21, 2024).

216. *Id*.

217. *EPA Affirms Farmers' Right to Repair*, NAT'L FARMERS UNION (Aug. 8, 2023), https://nfu.org/2023/08/08/epa-affirms-farmers-right-to-repair.

218. THE WHITE HOUSE, *Convening*, *supra* note 215.

219. *Id*.

220. *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy (last visited Mar. 21, 2024).

221. *FTC to Ramp Up Law Enforcement Against Illegal Repair Restrictions*, FTC (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions; *FTC Testifies Before California State Senate on Right to Repair*, FTC (Apr. 11, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-testifies-california-state-senate-right-repair [hereinafter FTC, *California Testimony*].

222. FTC, *California Testimony*, *supra* note 221.

223. *Right to Repair Legislation*, REPAIR.ORG, https://www.repair.org/legislation (last visited Mar. 10, 2024).

York,[224] Colorado,[225] Minnesota,[226] and California.[227] Other states, such as Massachusetts, have passed right-to-repair laws specifically regarding car manufacturers.[228] The Massachusetts law "requires vehicle manufacturers to provide diagnostic and repair information to owners and independent repair facilities for any car made in 2015 or later."[229] The Massachusetts law also requires car manufacturers to make replacement parts available to the public for repair.[230] In 2024, Massachusetts is considering two bills, HD 3826 and SD 793, which would give the state the right to fix mobile phones and tablets.[231]

On December 28, 2022, New York became the first state to pass a Digital Right-to-Repair Act that covers digital electronic products first sold and used in New York on or after July 1, 2023, with a value over ten dollars, excluding motor vehicles, medical devices, off-road and farm equipment, home appliances, and video game consoles. On May 24, 2023, the Minnesota state legislature signed the Minnesota Digital Fair Repair Act. The Act covers "any hardware product made after July 1, 2021, that depends on embedded digital electronics, except farm equipment, video game consoles, motor vehicles, medical devices, and specialized cybersecurity tools" (SF 1598 and HF 1337). When effective on July 1, 2024, the Digital Fair Repair Act will ensure that device owners and independent repair shops can fix their own consumer products and make parts, tools, and repair documentation available.[232]

Home of the tech revolution, California will also lead the repair movement. Governor Newsom signed the Right-to-Repair Act (SB244) on October 10, 2023.[233] This will "significantly expand consumers' and independent repair shops' access to materials and information needed to fix electrics and appliances."[234] The law will go into effect July 1, 2024.[235] Advocates for the movement hope that this bill will protect the environment by keeping electronic waste out of landfills and limiting unsustainable mining and extraction that has a tremendous impact up and down the supply chain.[236] Described as a strong

224. *See STATEMENT: N.Y. governor signs Right to Repair, after trimming it down significantly*, PIRG (Dec. 29, 2022) https://pirg.org/media-center/statement-n-y-governor-signs-right-to-repair-after-trimming-it-down-significantly.

225. *See Colorado Tractor Right to Repair signed into law*, PIRG (Apr. 25, 2022), https://pirg.org/updates/colorado-tractor-right-to-repair-signed-into-law.

226. *Minnesota passes broadest Right to Repair measure to date*, PIRG (May 24, 2023), https://pirg.org/articles/minnesota-passes-broadest-right-to-repair-measure-to-date.

227. *SB-244 Right to Repair Act*, CAL. LEG. INFO., https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB244 (last visited Mar. 10, 2024).

228. Godwin, *supra* note 211.

229. *Id*.

230. Calboli, *supra* note 207.

231. REPAIR.ORG, *supra* note 223.

232. *Id*.

233. *See* CAL. LEG. INFO., *supra* note 227.

234. *Statement: Governor Newsom signs Right to Repair Act*, CALIFORNIANS AGAINST WASTE (Oct. 10, 2023), https://www.cawrecycles.org/press-releases/govsignssb244?eType=EmailBlastContent&eId=c28facac-55ef-4829-9347-bbbc9d6199b7.

235. *Id*.

236. *Id*.

consumer protection legislation, advocates hope that SB244 will foster a thriving market for repair businesses and secondhand sales, making repairing a device the norm.[237] SB244 also aims to save consumers money and reduce their reliance on manufacturers.[238]

SB244 will apply to all appliances and electronics.[239] The new law "requires manufacturers to make the parts, tools, and documentation needed to diagnose, maintain, and repair consumer electronic devices and appliances available to independent repair shops and consumers at fair and reasonable prices."[240] Some manufacturers have also endorsed this policy. During a roundtable with federal and state officials at the White House, Apple advocated for robust federal right-to-repair legislation and declared its intention to implement the standards set by California's recently passed right-to-repair law nationwide across the entire country, extending benefits to consumers nationwide.[241]

4. Concerns About Intellectual Property, Safety, and Cost

Some manufacturers oppose the right-to-repair, citing apprehensions about security, safety, and potential liability concerns, particularly regarding data breaches and cybersecurity threats.[242] These companies argue that their products should be serviced exclusively by certified technicians or their company directly, asserting that only these authorized individuals possess the necessary qualifications to perform repairs.[243] They wish to avoid consumers or third-party repairers being liable for infringing companies' intellectual property rights.[244] All these reasons are valid, but given the evident issues of e-waste, the advantages of this right-to-repair policy should outweigh the potential safety and privacy drawbacks, particularly given that the data privacy risks highlighted by the opponents can be mitigated with sufficient technology and legal enforcement.

Right-to-repair policies are not without their skeptics. Recent research challenges the assumption that the right-to-repair will financially benefit consumers or significantly impact e-waste production.[245] Scholars argue that manufacturers may deliberately modify the pricing of their latest offerings to counterbalance the anticipated decrease in profits resulting from the right-to-repair legislation.[246]

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237. *Id*.

238. *Right to Repair in 2022: What happened in New York, and our top accomplishments,* PIRG (Jan. 4, 2023), https://pirg.org/articles/right-to-repair-in-2022-what-happened-in-new-york-and-our-top-accomplishments.

239. This excludes video game consoles and alarm systems made after July 1, 2021. *See* REPAIR.ORG, *supra* note 223.

240. THE WHITE HOUSE, *supra* note 220.

241. *Id*.

242. Calboli, *supra* note 207; *see also* Yang et al., *supra* note 205.

243. Calboli, *supra* note 207.

244. *Id*.

245. *See generally* Jin et al., *supra* note 205; *see also* Yang et al., *supra* note 205.

246. Yang et al., *supra* note 205.

In one study, researchers built an economic model to analyze manufacturers' reactive pricing strategies and found that how manufacturers respond depends on how much it costs to produce the product.[247] Their model predicts that manufacturers will lower new product prices with lower production costs.[248] They believe consumers would prefer to buy a new product at a lower price rather than repair it, contributing to more e-waste.[249] E-products with higher production costs will be sold at a higher price, but will likely come with a free repair service which can enhance the resale value of the product.[250] Therefore, they argue, the right-to-repair legislation would be unlikely to make a difference in the number of new devices sold or the amount of e-waste generated. The authors of this study also find a "lose-lose-lose" situation with the right-to-repair legislation when higher prices hurt consumers, manufacturers, and the environment because consumers may continue using old, energy-inefficient products that exacerbate environmental impact.[251] Therefore, they urge lawmakers to "examine specific product categories, including their production cost and environmental impact, and guard against sweeping one-size-fits-all legislation."[252]

Cost considerations for products are critical when dealing with matters of consumer law, particularly if there is an effect on the environmental footprint of such products. The repairability index has addressed some of these concerns.

B. The Repairability Index

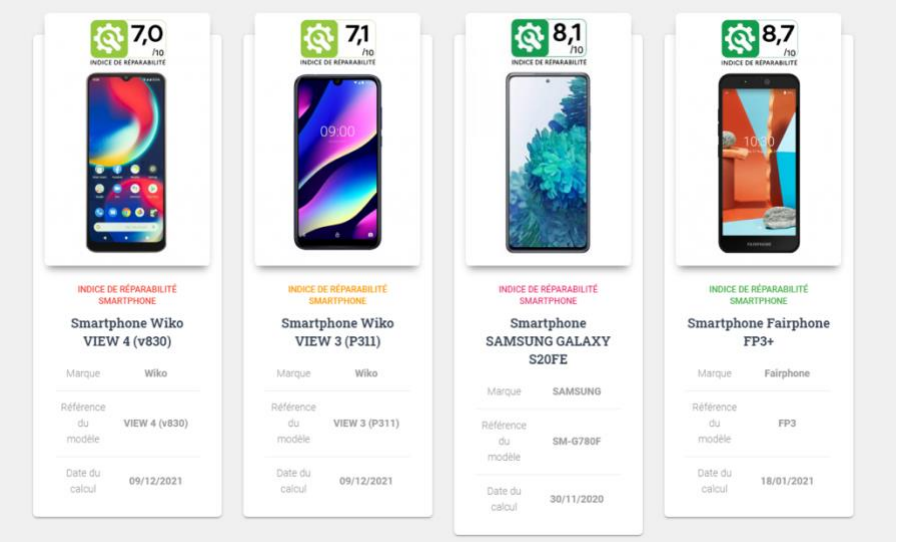
1. France's Anti-Waste Law: The Repairability Index

Whereas some private companies in the United States, such as iFixit,[253] have successfully established a repairability scorecard on WEEE products sold in the United States, France introduced a repairability index as mandatory national law.[254] France enacted the Law Against Waste for the Circular Economy[255] on January 1, 2021;[256] the law mandates display of a repairability index for electrical and electronic equipment on products. The score from one to

247. *Id*.
248. *Id*.
249. *Id*.
250. *Id*.
251. *Id.*
252. *Id*.
253. *See generally* IFIXIT, https://www.ifixit.com/ (last visited Mar. 27, 2024).
254. *Law Against Waste and For the Circular Economy*, n° 2020-105, article 16, Minister of the Ecological Transition (Feb. 10, 2020), https://www.ecologie.gouv.fr/loi-anti-gaspillage-economie-circulaire [hereinafter Anti-waste Law].
255. Anti-waste Law, *supra* note 254; *see also* MINISTÈRE DE LA TRANSITION ÉCOLOGIQUE [MINISTRY OF ECOLOGICAL TRANSITION], LA LOI ANTI-GASPILLAGE DANS LE QUOTIDIEN DES FRANÇAIS: CONCRÈTEMENT ÇA DONNE QUOI? [LAW AGAINST WASTE IN THE DAILY LIVES OF THE FRENCH: CONCRETELY WHAT ARE THE EFFECTS?] 24 (Sept. 2021), https://www.ecologie.gouv.fr/sites/default/files/Document_LoiAntiGaspillage%20_2020.pdf.
256. *Indice de réparabilité* [Repairability index], MINISTÈRES AMÉNAGEMENT DU TERRITOIRE TRANSITION ÉCOLOGIQUE, https://www.ecologie.gouv.fr/indice-reparabilite#scroll-nav__6 (last updated July 18, 2024) [hereinafter Repairability Index].

ten informs consumers about the repairability of the concerned products.[257] The index's score is calculated based on five criteria for all product categories: i) the producer's commitment to making technical documents to repairers and consumers available for free and for a lengthy time frame; ii) the ease to which the product can be disassembled, taking into consideration the tools necessary to do so; iii) the producer's willingness to make spare parts available; iv) the difference between the price of a new product and of the spare parts; and v) and any sub-criteria specific to the product category.[258] The repairability index seeks to educate consumers about their ability to extend the operational duration and overall life span of their e-product. This is primarily achieved by guiding them towards items that offer greater repairability and encouraging them to opt for repair services when products malfunction.[259]

Figure 1: Example of Four Smartphones Rated on a French Website[260]



The following categories of products fall within the scope of this regulation: front-loading washing machines, smartphones, laptops, TV monitors, electric lawnmowers (three types: with electric cable, with battery, robot), and soon, top-loading washing machines, dishwashers, vacuum cleaners (three types: with electric cable, with battery, robot), and high-pressure cleaners.[261] This list will

257. *Id.*
258. *Id.*
259. *Id.*
260. Amandine Jonniaux, *Fairphone: la marque éthique deviant championne de la réparabilité* [*Fairphone: The Ethical Brand Becomes A Champion of Repairability*], J. DU GEEK (Jan. 19, 2021), https://www.journaldugeek.com/2021/01/19/fairphone-la-marque-ethique-devient-championne-de-la-reparabilite.
261. Repairability Index, *supra* note 256.

likely continue to grow.[262] A consumer who wants to buy a repairable smartphone may prefer a product with a display score closer to ten.[263]

Figure 2: The Scope of the Repairability Index in France Introduced by the Anti-Waste Law [264]

The same legislation also includes an incentive of fifteen to sixty euros (calculated according to the e-product) to repair once the warranty has expired.[265] Since January 1, 2022, the legal guarantee of conformity and its duration must be mentioned on the product invoice or sales receipt.[266] Failure to do so may result in an administrative fine of up to €3,000 for a natural person and €15,000 for a legal entity (a company).[267]

The index and the repair incentive seem to be effective tools in the fight against e-product obsolescence and in avoiding trashing toxic products into landfills.[268] Studies on the French repairability index and consumer behavior since its enactment confirmed this effectivity.[269] Among the key findings: (1) 71 percent of consumers had heard about the index; (2) 54 percent of consumers tried to fix an item themselves or with the help of friends or family; (3) 29 percent left the repair to a professional service; (4) 86 percent said that the index impacted their purchasing behavior; and (5) 80 percent said that they would give up their favorite brand for a more repairable product.[270] The repairability index policy appears effective in changing people's behavior and educating them about their product.

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262. Le Parisien Le Guide, *Quels sont les produits concernés par l'indice de réparabilité* [*Which Products are Targeted by the Repairability Index*], LE PARISIEN (June 13, 2023), https://www.leparisien.fr/guide-shopping/pratique/quels-sont-les-produits-concernes-par-lindice-de-reparabilite-13-06-2023-LC4KQA32BVHHPETCX2IRGW3A5I.php.

263. This is regardless of whether the consumer is environmentally conscious or simply does not want to spend another thousand dollars on a mobile phone in three years' time.

264. *See supra* note 255.

265. Bercy Infos, *Tout savoir sur l'indice de réparabilité* [*All You Need to Know About the Repairability Index*], GOUVERNMENT FRA. (June 5, 2024), https://www.economie.gouv.fr/particuliers/tout-savoir-indice-reparabilite.

266. Anti-waste Law, *supra* note 254.

267. *Id.*

268. Repairability Index, *supra* note 256.

269. FAILING THE FIX: GRADING LAPTOP AND CELL PHONE COMPANIES ON THE FIXABILITY OF THEIR PRODUCTS, U.S. PIRG EDUC. FUND 6 (Feb. 2022), https://publicinterestnetwork.org/wp-content/uploads/2022/07/Failing20the20Fix_USPEF_March2022.pdf; *see also Les Français et l'indice de réparabilité: un sondage OpinionWay pour Samsung* [*The French and the Repairability Index: An OpinionWay Survey for Samsung*], SAMSUNG NEWSROOM FRA. (May 8, 2021), https://news.samsung.com/fr/sondage-indice-reparabilite.

270. *Id.*

2. Limitations of the Repairability Index

While some believe the French rating system sets precedent for other nations on the standard for product assessment, some detractors see flaws in the idea that manufacturers rate themselves, as opposed to an independent body.[271] Accusations of greenwashing could arise if a company exaggerates or falsely represents its environmental efforts with a better repairability score.[272] Additionally, there is the possibility that tech product manufacturers bring challenges when they believe a rival company's self-reported repairability score for a product is implausible.[273] Governmental oversight is needed to counteract these behaviors.[274] Evidently, this was not a barrier for the French government, nor does it seem to be a barrier in the EU, since energy labeling requirements will apply to smartphones and tablets in the EU market beginning in June 20, 2025.[275] Additionally, other EU countries, such as Belgium, have also adopted new laws that mandate manufacturers and retailers to provide repairability indices for household appliances.[276]

C. Policy Proposals to Fight Against E-Waste Pollution

When society faces a pollution crisis to the extent of e-waste, efficient and effective regulation is necessary to protect the environment and human health.[277] Regulation encourages a level playing field.[278] This Note puts forward two such policy proposals: a U.S. repairability index and a federal e-waste act.

1. Enact a Federal Repairability Index

Future U.S. federal legislation could include a repairability index based on the successful French policy. Repairability indexes are a good means for manufacturers to improve their products and image by combatting e-waste issues. This policy is also attractive to consumers. Upon purchase of a new e-product, they are provided the information about it, including how to fix it. They can keep objects longer, which is economically more appealing since they do not have to purchase the latest mobile phones that companies sell at high prices.

There is already a Repair Act proposal before Congress, H.R. 906, which would require a motor vehicle manufacturer to provide to owners certain data

271. WASTE360, *supra* note 203.

272. *Greenwashing – The Deceptive Tactics Behind Environmental Claims*, U.N. CLIMATE ACTION, https://www.un.org/en/climatechange/science/climate-issues/greenwashing (last visited Apr. 7, 2024).

273. Maggie Stone, *Why France's New Tech 'Repairability Index' Is a Big Deal*, WIRED (Feb. 28, 2011), https://www.wired.com/story/frances-new-tech-repairability-index-is-a-big-deal/.

274. *Id.*

275. *Id.*

276. João Antonucci Rezende, *The Belgian Repairability Index Includes The Price of Spare Parts: Will the EU Level Up with This Ambition?*, RIGHT TO REPAIR (Feb. 20, 2024), https://repair.eu/news/the-belgian-repairability-index-includes-the-price-of-spare-parts-will-the-eu-level-up-with-this-ambition.

277. CORNELIS P. BALDÉ ET AL., *supra* note 2, at 42.

278. *Id.*

regarding critical repair information and service.[279] While this bill specifically focuses on motor vehicles, a repairability index could be an acceptable addition to it. This kind of legislation empowers consumers to be part of the solution. The European Environmental Bureau has found that extending the lifetime of all washing machines, notebooks, vacuum cleaners, and smartphones in the EU by one year would save four million tons of carbon dioxide annually by 2030.[280] Such a policy could also reduce greenhouse gases emissions and play a role in mitigating further climate change.

2. Enact a Federal Anti-E-Waste Act

Today, e-waste is regulated at the state level in the United States. Only twenty-five states (including California) and the District of Columbia have implemented legislation establishing state-wide recycling programs.[281] Several states have implemented laws that ban the landfilling and incineration of e-waste, mandating instead that it be treated separately.[282] While enacting e-waste laws at the state level allows such states to be laboratories of democracy by testing out different approaches,[283] the absence of a uniform federal law has led to a regulatory patchwork of different laws that makes compliance challenging for producers, collectors, and recyclers.[284] This patchwork also makes it harder and more costly for manufacturers to be good corporate citizens.[285] Additionally, state-level e-waste collection rates per capita have shown a decline,[286] which is another strong indicator of the failings of state-only regulation.

This Note does not dismiss the work that EPA is doing to promote a circular economy, but a federal statute could help set more stringent e-waste standards to ensure protection of human health and the environment. The work of EPA can be a launching point for federal e-waste legislation. For instance, the "Draft National Strategy to Prevent Plastic Pollution," issued in April 2023, is a non-binding measure which sets e-waste dumping standards.[287] This proposal, along

279. H.R. 906, 118th Cong., 1st Sess. (Pa. 2023).

280. *Climate and Revealed: The Climate Cost of 'Disposable Smartphones*, EUROPEAN ENV'T BUREAU (Sept. 18, 2019), https://eeb.org/revealed-the-climate-cost-of-disposable-smartphones/.

281. *Maps of States with Legislation*, ELECS. RECYCLING COORD. CLEARINGHOUSE, https://www.ecycleclearinghouse.org/contentpage.aspx?pageid=10 (last visited Mar. 21, 2024).

282. CORNELIS P. BALDÉ ET AL., *supra* note 2, at 69.

283. *See How U.S. Laws Do (and Don't) Support E-Recycling and Reuse*, KNOWLEDGE AT WHARTON (Apr. 6, 2016) https://knowledge.wharton.upenn.edu/article/how-u-s-laws-do-and-dont-support-e-recycling-and-reuse.

284. As this Note discusses, many used e-products are stored in households or disposed of in landfills. *See* CORNELIS P. BALDÉ ET AL., *supra* note 2, at 69.

285. KNOWLEDGE AT WHARTON, *supra* note 283.

286. Electronics Recycling Coordination Clearinghouse, *Pounds Per Capita of Covered/Eligible Electronics in State Law Programs, ERCC Collection Per Capita 2018-2020*, https://www.ecycleclearinghouse.org/DocRepository/PerCapitaCollections%202018to2020.pdf (last updated Nov. 22, 2024)

287. *National Strategy to Prevent Plastic Pollution*, EPA, https://www.epa.gov/circulareconomy/draft-national-strategy-prevent-plastic-pollution (last updated Nov. 22, 2024).

with the new draft strategy for electronics that is being drafted, could be added to the proposed binding federal anti-e-waste act.[288]

This act could also be modeled in part on the French example while carefully encompassing the lessons learned from state legislatures regarding their right-to-repair acts and electronic recycling laws.[289] Such an anti-e-waste act would also level the playing field between states' e-waste management jurisdictions. The act would send a strong message to the OECD and Basel Convention parties that the United States is taking serious measures to fight the global problems of e-waste and its global environmental pollution. And would enable the United States to be "Basel" compliant and finally ratify this crucial international trade convention.

3. Challenges of the Policy Proposals

The above proposals will undoubtably face opposition. It is likely that a repairing index will be challenged under the First Amendment of the U.S. Constitution as compelled commercial speech.[290] However, some legal scholars believe a repairability index would survive judicial scrutiny because the repair scores are objective assessments based on factual criteria and that greater transparency on repairability is crucial for ensuring optimal performance of a mobile phone market.[291] Additionally, all legislation faces the challenge of current partisan division. Any successful piece of legislation must make economic and social arguments that appeal to the sensibilities of both the political left and right, a daunting task given the politicization of environmental issues.

Federal legislation is ideal to abide by international treaties like the Basel Convention. Nevertheless, encouraging states to enact right-to-repair and repairability indices could have similar effects as federal legislation (which is more difficult to pass). The more that subnational entities enact such laws, the more that repair information will be publicly available and create a de facto federal standard for the right-the-repair for e-products. Additionally, with California's status as the world's fifth-largest economy and its recent enactment of a Right to Repair Act, manufacturers will likely be compelled to produce more repairable goods to meet these standards in such a large market, effectively setting a precedent that could influence more states and nations to follow suit.[292]

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288. *What is a Circular Economy?*, EPA, https://www.epa.gov/circulareconomy/what-circular-economy (last updated Nov. 21, 2024).

289. ELECS. RECYCLING COORD. CLEARINGHOUSE, *supra* note 281.

290. Aaron Perzanowski, *Mandating Repair Scores*, BERKELEY TECH. L.J. 1123, 1137 (2022).

291. *Id* at 1141-3.

292. *California Remains the World's 5th Largest Economy*, GOVERNOR GAVIN NEWSOM, https://www.gov.ca.gov/2024/04/16/california-remains-the-worlds-5th-largest-economy/ (Apr. 16, 2024) (last visited Jan 1. 2025).

CONCLUSION

The right-to-repair is a solution to tackle negative externalities of e-waste. E-waste is the fastest-growing waste stream in the world. Many problems arise from it, including globalized illegal trade, informal recycling labor markets, and human health and environmental degradation. Most countries have come together as parties or observers of international treaties to find solutions. These nations collaborate to trade, negotiate, and treat hazardous waste in an environmentally sound manner. However, international law cannot be the only avenue to tackle these issues.

While the United States is not a party to the Basel Convention and does not have a specific federal law that deals with e-waste, the federal government has endorsed favorable right-to-repair policies through the impulsion of states. The Note proposes two policies that stem from this movement, a mandatory right-to-repair and a repairability index. Numerous challenges stand in the way of these proposals including pushback from industry and political resistance to environmental regulation. Like most environmental policy questions, it is important to weigh the interests of the different actors and stakeholders. It is unlikely that even if enacted, a federal repairability index and a mandatory Federal Anti-E-Waste Act in the United States would eradicate e-waste trade pollution. The goal of this Note is to suggest some solutions that could complement the existing mitigating ones and encourage policymakers to take the circular economy seriously. E-waste management is not an issue with a one-size-fits-all solution. This is evident from the Basel Convention, where most of the world's countries around a table cannot solve the issues together, let alone solve them in their own jurisdiction.

Nevertheless, if more products are repairable thanks to right-to-repair policies, the ones that do get through the loopholes of the illegal e-waste stream will likely be easier and less toxic to disassemble. Additionally, such policies should manage to keep the products in domestic waste streams longer, rather than enter landfills and international markets. Consumers will be able to learn about what composes the e-products they use and spend less by keeping them longer after repair. Mandatory anti-e-waste laws containing a right-to-repair and repairability index present state and federal opportunities to help tackle the global e-waste problem.

Turning Tides: The D.C. Circuit Will Not Give the Benefit of the Doubt to Endangered Species

INTRODUCTION

In *Maine Lobstermen's Association v. National Marine Fisheries Service* (*Maine Lobstermen's*), the D.C. Circuit restricted the ability of a biological opinion (BiOp) issued under the Endangered Species Act (ESA) to protect endangered species.[1] The Court stated that the National Marine Fisheries Service (NMFS) could not give the North Atlantic right whale (NARW) the "benefit of the doubt" by using "worst-case scenarios or pessimistic assumptions" when creating a BiOp analyzing how lobster and Jonah crab fisheries impacted the NARW.[2] This prohibition precludes NMFS from issuing BiOps using "predictive models for assessment of jeopardy."[3] This decision counters legislative statements from the 1979 ESA amendments indicating that, due to limited data on impacts to endangered species, agencies must "give the benefit of the doubt to the species."[4] In relying on a primarily textualist interpretation of the ESA and preventing NMFS from giving NARWs the benefit of the doubt, the D.C. Circuit limited agency interpretations when data is uncertain and contradicted the ESA's legislative history.

I. BACKGROUND

A. The Endangered Species Act

Enacted in 1973, the ESA puts forth comprehensive legal protections for animals and plants listed as threatened or endangered.[5] NMFS and U.S. Fish and Wildlife Service (FWS) are the two agencies that determine which species are to be listed.[6] Section 7 of the ESA requires NMFS and FWS to provide

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1. *See* 70 F.4th 582, 595–601 (D.C. Cir. 2023).
2. *Id.* at 586.
3. Emma Green, *The Inefficacy of Statutory Protections for the North Atlantic Right Whale*, 53 ENV'T L. REP. (ELI) 10712, 10722 (2023).
4. H.R. REP. NO. 96–697, at 12 (1979) (Conf. Rep.).
5. *See* Greer Gaddie, *Protecting Captive Endangered Animals: The Importance of Interpreting the Endangered Species Act Broadly*, 49 TEX. ENV'T L.J. 295, 296 (2019).
6. *Endangered Species: Species Information (Factsheets)*, EPA, https://www.epa.gov/endangered-species/endangered-species-species-information-factsheets (last visited Nov. 13, 2024).

consultations to ensure actions "authorized, funded, or carried out" by the federal government are "not likely to jeopardize the continued existence of any endangered species or threatened species" or cause the "destruction or adverse modification" of the species' habitat.[7]

Section 7's original language required that agency actions "do not jeopardize" the continued existence of a protected species.[8] In 1979, this language was revised to state that agencies cannot advance actions "likely to jeopardize" a protected species and must use "the best scientific and commercial data available" to assess jeopardy.[9] Conference report statements clarified that, due to the "reality of limited data" on how actions impact species, agencies must "give the benefit of the doubt to the species."[10] Evaluation of how proposed actions might impact species can include the amount or extent of incidental takings the action will likely cause.[11]

If an action is likely to adversely impact a species, the consulting agency, either NMFS or FWS, analyzes if federal actions violate the ESA and prepares a required BiOp examining the proposed action's effects.[12] BiOps can be "jeopardy" BiOps or "no-jeopardy" BiOps depending on the level of risk posed to the species.[13] Jeopardy BiOps are issued when federal actions jeopardize the species or adversely modify its habitat, and they provide "reasonable and prudent alternatives" to amend actions.[14] No-jeopardy BiOps allow proposed actions to proceed and must contain Incidental Take Statements, which "identif[y] and authoriz[e] the level of mortality and serious injury" that actions are predicted to produce.[15]

B. The Marine Mammal Protection Act

Enacted in 1972, the Marine Mammal Protection Act (MMPA) requires NMFS to establish take-reduction plans to curtail mortality and serious injury for endangered marine mammal species that come into contact with federal fisheries.[16] These plans lead to "promulgated final rules."[17] Within six months, the final rules seek to reduce species' mortality and serious injury to below the maximum amount of animals that may be killed while keeping the population of

7. 16 U.S.C. § 1536(a)(2).
8. *Maine Lobstermen's*, 70 F.4th at 596.
9. *Id.*; 16 U.S.C. § 1536(a)(2).
10. H.R. REP. NO. 96–697, at 12 (1979) (Conf. Rep.).
11. *Cf.* 50 C.F.R. § 402.02 ("*Reasonable and prudent measures* refer to those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species.").
12. 16 U.S.C. § 1536(b); Ctr. for Biological Diversity v. Raimondo, 610 F. Supp. 3d 252, 260–61 (D.D.C. 2022).
13. Maine Lobstermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv., 626 F. Supp. 3d 46, 53 (D.D.C. 2022).
14. *Id.*
15. *Id.*
16. *Id.*; 16 U.S.C. § 1387(f)(2).
17. *Maine Lobstermen's*, 626 F. Supp. 3d at 53.

the species stable.[18] The rules aim to reduce mortality and serious injury to "insignificant levels," near zero, within five years.[19]

Under the MMPA, whales experience strandings when they are deceased on a beach or floating in water, or alive on a beach and are "unable to return" to water.[20] An "unusual mortality event" (UME) is a stranding that is "unexpected," entails a "significant die-off" of the marine mammal's population, and "demands immediate response."[21] The Working Group on Marine Mammal Mortality Events, a group of marine mammal health experts, determines if a UME is occurring.[22] In response to a UME, the Working Group issues a "detailed contingency plan" to collect data on the threats to the species.[23] This investigation "identif[ies] actions and resources" to guide the UME response and agencies' responsibilities under MMPA and ESA provisions.[24]

C. Threats to the North Atlantic Right Whale

One of "the rarest of all marine mammal species," the NARW is a migratory endangered species that has its critical habitat in the Gulf of Maine and off the New England coast and its calving grounds in southeastern U.S. waters.[25] The NARW's population has been declining due to climate change, vessel strikes, and fishing gear entanglements.[26] Fixed-gear fisheries, including Maine's lobster and Jonah crab fisheries, pose "the greatest cause of human-induced" harm to the NARW.[27] Yet, the lobster industry is deeply tied to Maine's history, provides critical jobs, and generates significant revenue (an estimated $700 million in 2021).[28] From 2011 to 2019, the NARW population dropped from an estimated 481 to 368.[29] Warm waters are diminishing the populations of copepod, a plankton species and NARWs' preferred prey, causing NARWs to shift migratory patterns and face more fishing gear entanglements and vessel strikes.[30]

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18. *Id.*

19. *Id.* at 53–54.

20. *Understanding Marine Wildlife Stranding and Response*, NOAA FISHERIES, https://www.fisheries.noaa.gov/insight/understanding-marine-wildlife-stranding-and-response (last visited Apr. 21, 2024).

21. 16 U.S.C. § 1421h(9).

22. *Marine Mammal Unusual Mortality Events*, NOAA FISHERIES, https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-unusual-mortality-events (last visited Mar. 28, 2024).

23. *See* 16 U.S.C. § 1421c(b).

24. *See* U.S. DEP'T OF COM., NOAA, NMFS-OPR-9, NATIONAL CONTINGENCY PLAN FOR RESPONSE TO UNUSUAL MARINE MAMMAL MORTALITY EVENTS 7 (1996).

25. David Beasley, *Judge Rejects Whale Suit Against Navy Sub Training Site*, 33 No. 5 WESTLAW J. ENV'T 1, 1 (2012); *Maine Lobstermen's*, 70 F.4th at 586.

26. *See Maine Lobstermen's*, 70 F.4th at 586–87; Green, *supra* note 3, at 10713.

27. *See* Nathaniel Willse et al., *Vertical Line Requirements and North Atlantic Right Whale Entanglement Risk Reduction for the Gulf of Maine American Lobster Fishery*, 14 MARINE & COASTAL FISHERIES 1, 1–2 (2022); Allison K. Briggs, *Maine Lobstermen and the North Atlantic Right Whale: The Ongoing Conflict and the Obvious Solution*, 27 OCEAN & COASTAL L.J. 153, 163 (2022).

28. *See* Green, *supra* note 3, at 10713.

29. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 262.

30. *Maine Lobstermen's*, 70 F.4th at 587.

Tracing entanglements and strikes relies on several methods, including human detection, veterinary evaluation, and official public reporting.[31] Deceased NARWs can "lose buoyancy and sink" without being accounted for.[32] Thus, it is difficult to record and trace NARW entanglements and strikes.[33]

II. CASE HISTORY

A. 2021 NMFS NARW BiOp

In 2017, the Working Group on Marine Mammal Mortality Events declared a UME for the NARW under the MMPA after fishing gear entanglements and vessel strikes killed seventeen NARWs in U.S. and Canadian waters.[34] The same year, a study was published detailing the population decline of the NARW.[35] In response, NMFS took action under the ESA and MMPA and initiated a "formal consultation" for the federal fisheries that might jeopardize NARWs.[36]

In 2021, NMFS concluded its formal consultation of Maine's lobster and Jonah crab federal fisheries with a BiOp.[37] NMFS began by detailing the "reasonably certain" harmful effects the fisheries had on the NARW.[38] Because of the limited data on the NARW, it used inferences and NARW "scarring analysis" to estimate that the fisheries killed forty-six NARWs each decade and entangled over 9 percent of the estimated 368 NARWs each year.[39] NMFS explained these predictions gave "the benefit of the doubt" to the NARW and provided a species-protective estimate of total entanglements.[40] While preparing the BiOp, NMFS also created an associated Conservation Framework ("Framework"), which consisted of a four-part plan to reduce NARW killings to almost zero by 2030.[41] Although NMFS concluded that the fisheries killed unsustainable levels of NARWs and a Framework was necessary, NMFS issued a no-jeopardy BiOp stating that the lobster and Jonah crab federal fisheries were not likely to jeopardize NARWs.[42] To reach this conclusion, NMFS used projections that assumed the fisheries would follow the Framework, requiring the fisheries to implement the Framework to continue operating.[43] After issuing the BiOp, NMFS promulgated the Final Rule, which required lobster fishers to "mark their ropes, add weak links or use weak ropes, and increase the number of

31. *See* Richard M. Pace et al., *Cryptic Mortality of North Atlantic Right Whales*, 3 CONSERVATION SCI. & PRAC. 1, 2 (2021).
32. *Maine Lobstermen's*, 70 F.4th at 589.
33. *See id.* at 588–89.
34. *Id.* at 587.
35. *Id.*
36. *Id.* at 588.
37. *Id.*
38. *Id.*
39. *Id.* at 589–90.
40. *Id.*
41. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 263.
42. *Maine Lobstermen's*, 70 F.4th at 590.
43. *See id.*

traps" used for every trawl, and also imposed seasonal fishing restrictions.[44] This Final Rule implemented the Framework's first phase and amended the NARW take-reduction plan under the MMPA.[45]

B. The D.C. District Court Cases and the Consolidated Appropriations Act

The Maine Lobstermen's Association ("Lobstermen") filed suit against NMFS under the ESA contesting the BiOp, Framework, and Final Rule. The Lobstermen asserted that NMFS "overstate[d] the risks lobstering pose[d]" to the NARW and that the Final Rule overregulated the fisheries.[46] The Lobstermen pointed out that only two NARW deaths from U.S. fisheries were documented from 2010 to 2018.[47] The Lobstermen sought remand without vacatur so that NMFS could rewrite the BiOp, Framework, and Final Rule.[48] NMFS argued that its BiOp, Framework, and Final Rule were valid, as it utilized the best available commercial and scientific data in its analyses and "reasonably explained its scientific conclusions."[49]

Applying the arbitrary and capricious standard of review, which is deferential to the agency, the D.C. District Court held that the BiOp survived.[50] The court stated that NMFS "reasonably explained" its inferences and utilized "what it rationally assessed was the best available data."[51] The court expressed that it would not override NMFS's expert judgment, as NMFS had provided "peer-reviewed" analyses and determined "mortal entanglements is quintessentially murky water."[52] The Lobstermen appealed.

Shortly before the Lobstermen filed suit, conservation groups also filed suit against NMFS, arguing that the BiOp and the Final Rule did not comply with the ESA and MMPA.[53] They asserted that the BiOp and its Incidental Take Statement did not comply with the MMPA's requirement of "negligible impact" from fisheries.[54] Further, they contended that the Final Rule was "insufficiently whale protective" and failed to "reduce" NARW mortality and serious injury.[55] The D.C. District Court held that the BiOp and Final Rule were invalid and ordered additional briefing as to potential remedies.[56] After supplemental

44. *Id.*
45. *Id.*
46. *Maine Lobstermen's*, 626 F. Supp. 3d at 52.
47. *Id.* at 59.
48. *Id.* at 55.
49. *Id.* at 55, 57–69.
50. *Id.* at 52.
51. *Id.*
52. *Id.* at 60.
53. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 258.
54. *Id.*
55. *Maine Lobstermen's*, 626 F. Supp. 3d at 54.
56. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 280.

briefings, the D.C. District Court remanded the BiOp and Final Rule but "[held] the vacatur decision in abeyance."[57]

After these cases, Congress passed the Consolidated Appropriations Act, a $1.7 trillion omnibus spending bill providing federal agency funding for 2023.[58] Maine lawmakers inserted a provision in the Act stating the Final Rule was "sufficient to ensure . . . the American lobster and Jonah crab fisheries are in full compliance with the [MMPA] and the [ESA]" until December 31, 2028.[59] This resulted in the vacatur of the orders in the conservation groups' case.[60]

C. The 2023 D.C. Circuit Court Case

On appeal, the D.C. Circuit Court held that the Lobstermen had standing to challenge the BiOp and Final Rule, given the BiOp had a "coercive effect" on the Lobstermen and the Final Rule would cost between $50-90 million over six years to implement.[61] The court found that the Consolidated Appropriations Act only set a "temporary ceiling . . . for compliance" and that the Final Rule was not definitively "necessary."[62] The court directed the district court to vacate the BiOp, rejecting NMFS's *Chevron* argument that the ESA's silence on handling data uncertainties gave it discretion to use species-protective estimates.[63] The court remanded the Final Rule, allowing NMFS to explain how the Rule did not rely upon the BiOp's "validity."[64]

Assessing the BiOp, the court first looked to the ESA's text and history.[65] The court emphasized that the ESA requires agencies to "ensure an action is 'not likely to jeopardize the continued existence of' a protected species."[66] The court focused on the word "likely" and reasoned it should have its "ordinary . . . common meaning" of "probable."[67] The court noted the agency must avoid actions that are "more likely than not" to cause jeopardy—"[n]o more, and no less."[68] The court also focused on the language that the agency must utilize "the best scientific and commercial data available," spotlighting that this ensures the ESA is not administered "on the basis of speculation" and refrains from

57. Ctr. for Biological Diversity v. Raimondo, Civil Action No. 18-112 (JEB), 2022 WL 17039193, at *2 (D.D.C. Nov. 17, 2022).

58. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022).

59. *See* Maxine Joselow, *To protect lobstermen, spending bill may speed whales' extinction, activists say*, WASH. POST (Dec. 20, 2022), https://www.washingtonpost.com/climate-environment/2022/12/20/right-whales-maine-spending-bill/; *Maine Lobstermen's*, 70 F.4th at 592.

60. *Ctr. for Biological Diversity v. Raimondo*, Civil Action No. 18–112 (JEB), 2024 WL 324103, at *11 (D.D.C. Jan. 29, 2024).

61. *Maine Lobstermen's*, 70 F.4th at 592-93.

62. *Id.* at 593–94.

63. *Id.* at 597–601.

64. *Id.* at 601.

65. *Id.* at 595.

66. *Id.* (quoting 16 U.S.C. §1536(a)(2)).

67. *Id.* (quoting Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 433–34 (2019); *Likely*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

68. *Id.* (quoting Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671, 684 (9th Cir. 2016)).

"needless economic dislocation."[69] The court stated that because data regarding fisheries' impacts on the NARW was uncertain, NMFS could not "distort[] the decisionmaking process by overemphasizing" speculative harms.[70] The court held that the ESA's history did not mandate a worst case analysis.[71] Rather, the change in language from "do not" to "is not likely" to jeopardize revealed Congress did not want to empower the ESA to "paralyze government, or force industry 'to spend billions to save one more fish.'"[72]

The court also took issue with NMFS's *Chevron* argument that the ESA's silence on what to do with uncertain data gave it discretion to release a precautionary BiOp.[73] First, the court stated that NMFS's *Chevron* argument did not align with the agency proceeding—NMFS had never argued it was protecting the NARW for reasons of "policy."[74] Rather, the court found that NMFS had incorrectly believed the ESA's legislative history "had ordained . . . a precautionary principle in favor of the species."[75] The court affirmed that an agency interpretation was not owed deference when the agency mistakenly "believe[d] that interpretation [was] compelled by Congress."[76] Secondly, the court declined to apply *Chevron* deference because NMFS had been "arbitrary and capricious" and inconsistent in its stance on the silence—NMFS had publicly "oscillated" between the view that NMFS should give the benefit of the doubt to species and the view that NMFS should not use "worst-case scenario" assumptions.[77] Lastly and most importantly, the court held that even if NMFS had properly asserted its deference argument, the ESA did not permit NMFS to use "worst case-scenario" or "pessimistic" predictions.[78] The court held that Congress would be clear if it wanted NMFS to use a "precautionary principle" as a presumption in favor of the species that would allow NMFS to "err on the side of caution" when faced with uncertain data.[79] The court concluded that NMFS was not authorized by the ESA to make presumptions in favor of the NARW and "pick whales over people."[80]

69. *Id.* (quoting 16 U.S.C. §1536(a)(2); Bennett v. Spear, 520 U.S. 154, 176–77 (1997)).
70. *Id.* at 596.
71. *Id.*
72. *Id.* (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)).
73. *Id.* at 596–97.
74. *Id.* at 597
75. *Id.* at 597-98.
76. *Id.* (quoting Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006)).
77. *Id.* at 598.
78. *Id.* at 599.
79. *Id.*
80. *Id.* at 600.

III. ANALYSIS

A. This Textualist Approach Counters Legislative History and Defies Precedent

In deciding that the BiOp was invalid, the court utilized a textualist approach that runs contrary to the ESA's legislative history and its aim to precautionarily protect endangered species. The court primarily focused on two textual provisions in Section 7: that the action "is not likely to jeopardize" a listed species and that the agency must use "the best scientific and commercial data available."[81] The court interpreted these terms in complete isolation, holding that unless NMFS definitively showed that the fisheries were "more likely than not" to cause the predicted harms to the NARW, the BiOp was invalid.[82] However, this language in Section 7 must be analyzed in conjunction with the legislative history of the ESA.

Before 1979, Section 7 required that agencies "do not jeopardize" protected species; the language was revised to state that agencies cannot advance actions that are "likely to jeopardize the continued existence" of protected species.[83] Statements in the House Conference Report for the 1979 ESA amendments clarify that the amendment simply brought the language of the ESA "into conformity with existing agency practice and judicial decisions."[84] The statements further explain that BiOps must be based on the "best evidence that is available or can be developed" during the consultation.[85] The statements express that an agency that prepares a BiOp without utilizing the "best evidence," but instead relies on "inadequate knowledge or information," must then "make a reasonable effort to develop that information" and risks noncompliance with Section 7.[86] Although the new language provides less stringent protections for potentially impacted species, the legislative statements declared that Section 7 "continues to give the benefit of the doubt to the species" and does not "lessen" agency "obligation[s]" under the ESA.[87]

Ignoring this explicit legislative intent, the court refused to acknowledge the importance of resolving data uncertainties in favor of endangered species. Also, the House Conference Report explains that "courts have given substantial weight" to BiOps created under the ESA, and the language amendments "would not alter this state of the law."[88] In only looking to Section 7's plain language and assessing the language amendments in isolation, the D.C. Circuit diminished

81. *See id.* at 596 (quoting Act of Dec. 28, 1979, Pub. L. No. 96–159, 93 Stat. 1225, 1226).
82. *See id.* at 595 (quoting *Alaska Oil & Gas Ass'n*, 840 F.3d at 684).
83. *Id.* at 596.
84. H.R. REP. NO. 96–697, at 12 (1979) (Conf. Rep.).
85. *Id.* at 10.
86. *See id.* at 12.
87. *See id.*; *see generally* Christopher H.M. Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 B.C. ENV'T AFFS. L. REV. 135 (1991) (discussing Section 7 amendments).
88. H.R. REP. NO. 96–697, at 12 (1979) (Conf. Rep.).

the power of BiOps to precautionarily protect endangered species. This decision enabled the court to determine the fate of a species, rather than scientists and agency experts who conducted thorough, peer-reviewed investigations into the likely outcomes of the federal fishery operations. This dangerous exercise of the court's power over agency experts is particularly concerning, given that climate change is advancing and "considerable uncertainty surrounds" the impacts of climate change on "the present and future status" of protected species.[89] Here, "warming [] waters from climate change" are modifying copepod "location and availability," which has ultimately contributed to NARWs altering their migratory patterns and being driven into the path of the fisheries.[90] Any assessment of the NARW's future will necessarily entail some degree of uncertainty, and now a BiOp accounting for these uncertainties will not stand.

Further, the court failed to follow precedential D.C. District Court decisions regarding agency actions under the ESA. For instance, in *Defenders of Wildlife v. Babbitt*, the court stated that as long as the agency has "considered the relevant factors and articulated a rational connection" between the data and the agency's decision, special "deference to an agency's scientific and technical expertise" directs that the agency's actions be upheld.[91] Here, NMFS used a precautionary, peer-reviewed approach to address uncertainties and propose conservation actions as it thought most effective in protecting the NARW.[92] The decision in *Maine Lobstermen's* empowers courts to vacate a BiOp prepared by an agency with the best expertise.

B. The Future of the NARW

After *Maine Lobstermen's*, NARWs receive little protection from the lobster and Jonah crab federal fisheries. As climate change intensifies, NARWs will continue to lose feeding grounds and migrate into unprotected waters.[93] With a "scarcity of breeding females" and increasing rates of entanglements and strikes, the species faces the real possibility of extinction.[94] This decision will likely adversely impact the assessment of other actions that may harm NARWs, especially when modifying the action entails "economic dislocation."[95] For

89. *See* Daniel Kim et. al., *Judicial Review of Scientific Uncertainty in Climate Change Lawsuits: Deferential and Nondeferential Evaluation of Agency Factual and Policy Determinations*, 46 HARV. ENV'T L. REV. 367, 372, 388 (2022).

90. *See* Briggs, *supra* note 27, at 168; *North Atlantic Right Whale*, NOAA FISHERIES, https://www.fisheries.noaa.gov/species/north-atlantic-right-whale/overview (last visited Nov. 24, 2024).

91. *See* 958 F. Supp. 670, 678–79 (D.D.C. 1997) (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105 (1983)). *But c.f.* Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 228 (D.D.C. 2005) (holding that the ESA does not require NMFS to create BiOps using precautionary estimates that would be entirely "lacking" in scientific "support").

92. *See Maine Lobstermen's*, 626 F. Supp. 3d at 58–60.

93. *See* Green, *supra* note 3, at 10713.

94. *See* Ali Sullivan, *DC Judge Won't Halt Toss of Lobster Fishing Rule*, LAW360 (Oct. 31, 2023), https://www-law360-com.libproxy.berkeley.edu/articles/1738542/dc-judge-won-t-halt-toss-of-lobster-fishing-rule.

95. *See Maine Lobstermen's*, 70 F.4th at 599; Green, *supra* note 3, at 10724.

example, NMFS is partnering with the Bureau of Ocean Energy Management to advance offshore wind projects in the Atlantic.[96] NMFS must prepare BiOps to determine if these projects will harm the NARW or its habitat.[97] This evaluation of threats to the NARW will likely face challenges in using "predictive models for assessment of jeopardy" or "worst-case scenario" predictions.[98] Further, other species listed as endangered or threatened under the ESA may be affected by this decision.[99]

C. Broader Limitations on the Power of Agency Interpretations When Data is Uncertain

Broadly, the decision in *Maine Lobstermen's* likely limits agencies' powers when data is uncertain. Agencies striving to achieve perceived statutory goals will struggle to produce acceptable assessments in the D.C. Circuit when faced with predictive data models. In rejecting NMFS's *Chevron* argument that statutory silence gave it discretion to issue a precautionary BiOp, the D.C. Circuit revealed its disfavor for legislative history "supply[ing] duties . . . not found in the enacted law."[100] This indicates that precautionary principles not explicitly stated in statute will face pressure in the current D.C. Circuit. Parties litigating other environmental statutes like the Clean Air Act and Clean Water Act might face challenges in advancing environmental protections.[101] This decision exemplifies a scenario where the court purely looked to statutory text and declined to defer to the agency's scientific expertise and interpretation of ambiguities.

96. *See* U.S. DEP'T OF COM., BOEM AND NOAA FISHERIES NORTH ATLANTIC RIGHT WHALE AND OFFSHORE WIND STRATEGY 1 (2024).

97. *See id.* at 6.

98. *See* Green, *supra* note 3, at 10722; *Maine Lobstermen's*, 70 F.4th at 595; *see also* Tyler S. Johnson & Ann D. Navaro, *Endangered Species Act Developments: Court Finds Species Do Not Get The "Benefit Of The Doubt" & Agencies Propose Compensatory Mitigation Under ESA Section 7*, BRACEWELL ENERGY LEGAL BLOG (June 23, 2023), https://www.bracewell.com/resources/endangered-species-act-developments-court-finds-species-do-not-get-benefit-doubt-agencies/ (discussing how NMFS may be impacted in the "modeling and assumptions" it may use in reducing harm to the NARW).

99. *See*, e.g., Brief of Plaintiffs-Appellees at *41–42, *Louisiana v. Haaland*, 86 F.4th 663 (5th Cir. 2023) (No. 23-30666) (citing to *Maine Lobstermen's* to argue that the Bureau of Ocean Energy Management impermissibly used a precautionary principle to protect the Rice's whale); David Filippi, *The Continuing Impact of the Endangered Species Act on Water Rights and Water Use*, *in* The Foundation for Natural Resources and Energy Law Annual Institute: Proceedings of the Sixty-Ninth Annual Natural Resources and Energy Law Institute, *10-1, *10-5, n. 9 (2023) (stating that, as a result of *Maine Lobstermen's*, biological opinions "involving water allocations to benefit listed species and their habitats will undoubtedly be scrutinized by water users to ensure" that NMFS or FWS is not using "worst-case scenarios" or "pessimistic assumptions").

100. *See Maine Lobstermen's*, 70 F.4th at 598.

101. *See* Green, *supra* note 3, at 10724–25 (discussing the current trend towards curtailing agency authority and the likelihood of environmental statutes being incorrectly "strict[ly] interpret[ed]" without regard to legislative history).

CONCLUSION

The D.C. Circuit's textualist approach to the ESA and refusal to give the benefit of the doubt to the endangered NARW limits the scope of agency interpretations when data is uncertain and goes against stated legislative intent. In a time when climate change is intensifying and its future is uncertain, this decision poses a serious threat to protecting endangered and threatened species and promoting sustainable ecosystems.[102] Working with uncertain data, NMFS and FWS will face challenges in producing BiOps deemed acceptable by the D.C. Circuit.

Sophie Allan

102. *See* Kim et al., *supra* note 89, at 371–73.

Reeling in Commercial Fishing: Federal Jurisdiction and the San Francisco Bay Herring Population

INTRODUCTION

Pacific herring are a major part of the economy, culture, and natural environment of the San Francisco Bay and Northern California Coast.[1] They are integral to both commercial fishing and recreational fishing, as well as being a major part of the ecosystem.[2] Stakeholders hold differing views on how to maintain the population of herring within the San Francisco Bay, and with the herring population trending downward, determining the correct path to conservation is increasingly important.[3]

Tensions between two stakeholders, commercial herring fisheries and government regulators, boiled over when the National Park Service (NPS) began regulation of the Golden Gate National Recreation Area (GGNRA) in 2007. In response to regulations, the San Francisco Herring Association (plaintiff) brought a suit against the U.S. Department of the Interior, NPS, and the Superintendent of the GGNRA (collectively, Park Service).[4] The plaintiff, a nonprofit group of small-business commercial fishers, filed suit to prevent the Park Service from enforcing in the GGNRA the general commercial fishing prohibition applied across national park lands. [5,6] However, the court held that the Park Service had authority to administer the waters within the boundary of the GGNRA.

Federal jurisdiction over these navigable waters is critical for effective land management and conservation of both the herring population and, more broadly, the ecosystem of the San Francisco Bay. The Ninth Circuit's holding correctly reflects that federal regulation of the waters in the GGNRA is consistent with the goals of the GGNRA and Organic Acts for three reasons. First, the language and

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1. *See* CAL. DEP'T FISH & WILDLIFE, CALIFORNIA PACIFIC HERRING FISHERY MANAGEMENT PLAN 4-1, 4-16 to 4-22 (Oct. 2019).

2. *Id*.

3. *See, e.g.*, Jerome D. Spratt, *The Evolution of California's Herring Roe Fishery*, 78 CAL. FISH & GAME 20, 44 (1992) (discussing the various management methods, which although "controversial . . . have proven effective in solving socioeconomic conflicts in a congested fishery").

4. San Francisco Herring Ass'n v. U.S. Dep't of the Interior, 33 F.4th 1146, 1146 (9th Cir. 2022).

5. *Id.*

6. *Id*. at 1151.

goals of the GGNRA Act are distinguishable from the Alaska National Interest Lands Conservation Act (ANILCA) which administers waters differently; second, any other reading of the statute would lead to impossible outcomes; and third, the federal government is better resourced and better able to support conservation interests.

I. BACKGROUND

A. Federal Management of The Golden Gate National Recreation Area

Congress passed the Golden Gate National Recreation Area (GGNRA) Act in 1972.[7] The GGNRA covers lands and waters in the San Francisco Bay that "possess[] outstanding natural, historic, scenic and recreational values," with the goal to "protect [them] from development and uses which would destroy the scenic beauty and natural character of the area[s]."[8] Congress designated the management of the GGNRA to the Department of the Interior (DOI), granting the Park Service the ability to administer the land within its borders.[9] The designated area was drawn to "extend one-quarter mile offshore from Sausalito to Bolinas Bay in Marin County, around Alcatraz Island, and from Fort Mason to below Ocean Beach in San Francisco County and the navigable waters one-quarter mile offshore."[10] Upon the DOI gaining authority to protect and manage GGNRA, both federal and state law applied to herring conservation in the area.

In addition to the GGNRA Act, Congress passed the National Park Service Organic Act (the Organic Act) in 1916 "to conserve the scenery, natural and historic objects, and wildlife" in national parks.[11] The Organic Act sought to allow people to enjoy the parks in a way that "will leave them unimpaired for the enjoyment of future generations."[12] The Organic Act authorized the Park Service, under the supervision of DOI, to administrate and regulate public lands.[13] The Park Service has regulated waterways within the national park system for decades.[14] Under the Organic Act, the Park Service "is authorized to regulate within park boundaries without regard to ownership of the lands or waters."[15] In 1976, the Organic Act was amended to emphasize the Park Service's role in regulating "boating and other activities on or relating to water" within national parks and under federal jurisdiction.[16]

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7. 16 U.S.C. § 460bb.
8. *Id*.
9. *See id*. (entrusting management to the Secretary of the Interior).
10. *San Francisco Herring Ass'n*, 33 F.4th at 1149.
11. 54 U.S.C. § 100101.
12. *Id.*
13. *Id*.
14. Reply Brief to Plaintiff-Appellant San Francisco at 5, *San Francisco Herring Ass'n*, 33 F.4th 1146 (2021) (No. 20-17412) 2021 WL 6280259 (dating the authority of the Park Service in this area to 1970).
15. *San Francisco Herring Ass'n*, 33 F.4th at 1155.
16. *Id.* at 1153.

B. Leadup to the Case

Herring are exceptionally important to the Bay Area ecosystem, supporting crabs and fish that eat herring roe (eggs), various species of birds that rely on them as winter prey, and other marine life including seals and whales that eat adult herring.[17] Several factors, including "high sea surface temperatures and depressed productivity in the central California Current Ecosystem as well as low freshwater outflow in the San Francisco Estuary" have significantly reduced the herring population in the Bay, resulting in a complete lack of commercial fishing in the area during the 2018–19 season.[18] Fears of a diminishing population of herring have increased tensions between environmentalists and commercial fishers in debates surrounding commercial fishing in the San Francisco Bay. In response to growing concerns about the depletion of pacific herring, the California Fish and Game Commission has enacted policies that prevent overfishing by restricting the catch in each season to a maximum of 10 percent of the estimated herring population.[19]

In 1983, in accordance with the Organic Act, the Park Service issued a ban on commercial fishing in national parks under penalty of a fine and up to six months in jail.[20] In the late nineties, the California Department of Fish and Wildlife (CDFW) disputed the Park Service's jurisdiction to regulate the waters within the GGNRA, and in 2003, refused to include the Park Service's notice of the commercial fishing ban in the CDFW's information packet.[21] The dispute lasted until 2006, when CDFW recognized the Park Service's exclusive jurisdiction of the waters, and in 2007, CDFW included their recognition of the Park Service's authority in their yearly information packet.[22] Following this, California officials began warning fishermen of federal bans, and in 2011, the Park Service began enforcing its ban on commercial fishing in the GGNRA.[23] The ban represented a major disruption to herring fisheries because roe are found primarily on shorelines.[24] As a result, commercial fisheries focused on roe were unable to move their operations more than a quarter-mile offshore to comply with the Park Service regulation.

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17. CAL. DEP'T FISH & WILDLIFE, CALIFORNIA PACIFIC HERRING FISHERY MANAGEMENT PLAN, 3-1, 3-8 (Oct. 2019).

18. *See* CAL. DEP'T FISH & WILDLIFE, 2018-19 SUMMARY OF THE PACIFIC HERRING SPAWNING POPULATION AND COMMERCIAL FISHERIES IN SAN FRANCISCO BAY, 10 (2019); Phillip S. Levin et al, *Thirty-two Essential Questions for Understanding the Social-ecological System of Forage Fish: The Case of Pacific Herring*, 2(4) ECOSYSTEM HEALTH AND SUSTAIN'Y 1, 1 (2017).

19. CAL. DEP'T FISH & WILDLIFE, CALIFORNIA PACIFIC HERRING FISHERY MANAGEMENT PLAN, 5-5 (Oct. 2019).

20. *Cf.* 36 C.F.R. § 2.3(d)(4) (1987) (prohibiting "[c]ommercial fishing, except where specifically authorized by Federal statutory law").

21. Appellees' Answering Brief at 17, *San Francisco Herring Ass'n* (No. 20-17412).

22. *Id.* at 18.

23. *Id.* at 19, 56.

24. California Department of Fish and Wildlife, *State Managed California Commercial Pacific Herring Fishery*, https://wildlife.ca.gov/Fishing/Commercial/Herring.

II. *SF HERRING ASSOCIATION V. U.S. DEPARTMENT OF INTERIOR*

A. The District Court Case

In 2013, the plaintiff filed a lawsuit challenging the Park Service's authority to prohibit commercial fishing and regulate the waters of the GGNRA.[25] The case centered on whether the Park Service had the authority under the Organic Act and the GGNRA Act to administer navigable waters within the GGNRA without first formally acquiring them.

The plaintiff claimed that the Park Service was not authorized to regulate the waters of the GGNRA because the Park Service had not first acquired a formal property interest in them, which the plaintiff interpreted as a requirement of the Organic Act. The plaintiff relied upon the portion of the text of the GGNRA which states that "the Secretary shall administer the lands, waters, and submerged lands therein acquired." The plaintiff interpreted the presence of the word "acquired" to require formal acquisition of all lands, waters, and submerged lands, whether they were included in the boundaries of the GGNRA or not. The plaintiff also argued that the Supreme Court's decision in *Sturgeon v. Frost*, which held that the Park Service had no authority to apply its regulation banning hovercrafts to the navigable waters in Alaska because the United States did not own them, should apply to the navigable waters of the San Francisco Bay.[26] Though the plaintiff did not dispute that the land in the GGNRA was under federal jurisdiction, it argued that the Park Service was not authorized to regulate the waters because DOI had not formally "acquired" them in accordance with the Organic Act and the GGNRA Act.[27]

The plaintiff claimed that prohibiting commercial fishing in the GGNRA would require fisheries to extend their season and to collect younger herring earlier than they normally would.[28] The plaintiff contended that this would frustrate conservation efforts and ultimately diminish the population of herring more significantly than would allowing commercial fishing in the GGRNA.[29]

The Park Service argued that the Organic Act and the GGNRA Act authorized the Park Service to administer the waters without first formally acquiring them. It reasoned that navigable waters cannot be owned, so there was no possible way to acquire them.[30] The Park Service noted that the plain language of the GGNRA shows that the boundaries of the GGNRA were drawn to include waters one-quarter mile offshore, which placed them under the purview of Park Service regulation.[31] Furthermore, the section on acquisitions made no mention of acquiring waters, which the Park Service argued was

25. Appellees' Answering Brief at 19, *San Francisco Herring Ass'n* (No. 20-17412).
26. *See generally id.* (referring to Sturgeon v. Frost, 587 U.S. 28 (2019)); 36 C.F.R. § 2.17(e).
27. *San Francisco Herring Ass'n*, 33 F.4th at 1148.
28. Plaintiff-Appellant's Opening Brief at 8, *San Francisco Herring Ass'n* (No. 20-17412).
29. *Id.*
30. Appellees' Answering Brief at 21, *San Francisco Herring Ass'n* (No. 20-17412).
31. *Id.* at 52.

because it was implied that the navigable waters were already within the jurisdiction of the United States.[32] Therefore, the Park Service did not have to "acquire" them or the land beneath them for purposes of regulating boating, fishing, or other activities conducted on the water.[33] Finally, the Park Service argued that most of the submerged lands within the GGNRA were already federally owned, so it would not need to gain a further interest in the waters in order to regulate them, unlike *Sturgeon*, where the federal government did not have title to the submerged lands in Alaska.[34] The lower court granted summary judgement to the Park Service in agreement that the Park Service has the requisite statutory authority to regulate lands and waters within the GGNRA.

B. The Ninth Circuit Case

The plaintiff appealed to the Ninth Circuit and again challenged the Park Service's authority to regulate the navigable waters within the GGNRA without acquiring a formal property interest in the submerged lands in the bay.[35] The Ninth Circuit held that Congress had jurisdiction over navigable waters regardless of whether a state owns any part of the submerged lands beneath the waters, as California did.[36] Because running waters cannot be owned, to acquire the waters for purposes of administering them the Secretary only had to have control over them.[37] In this case, the Secretary already controlled the waters because they were designated as part of the GGNRA.[38]

The outcome of the case turned on the Court's statutory interpretation of the Organic Act and the GGNRA Act. The GGNRA Act states that "the Secretary shall administer the lands, waters, and interests therein acquired for the recreation area."[39] That process allowed the Secretary of the Department of the Interior to acquire California lands only through donation.[40] This further complicated the plaintiff's argument because the California Constitution prevents the state from donating or selling lands in the public trust for fishing and navigation purposes.[41] According to the court, Congress would have been aware that the California Constitution prohibited land transfers and would not have intended the statute to

32. *Id.* at 21.
33. *Id*.
34. *Id.* at 11; *see generally* Sturgeon v. Frost, 587 U.S. 28.
35. *See San Francisco Herring Ass'n*, 33 F.4th at 1152.
36. *See id.* at 1153.
37. *See id.*
38. *Id.*
39. 16 U.S.C. § 460bb-3.
40. 16 U.S.C. § 460bb-2 ("Any lands, or interests therein, owned by the State of California or any political subdivision thereof, may be acquired only by donation.").
41. CAL. CONST. art. I, § 25 ("[N]o land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon"); art. X, § 4 ("No [entity] claiming or possessing the frontage or tidal lands of . . . navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water").

require that the Department of Interior protects the land and waters only after formal acquisition when formal acquisition is impossible.[42]

The Court rejected the plaintiff's interpretation of the statute, determining that the acquisition of waters for the purposes of regulating them did not need to be a formal transfer of property to the Park Service.[43] The court reasoned that the boundary line of the GGNRA deliberately included the waters extending a quarter mile offshore.[44] The court stated that it was also clear Congress would not delegate this responsibility to the Park Service and then prevent the agency from carrying out its duty by not formally acquiring the area if that were required by the Organic Act.[45]

The court distinguished this case from *Sturgeon v. Frost*, a Supreme Court case about the Park Service's authority to regulate the nearly forty-four million acres of Alaskan land designated as a national park. ANILCA designated large swaths of land in Alaska, including that of Native Alaskans and private landowners, as national parks.[46] ANILCA designated federal jurisdiction only to the public lands within the borders of the national park.[47] ANILCA included clear language "borne out of Alaska's unique history and geography" that allowed the Park Service to regulate only what the federal government owned.[48] Because navigable water cannot be owned, the United States government did not have title to it and therefore could not regulate it under the unique statutory language in ANILCA. The Supreme Court held that Congress explicitly carved out non-public lands from federal jurisdiction, and that the Park Service could not regulate the waters above private lands.[49] According to the Ninth Circuit, "*Sturgeon* shows that when Congress wants to disallow NPS from exercising its usual authority over navigable waters falling within the drawn boundaries of a national park system unit, Congress makes that intention clear."[50] In this case, there was nothing to state or imply that Congress intended to exclude the waters of the GGNRA from the authority of the Park Service.[51] Therefore, the court concluded, Congress must have intended the Park Service to regulate the waters.

III. LEGAL ANALYSIS

The Ninth Circuit's ruling in this case was correct for three reasons: first, federal regulation of the designated area is consistent with the GGNRA and the overall goals of the Organic Act which preempt state regulation; second, any other reading of the statute would render the Park Service unable to administer

42. *See San Francisco Herring Ass'n*, 33 F.4th at 1154.
43. *See id.*
44. *Id.*
45. *Id*.
46. *Id*. at 1155.
47. *Id.*
48. *Id.*
49. *Id* at 1156.
50. *Id.*
51. *Id.*

any navigable waters not already over submerged federal land; third, the goal of conservation is better accomplished given that the federal government is better resourced to implement conservation driven regulation and because the Organic Act and GGNRA provide for stricter conservation measures than state laws.

A. Federal Regulation of the Designated Area Is Consistent with the GGNRA and the Overall Goals of the Organic Act

Federal regulation of the designated area is more consistent with the GGNRA and the overall goals of the Organic Act. According to the court, the purpose of the Organic Act was to take this piece of land and water and give it federal resources and management.[52] This becomes clear after distinguishing both the statutory language and the historical circumstances of ANILCA identified in *Sturgeon v. Frost* with that of the GGNRA Act. According to the court, the language in the GGNRA and Organic Act expressly obligate the Park Service to administer the designated area, which was drawn to include land and waters.[53] Conversely, the language in ANILCA states that only public lands (which according to ANILCA itself included water), meaning lands the U.S. government holds title to, could be regulated by the Park Service, expressly prohibiting federal regulation of the waters.[54] The goal of ANILCA was to geographically define lands and waters as part of a conservation unit without giving the Park Service authority over non-federally owned land.[55] The goal of the GGNRA was the opposite – to provide federal funding and management to the designated area.

In addition, the circumstances of ANILCA are different from those of the GGNRA Act. Alaska's land management circumstances are vastly different from those of the GGNRA. ANILCA intentionally excluded lands and waters not owned by the United States in its land management strategy because rather than setting the boundaries of the park to areas with exclusive federal jurisdiction, the national park boundary included forty-four million acres of land owned by the State of Alaska and Alaskan Natives.[56] The boundaries followed topographical features because it was nearly impossible to draw boundaries excluding State and Native Alaskan owned land.[57] On the other hand, the GGNRA Act dedicated a small portion of land, carefully considered by Congress and almost entirely within United States Jurisdiction, to be administered by the federal government, with no carve-out for lands or waters not specifically owned by the United States, because it wanted the Park Service to conserve the natural beauty of the area.[58]

52. *See id.* at 1153.
53. *Id.*
54. Sturgeon v. Frost, 587 U.S. at 49.
55. *Id.* at 48.
56. *Id.* at 37.
57. *Id.*
58. *San Francisco Herring Ass'n*, 33 F.4th at 1156.

B. Requiring the Park Service to Acquire Navigable Waters to Govern Them Would Render Park Service Administration of Navigable Waters Impossible

Despite the widely understood principle that navigable waters cannot be owned,[59] the parties and the court spent significant time discussing the possible "acquisition" of the waters in the San Francisco Bay for the purposes of administering them.[60] While the court's ruling in *SF Herring Association* was narrow in that it implicated only the GGNRA, if the court had ruled in favor of the plaintiff, requiring that the Park Service "acquire" the un-acquirable waters, it would have condemned the Park Service to abiding by a requirement to obtain the land beneath the waters in every effort to administer waters under federal jurisdiction. This would have encumbered the legal system because it would result in extensive litigation across multiple states for control of water within their borders and disrupt countless other established federal regulatory conservation efforts.

C. The Federal Government Is Better Suited to Conservation Efforts than State Governments

Federal regulation of waters is essential because effective public lands management requires balancing the competing interests of the state, including local economies and businesses, tourism, community development, and conservation. Conservation of water and the ecosystem in the San Francisco Bay preserves community and economic interests for future generations. To accomplish this, the Park Service serves as "the ultimate caretaker of America's most valuable natural and cultural resources, while providing for public use and enjoyment of those resources."[61] Contrary to the plaintiff's argument that reduced commercial fishing would ultimately reduce the population of herring, the Park Service's ban on fishing in the GGNRA works in tandem with the CDFW's herring and roe quotas to prevent over-fishing, which will allow the population of herring to increase with conservation efforts.[62] The power of Congress to designate the Park Service to govern public land without formal acquisition is vital to both the continued creation of public land and protection of those lands already designated under the purview of the Park Service. The Park Service's ability to regulate navigable waters within its jurisdiction is essential for conservation efforts.

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59. *Id.* at 1153 (citing *Sturgeon v. Frost*, 587 U.S. 28).

60. *Id.*

61. *Land Resources Division*, NAT'L PARK SERV., https://www.nps.gov/orgs/1860/index.htm (last visited Nov. 20, 2024).

62. *See* California Department of Fish and Wildlife, *State Managed California Commercial Pacific Herring Fishery*, https://wildlife.ca.gov/Fishing/Commercial/Herring; California Audubon Society, *Pacific Herring Conservation Program*, https://ca.audubon.org/pacific-herring-conservation-program.

CONCLUSION

The Ninth Circuit's ruling in *SF Herring Association* was based primarily on statutory interpretation of the GGNRA Act distinguished from ANILCA and therefore was a narrow holding on the Park Service's ability to administer the waters of the San Francisco Bay. However, the ruling has broad implications for conservation efforts in navigable waters and will support the herring population in the San Francisco Bay. Ruling in favor of the government has allowed the Park Service to enforce its ban on commercial fishing in National Parks and conserve the ecosystem of the GGNRA.

Natalie Belknap

Using the European Sustainability Reporting Standards to Address Climate Change

INTRODUCTION

Implemented on January 1, 2024, the European Sustainability Reporting Standards (ESRS[1]) for climate-related financial disclosures signify a pivotal shift in integrating environmental accountability into corporate practices.[2] However, stakeholders such as the European Sustainable Investment Forum have criticized the ESRS for allowing a company not to disclose information about climate change issues if a company determines that an issue is immaterial.[3] This In Brief will examine the ESRS's role in climate change action, including the evolution of sustainability reporting and materiality assessment nuances. To mitigate the non-disclosure issue, this In Brief will argue that it is necessary to interpret the ESRS to recognize climate change issues as inherently material and subject to disclosure. Further, this In Brief will discuss ways in which the ESRS's double materiality standard offers opportunities for comprehensive materiality assessment under the U.S. Securities and Exchange Commission's (SEC) Climate Disclosure Rule.[4]

I. Background

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1. Commission Delegated Regulation (EU) 2023/2772 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, 2023 O.J. (L __) 1 [hereinafter Commission Delegated Regulation 2023/2772]. Because, at time of writing, the Directive has not yet been assigned to a volume of the Official Journal of the European Union, this In Brief cites to the page numbers of the Directive and accompanying Annexes as they appear at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302772.

2. *See* Mairead McGuinness, Eur. Comm'r for Fin. Stability, Fin. Servs. and the Cap. Mkts. Union, Speech at EFRAG annual conference, 'European corporate reporting: two pillars for success' (Nov. 28, 2023) (transcript available at https://ec.europa.eu/commission/presscorner/detail/en/speech_23_6574).

3. *See* Ian Lewis, *Final EU Sustainability Reporting Rules Trigger Fresh Wave of Criticism*, IMPACT INVESTOR (Aug. 3, 2023), https://impact-investor.com/final-eu-sustainability-reporting-rules-trigger-fresh-wave-of-criticism/.

4. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

A. The Evolution of Sustainability Reporting

The evolution of sustainability reporting is rooted in addressing externalities that arise from corporate activities, notably greenhouse gas emissions and air pollution. These externalities have global effects, such as climate change and drastic weather events, with a disproportionate impact on future generations. Effectively addressing these externalities requires accurate and prompt reporting of activities that contribute to them. This involves tracking and documenting what companies consume and emit into the atmosphere, as well as understanding the broader impact of these actions on both humans and the environment.[5] For instance, accurately reporting on a company's use of fossil fuels and its contribution to global warming is crucial for addressing climate change effectively.

B. Development of the ESRS

The European Union (EU) has committed to addressing climate change and promoting sustainable development,[6] and this commitment was embodied in the European Green Deal.[7] As part of the European Green Deal, in December 2022 the EU amended its accounting standards: the Corporate Sustainability Reporting Directive (CSRD[8]).[9] The CSRD mandates certain companies to disclose in their management reports the information necessary to understand the company's impacts on sustainability matters, as well as how these matters influence the

5. *See* Patricia M. Dechow, *Understanding the Sustainability Reporting Landscape and Research Opportunities in Accounting*, 98 ACCT. REV. 481, 484-485 (Sept. 1, 2023).

6. *Communication from the Commission: Action Plan: Financing Sustainable Growth*, EUROPEAN COMMISSION (Mar. 8, 2018) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0097.

7. *See generally Communication from the Commission: The European Green Deal*, COM (2019) 640 final (Dec, 11, 2019) (articulating broad policy aims to reduce European reliance on fossil fuels).

8. Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU, as regards corporate sustainability reporting, 2022 O.J. (L 322) 15.

9. The EU's ordinary legislative procedure enacts Regulations, Directives, and Decisions. Regulations are immediately enforceable as law across the EU. In contrast, Directives establish objectives for all member states, which then have the freedom and responsibility to enact their own laws to achieve these objectives by a set deadline. Meanwhile, Decisions are fully binding but are limited to specific groups or individuals they address. This system ensures both uniformity in goals and flexibility in execution across the diverse legal systems within the EU. *See Ordinary legislative procedure*, EUR. PARLIAMENT, https://www.europarl.europa.eu/infographic/legislative-procedure/index_en.html (last visited Nov. 25, 2024).

company.[10] In accordance with the CSRD's delegation,[11] the European Commission adopted the first set of ESRS in July 2023 to specify the content and structure that companies subject to the CSRD must disclose and use to meet the requirements under the CSRD.[12]

C. Overview of the ESRS

The ESRS outlines how companies can fulfill their reporting obligations regarding sustainability matters under the CSRD. The implementation of uniform standards is anticipated to decrease reporting expenses for companies over time by eliminating the need to comply with various voluntary standards.[13] The ESRS are structured into two overarching standards and ten specific standards. The overarching standards are General Requirements (the ESRS 1) and General Disclosures (the ESRS 2). The ESRS 1 covers the foundational principles and framework for reporting, including double materiality. The ESRS 2 outlines the necessary information for all sustainability areas, focusing on governance, strategy, risk management, and performance metrics.

The ESRS includes ten detailed standards for various sustainability topics like climate change, pollution, water resources, biodiversity, and others.[14] Each standard includes specific disclosure requirements evaluated based on their materiality. For example, the Climate Change standard concentrates on climate-related sustainability matters, aligning with the Paris Agreement goals and covering greenhouse gas emissions and related risks.[15] Under the ESRS 1, companies are

10. The CSRD applies to publicly listed companies (including listed Small and Medium-sized Enterprises with the exception of micro-enterprises), large companies, and non-EU companies with a net turnover of EUR 150 million in the EU and with at least one subsidiary or branch in the union. Under the CSRD, a large company means one that meets two out of three of the following criteria: more than 250 employees, a turnover of over EUR 40 million, and over EUR 20 million total assets. These companies will also have to take into account information at subsidiary level. *See* Noor Crabbendam, *Corporate Sustainability Reporting Directive (CSRD) Explained*, CARBON TRUST (Dec. 15, 2022), https://www.carbontrust.com/news-and-insights/insights/corporate-sustainability-reporting-directive-csrd-explained; *Corporate Sustainability Reporting*, EUR. COMM'N (Jan. 5, 2023), https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en.

11. Once an EU law is enacted, it may require updates to accommodate developments in a specific sector or to ensure correct implementation. The European Parliament and Council have the authority to permit the Commission to adopt delegated or implementing acts. *See Implementing and delegated acts*, COUNCIL OF THE EUR. UNION https://www.consilium.europa.eu/en/council-eu/decision-making/implementing-and-delegated-acts/ (last updated Jan. 11, 2024); *see, e.g.*, Commission Delegated Regulation 2023/2772, 2023 O.J. (L __) 1, 1.

12. *See Questions and Answers on the Adoption of European Sustainability Reporting Standards*, EUR. COMM'N (July 31, 2023), https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_4043.

13. *Id*.

14. *Id*.

15. Commission Delegated Regulation 2023/2772, 2023 O.J. (L __) 1, 73.

required to report all GHG emissions (Scope 1, 2, 3),[16] quantified as CO2 equivalents.[17]

D. Double Materiality Principle Under the ESRS

One of the ESRS's key concepts is the double materiality principle.[18] This principle mandates that a company assess the financial materiality and impact[19] materiality of sustainability matters. Double materiality merges two viewpoints: 'inside-out' (the company's impact on environmental, social, and economic factors) and 'outside-in' (the financial impact of these factors on a company).[20] If a sustainability matter meets the criteria for either impact materiality, financial materiality, or both, it is considered "material." If a company determines that the sustainability matter is material, it must disclose it.

Impact materiality deems a sustainability matter material when it does or has the potential to significantly affect "people or the environment over the short-, medium-, or long-term. . . . includ[ing] through a [company's] own operations and upstream and downstream value chain . . . its products and services, as well as through its business relationships," extending beyond direct contracts.[21]

On the other hand, financial materiality deems a sustainability matter material if it has, or is likely to have, significant financial effects on the company. This situation arises

> when a sustainability matter generates risks or opportunities that . . . could reasonably be expected to have a material influence, on the [company's] development, financial position, financial performance, cash flows, access to finance or cost of capital over the short-, medium-, or long-term. . . . originat[ing] from both historical and prospective future events.[22]

The financial materiality evaluation for risks and opportunities considers both "the likelihood of occurrence and the potential magnitude of the financial effects."[23]

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16. Scope 1 encompasses direct emissions from sources the company owns or controls. Scope 2 covers indirect emissions from energy sources like electricity, steam, or heating purchased by the company. Scope 3 is more expansive, including all other indirect emissions from activities in the company's value chain, both upstream and downstream. *Id.* at 277.

17. CO2 equivalents (CO2e) is a standard unit for measuring carbon dioxide equivalents, used to express the impact of each different greenhouse gas in terms of the amount of CO2 that would create the same amount of warming. *See What Are CO_2 Equivalents?*, MYCLIMATE, https://www.myclimate.org/en/information/faq/faq-detail/what-are-co2-equivalents / (last visited Nov. 25, 2024).

18. Commission Delegated Regulation 2023/2772, 2023 O.J. (L __) at 266.

19. Under the ESRS, impact means the effect company has or could have on the environment and people, including effects on their human rights, connected with its own operations and upstream and downstream value chain, including through its products and services, as well as through its business relationships. *See id.* at 267.

20. *See* Maria Niculescu & Alain Burlaud, *From Non-Financial Disclosure to Sustainability Reporting: New Challenges for Financial Analysts and Auditors*, 21 AUDIT FINANCIAR 685, 698 (2023).

21. Commission Delegated Regulation 2023/2772, 2023 O.J. (L __) at 10.

22. *Id*. at 11.

23. *Id*.

E. Corporate Discretion in Climate Change Reporting

While the ESRS 1 mandates that a company conduct materiality assessments for sustainability matters,[24] it allows companies discretion in reporting; they are not required to disclose information on topics deemed non-material after assessment.[25] The ESRS 1 mandates that a company "shall establish how it applies criteria, including appropriate thresholds, to determine: (a) the information it discloses on metrics for a material sustainability matter . . . and (b) the information to be disclosed as entity-specific disclosures."[26] This approach aims to provide flexibility by allowing companies to focus on relevant disclosures specific to their circumstances.[27]

More specifically, the ESRS 1 stipulates that "[i]f the undertaking concludes that climate change is not material and therefore omits all disclosure requirements in ESRS E1 Climate change, it shall disclose a detailed explanation of the conclusions of its materiality assessment with regard to climate change."[28] This implies that the ESRS permits a company not to disclose any information about climate change, provided the company offers a detailed explanation. This approach has drawn criticism for potentially enabling companies to pretend to be more environmentally friendly or sustainable than they actually are because it may allow companies to avoid disclosing certain adverse impacts by labeling them as non-material.[29] Critics, including environmental and sustainable investment organizations, argue that this could dilute the effectiveness of the ESRS, leading to less stringent reporting on critical sustainability aspects and undermining the overall goal of transparency in sustainability reporting.[30]

II. ANALYSIS

A. Mitigating Non-Disclosure by Recognizing Climate Change as Inherently Material

It is crucial to establish robust measures to prevent non-disclosure of material environmental impacts, especially those related to climate change. One way to mandate comprehensive disclosure is to interpret the ESRS in a way that acknowledges the inherent materiality of climate change issues, necessitating

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24. *Id*. at 8.

25. *See id*. at 5 ("ESRS do not require undertakings to disclose any information on environmental, social and governance topics covered by ESRS when the undertaking has assessed the topic in question as non-material.").

26. *Id*. at 9.

27. EUR. COMM'N, *Questions and Answers on the Adoption of European Sustainability Reporting Standards*, *supra* note 12.

28. Commission Delegated Regulation 2023/2772, 2023 O.J. (L __) at 9.

29. *See* Lewis, *Final EU Sustainability Reporting Rules Trigger Fresh Wave of Criticism*, *supra* note 3.

30. *See, e.g.* NingShan Hao et al., *Effects on Corporate Stakeholders and Limitations of the Implementation of the Non-Financial Reporting Directive (2014/95/EU)*, 22 ACCT. AND MGMT. INFO. SYS. 609, 616-618 (2023).

their disclosure. In the context of general accounting, the term "material" refers to the relevance and importance of information.[31] Within the ESRS, a sustainability matter is material if it satisfies criteria for either impact materiality or financial materiality, or both.

The impact materiality assessment spans a company's entire operations and its value chain, and extends to its products, services, and business relationships.[32] Under the ESRS, it is recognized that "all global economic enterprise depends on the functioning of earth systems, such as a stable climate."[33] Companies rely on a stable climate for their operations, and their activities can directly or indirectly impact the climate by using fossil fuels (Scope 1 GHG emissions) or consuming externally purchased or acquired energy (Scope 2 GHG emissions). Their impacts can extend through the company's upstream and downstream value chain (Scope 3 GHG emissions). These impacts may be either actual, potential, or both. Therefore, it is reasonable to conclude that climate change issues must be relevant for most companies.

The ESRS defines "impact drivers" as "[a]ll the factors that cause changes in nature, anthropogenic assets, nature's contributions to people, and a good quality of life."[34] It explicitly includes "climate change" as a direct impact driver with "direct physical and behavior-affecting impacts on nature."[35] Given that global economic enterprise relies on a stable climate, corporate actions that contribute to climate change, whether directly or indirectly, are relevant to climate change. Climate change issues must therefore be important to most companies and thus should necessitate disclosure in most cases.[36]

Additionally, because ESRS 1 includes disclosures of a company's direct and indirect GHG emissions, as well as those through its value chain, it is reasonable to consider that unless the company has fully transitioned to renewable energy, its operations or parts of its value chain contribute to GHG emissions, thereby affecting climate change. Therefore, within the ESRS, these impacts on climate change could be considered inherently material for most companies, except for those that do not depend on fossil fuels and exclusively use renewable energy throughout their entire value chain.

On the other hand, the financial materiality assessment seeks to determine information critical for primary users of the company's financial reports, focusing on its potential impact on its decisions. Information is considered

31. Niculescu & Burlaud, *supra* note 20, at 698-699.

32. Commission Delegated Regulation 2023/2772, 2023 O.J. (L __) 1, 10.

33. *Id*. at 274.

34. *See id*. at 269.

35. *Id.*

36. Companies should be exempt from disclosing information about climate change only in exceptional circumstances where the issue is deemed insignificant for the company. This includes when the company demonstrates no substantial impact on climate change through its operations, upstream and downstream value chains, products, services, or business relationships. However, when companies are required to disclose climate-related information, the scope and specifics of such disclosures may vary appropriately depending on the company's unique circumstances.

material for users of general-purpose financial reports[37] "if omitting, misstating or obscuring that information could reasonably be expected to influence decisions that they make based on the [company's] sustainability statement."[38]

In this context, some might argue that climate change is only material if it has direct, substantial financial consequences for the company. However, it is noteworthy that ESRS 1 dictates that assessments of impact and financial materiality are interdependent. Thus, the issue of climate change, which may appear financially immaterial in the short term, can become financially significant over the long term as public and regulatory attention intensifies. For instance, an oil and gas company with high greenhouse gas emissions may face reduced customer loyalty and heightened legal challenges due to increasing demand for renewable energy and strengthened regulations on oil exploitation and refining; this could impact its sales and profitability. This demonstrates dynamic materiality, where environmental impacts, not initially considered financially significant, can gradually become material as they begin to influence consumer behavior and investor decisions (dynamic materiality).[39]

Although ESRS 1 permits companies to assess climate change issues as immaterial and subsequently not disclose information about climate change issues, an interpretation of the ESRS could conclude that climate change is inherently material for disclosure. As long as a company emits carbon in any part of its value chain, contributing to climate change, it could be considered to meet the threshold for impact materiality. Additionally, if carbon emissions or related events may contribute to decreased customer loyalty and potential legal challenges, affecting sales and profitability, then it meets the threshold for financial materiality.

B. Using the ESRS Double Materiality Standard to Inform the U.S. SEC's Climate Disclosure Rule

On March 4, 2024, the SEC adopted final rules to enhance and standardize climate-related disclosures for investors.[40] The ESRS could significantly influence the SEC's approach to enforcing the final rules. Notably, the CSRD and ESRS will affect U.S. companies with operations in the EU, underscoring the interconnected nature of global business and environmental regulation.[41] In this context, the ESRS could suggest ways in which the SEC understands the materiality standards and promotes comprehensive disclosure under the SEC's Climate Disclosure Rule.

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37. *Id*. at 278 (defining users as "existing and potential investors, lenders and other creditors including asset managers, credit institutions, insurance undertakings").

38. *Id*. at 284.

39. Dechow, *supra* note 5, at 489-91.

40. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

41. *See Trends in Europe v. North America*, 40 Bus. TRAVEL NEWS no. 12, at 8 (June 12, 2023).

The ESRS and the SEC's Climate Disclosure Rule differ in several respects. The ESRS addresses a broad range of environmental, social, and governance matters issues, whereas the SEC's Climate Disclosure Rule specifically mandates material climate risk disclosures.[42] The ESRS requires Scope 3 GHG emissions disclosures related to climate change, while the SEC's rule does not.[43] In addition, the ESRS adopts the double materiality principle, considering both financial and impact materiality, whereas the SEC's rule primarily focuses on financial materiality.[44]

However, to bolster the comprehensive materiality assessment of climate-related risks under the SEC's Climate Disclosure Rule, it could be helpful for the SEC to integrate the concept of the double materiality principle of the ESRS, particularly the assessment of impact materiality and its interdependence with financial materiality.

Specifically, it is reasonable to require companies to consider both their impact on the environment and people (impact materiality) and the resulting financial risks (financial materiality) when assessing climate-related risks, particularly transition risks,[45] under the SEC's Climate Disclosure Rule. The SEC's Climate Disclosure Rule mandates that companies describe "any climate-related risks that have materially impacted or are reasonably likely to have a material impact on the registrant, including on its strategy, results of operations, or financial condition." In doing so, a company "must describe whether such risks are reasonably likely to manifest in the short-term (i.e., the next 12 months) and separately in the long-term (i.e., beyond the next 12 months) . . . [and] disclose whether the risk is a physical or transition risk."[46]

Further, under the SEC's Climate Disclosure Rule, if the risk is a transition risk, a company must disclose whether it relates to regulatory, technological, market (including changing consumer, business counterparty, and investor preferences), or other transition-related factors, and how those factors impact the company.[47] Transition risks include reduced market demand for carbon-intensive products leading to decreased prices or profits for such products, legal liability and litigation defense costs, competitive pressures associated with the

42. *SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, SEC (Mar. 6, 2024), https://www.sec.gov/news/press-release/2024-31.

43. *See* Caroline A. Crenshaw, *A Risk by Any Other Name: Statement on the Enhancement and Standardization of Climate-Related Disclosures*, SEC (Mar. 6, 2024), https://www.sec.gov/news/statement/cresnshaw-statement-mandatory-climate-risk-disclosures-030624.

44. *See SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, SEC (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46; Gary Gensler, *Statement on Proposed Mandatory Climate Risk Disclosures*, SEC (Mar. 21, 2022), https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321; Enhancement and Standardization, 89 Fed. Reg. at 21671-72.

45. "Transition risks" are risks related to a potential transition to a lower carbon economy. In contrast, "physical risks" are risks related to the physical impacts of the climate. Enhancement and Standardization, 89 Fed. Reg. at 21687.

46. 17 C.F.R. § 229.1502(a)(1) (2024).

47. 17 C.F.R. § 229.1502(a)(2) (2024).

adoption of new technologies, and reputational impacts (including those stemming from a company's customers or business counterparties).[48]

Given the interdependence of financial and impact materiality assessments, these risks might seem immaterial at first but can become financially significant over time as public and regulatory scrutiny intensifies. These regulations demonstrate how considering the concept of interdependence between impact and financial materiality, as outlined in the ESRS, could enhance comprehensive climate-related disclosures of transition risks under the SEC's Climate Disclosure Rule.

Under the SEC's Climate Disclosure Rule, a company must describe any processes it has for identifying, assessing, and managing material climate-related risks. In doing so, a company should address how it identifies whether it has incurred or is reasonably likely to incur a material physical or transition risk; decides whether to mitigate, accept, or adapt to the particular risk; and prioritizes whether to address the climate-related risk. If a company manages a material climate-related risk, it must disclose whether and how it integrated the risk into its overall risk management system or processes.[49]

This requirement underscores the relevance of the ESRS's approach, which mandates that companies assess both impact and financial materiality and disclose information that meets either or both criteria, thereby providing a more comprehensive basis for disclosure. Thus, it is reasonable to consider adopting the ESRS's approach in enforcing the SEC's Climate Disclosure Rule to more accurately assess climate-related risks and manage them more effectively, thereby providing more detailed, complete, and reliable information to investors. Integrating the interdependence of financial and impact materiality assessments under the ESRS could significantly bolster the effectiveness of a company's transition risk and its management, aligning it with the objectives of enhancing climate-related disclosures for investors under the SEC's Climate Disclosure Rule.

CONCLUSION

The ESRS signifies a pivotal advancement in combating climate change via corporate sustainability reports, highlighting the importance of integrating environmental responsibility within corporate disclosures for enhanced accuracy and transparency. Recognizing climate change as an inherently material issue for most companies is essential for reinforcing this framework's effectiveness. Furthermore, the alignment of the ESRS with global sustainability benchmarks could offer valuable insights for the SEC's Climate Disclosure Rule, particularly in conducting a thorough materiality assessment. Integrating the concept of double materiality–emphasizing interdependence between impact materiality

48. 17 C.F.R. § 229.1500 (2024).
49. 17 C.F.R. § 229.1503 (2024).

and financial materiality–in the SEC's framework could lead to a more effective approach to assessing and managing climate-related risks by companies.

Dohyung Koo

Klamath Irrigation District v. U.S. Bureau of Reclamation: Defending Tribal Treaty Rights in the Drought-Stricken West

INTRODUCTION

Perhaps nowhere along the Pacific coast are the impacts of intense, years-long drought more pronounced than in the Klamath River Basin.[1] Spanning southern Oregon and northern California, the Klamath Basin encompasses a complex hydrologic system.[2] The Upper Klamath Lake is a crucial habitat for the C'waam (Lost River sucker) and Koptu (shortnose sucker), and downstream, the Klamath River supports the Southern Oregon/Northern California Coast coho salmon.[3] These species have tremendous subsistence, spiritual, cultural, and economic value for the Tribal communities that have lived in the Klamath Basin "since time immemorial," including the Klamath Tribes and Hoopa Valley Tribe ("the Tribes"[4]).[5] However, the fish species have significantly declined and are now threatened or endangered.[6] Diversions for irrigation and severe droughts resulting from climate change have resulted in critically reduced water levels.[7] Water from the Klamath Basin, distributed by irrigation districts,[8] has also

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1. *See Drought and Climate Change*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, https://www.c2es.org/content/drought-and-climate-change/ (last visited Nov. 24, 2024); *U.S. Drought Monitor*, NAT'L DROUGHT MITIGATION CTR., https://droughtmonitor.unl.edu/ (last visited Nov. 24, 2024).

2. Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 48 F.4th 934, 938 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 342 (2023); *Klamath River Basin*, NOAA FISHERIES, https://www.fisheries.noaa.gov/west-coast/habitat-conservation/klamath-river-basin, (last updated Aug. 2, 2023).

3. *Klamath Irrigation Dist.*, 48 F.4th at 939, 941; *Klamath River Basin*, NOAA FISHERIES, https://www.fisheries.noaa.gov/west-coast/habitat-conservation/klamath-river-basin (last updated Aug. 2, 2023); Brief of the Klamath Tribes at 1, Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 48 F.4th 934 (2022) (Nos. 20-36009, 20-36020).

4. Throughout this In Brief, "the Tribes" will refer to the Klamath Tribes and Hoopa Valley Tribe, intervenors to the case. Other mentions of Tribe, Tribes, Tribal, etc. that do not refer to the Klamath Tribes and Hoopa Valley Tribe are nevertheless capitalized out of respect.

5. *Klamath Irrigation Dist.*, 48 F.4th at 939-40; *Klamath River Basin Condition and Opportunities: Before the H. Comm. on Nat. Res., Subcomm. on Water, Oceans, and Wildlife*, 177th Cong. (Mar. 8, 2022) (testimony of Stephen Guertin, Deputy Director for Policy, United States Fish & Wildlife Service, Department of the Interior).

6. *Klamath Irrigation Dist.*, 48 F.4th at 939.

7. Guertin, *supra* note 5.

8. Irrigation districts transport water from the Klamath Basin to their members, who include farmers, landowners, and other irrigation and drainage districts. *Klamath Irrigation Dist.*, 48 F.4th at 942.

supported farming and ranching since the U.S. Reclamation Service[9] began constructing dams and levees in 1905.[10] Reliance on this water by the Tribes, fish, and irrigators has led to conflicts regarding the appropriate water level of the Upper Klamath Lake and instream flows of the Klamath River, which are results of decisions made by the U.S. Bureau of Reclamation ("Reclamation").[11]

Klamath Irrigation Dist. v. U.S. Bureau of Reclamation followed a 2021 drought year marked by wildfires and water shortages. The Ninth Circuit affirmed that Tribal treaty rights are senior to those of the irrigation districts and are central to Reclamation's water management procedures. The court additionally found that the federal government did not adequately represent the Tribes' interests in adequate lake levels and stream flows for the protected fish species.[12] While this case is not the final word on Klamath water rights disputes, it sets the stage for prioritizing the rights of Tribes as water becomes scarcer.

I. BACKGROUND

A. The Trust and Winters *Doctrines*

The Tribal trust doctrine describes the "government-to-government relationship" between the federal government and federally recognized Native American Tribes, arising from the fact that Tribes were "preexisting sovereigns."[13] This "general trust relationship"[14] imposes on the federal government "moral obligations of the highest responsibility," including making the government trustee of Tribes' property rights.[15] Early and clear examples of this trust relationship are the treaties created between the federal government and Tribes that protect Tribes against intruders.[16] These "established enduring and

9. The U.S. Reclamation Service is the predecessor to the U.S. Bureau of Reclamation. CHARLES V. STERN AND ANNA E. NORMAND, CONG. RSCH. SERV., R46303, BUREAU OF RECLAMATION: HISTORY, AUTHORITIES, AND ISSUES FOR CONGRESS 3 (2020).

10. *Klamath Irrigation Dist.*, 48 F.4th at 940; Guertin, *supra* note 5.

11. *Klamath Irrigation Dist.*, 48 F.4th at 940; *see also* Brief of the Klamath Tribes, *supra* note 3, at 5 (explaining how "Reclamation operates [Upper Klamath Lake] at elevations significantly lower than occurred prior to construction of the [Klamath] Project, depriving C'waam and Koptu of habitat and exposing them to increased risk of predation and the effects of poor water quality"); Second Amended Complaint for Remand and Declaratory Relief at 11, Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 489 F. Supp. 3d 1168 (D. Or. 2020) (Nos. 1:19-cv-00451-CL, 1:19-cv-00531-CL), 2020 WL 13561449, at ¶ 39 (claiming that maintaining levels for the Tribes and fish would "result in an amount of water available that is far less than irrigation water demand").

12. *Klamath Irrigation Dist.*, 48 F.4th at 938.

13. RESTATEMENT OF THE L. OF AM. INDIANS § 4 (AM. L. INST. 2024). However, the origins of this doctrine are overtly paternalistic and were originally described in terms of a stronger sovereign claiming supremacy over another.

14. United States v. Mitchell, 463 U.S. 206, 225 (1983).

15. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); RESTATEMENT OF THE L. OF AM. INDIANS § 4 (AM. L. INST. 2024); *see also* United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011) ("We do not question the undisputed existence of a general trust relationship between the United States and the Indian people." (internal quotations and citations omitted)).

16. RESTATEMENT OF THE L. OF AM. INDIANS § 4 (AM. L. INST. 2024).

enforceable . . . obligations" to Tribes as sovereigns.[17] Importantly, this relationship only extends to federally recognized Tribes.[18]

While the treaties between the federal government and the Klamath Tribes and Hoopa Valley Tribe do not explicitly set aside water rights,[19] courts have found implied water rights in treaties without expressly reserved water rights.[20] This is known as the *Winters* doctrine.[21] Reservations were established to "create a home for . . . Tribe[s], and water was necessarily implicated in that purpose."[22] These implied water rights are federally protected and reflect "the right to prevent other appropriators from depleting the streams waters below a protected level."[23] In *United States v. Adair*, the Ninth Circuit confirmed that the Klamath Tribes' treaty contains "a recognition of the Tribe's aboriginal water rights . . . [that] necessarily carry a priority date of time immemorial."[24]

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17. Arizona v. Navajo Nation, 599 U.S. 555, 585 (2023) (J. Gorsuch, dissenting) (quoting another source).

18. RESTATEMENT OF THE L. OF AM. INDIANS § 2 (AM. L. INST. 2024).

19. In the 1864 treaty between the U.S. government and the Klamath Tribes, the Tribes retained "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits." Treaty with the Klamath, etc., 1864, art. 1, Oct. 14, 1864, 16 Stat. 707. The Hoopa Valley Tribe, too, retained "a sufficient area of the mountains on each side of the Trinity river . . . necessary for hunting grounds, gathering berries, seeds, [etc.]." Treaty with the Hoopa, South Fork, Redwood, and Grouse Creek Indians, art. 1 sec. 2, Aug. 6, 1864 (not ratified, but considered valid). The Klamath Tribes' water rights in the Klamath River and Klamath Lake have been quantified under Oregon law, while the Hoopa Valley Tribe's has not. *See* OR. WATER RES. DEP'T, CORRECTED FINDINGS OF FACT AND ORDER OF DETERMINATION, IN RE THE DETERMINATION OF THE RELATIVE RIGHTS TO THE USE OF THE WATERS OF KLAMATH RIVER AND ITS TRIBUTARIES 21-37 (2014).

20. RESTATEMENT OF THE L. OF AM. INDIANS § 86 (AM. L. INST. 2024).

21. *Id.; see generally* Winters v. United States, 207 U.S. 564 (1908) (holding that the agreement creating the Fort Belknap reservation impliedly included water rights to the Milk River for the use and benefit of the Native Americans on the reservation).

22. Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1270 (9th Cir. 2017); RESTATEMENT OF THE L. OF AM. INDIANS § 89 (AM. L. INST. 2024); *see also* Arizona v. California, 373 U.S. 546, 600 (1963) (affirming *Winters* and explaining that when creating reservations the federal government "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless," and "that the water was intended to satisfy the future as well as the present needs of the Indian Reservations").

23. RESTATEMENT OF THE L. OF AM. INDIANS § 86 (AM. L. INST. 2024); United States v. Adair, 723 F.2d 1394, 1411 (9th Cir. 1983); *see also Arizona v. Navajo Nation*, 599 at 561 ("Under this Court's longstanding reserved water rights doctrine . . . the Federal Government's reservation of land for an Indian Tribe also implicitly reserves the right to use needed water . . . ." (citations omitted)).

24. *Adair*, 723 F.2d at 1414; *see also id.* at 1415 ("The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. To assign the Tribe's hunting and fishing water rights the later, 1864, priority date . . . would ignore one of the fundamental principles of prior appropriations law—that priority for a particular water right dates from the time of first use.") (citations omitted). By way of background, both Oregon and California, generally, have a system of water rights based on prior appropriations, commonly referred to as "first in time, first in right," so the determination that Tribes' water rights pre-date those of all other entities is paramount. JUDITH CALLENS, LEGISLATIVE COMMITTEE SERVICES, STATE OF OREGON, VOL. 2 ISSUE 1, WATER RIGHTS 1 (2004); MARYBELLE D. ARCHIBALD, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, STAFF PAPER NO. 1, APPROPRIATIVE WATER RIGHTS IN CALIFORNIA: BACKGROUND AND ISSUES 1 (1977). This is in comparison to the riparian water rights system of the eastern United States that establishes water rights based on ownership of land adjacent to water sources. *The Water Rights Process*, CAL. STATE WATER RES. CONTROL BD. (last updated Aug. 20, 2020), https://www.waterboards.ca.gov/

B. The Klamath Basin Adjudication

Under Oregon's general stream adjudication law,[25] the Klamath Basin Adjudication began in 1975 to determine the relative water rights of parties in the Klamath River Basin.[26] All parties "claiming any interest in the stream" filed claims with the Oregon Water Resources Department, [27] and in 2014, an adjudicator submitted the Amended Corrected Findings of Fact and Order of Determination to the Klamath County Court in 2014.[28] This document regulates water use while the county circuit court hears appeals.[29]

C. The Reclamation Act

Reclamation oversees water management projects and manages the Klamath River Basin Reclamation Project following state and federal laws.[30] Reclamation has the "nearly impossible" job of weighing the many competing water interests in the Klamath Basin, namely the irrigation districts, Tribal treaty rights, and Endangered Species Act (ESA) obligations.[31] Subject to availability, Reclamation distributes water to irrigators, but droughts, the need to satisfy more senior Tribal water rights, and compliance with the ESA all complicate this task.[32]

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waterrights/board_info/water_rights_process.html (providing more details about California's system, which in fact has a hybrid system of both riparian and appropriative rights).

25. The adjudication process aims to determine the validity and quantity of those water rights based on surface water-usage, in addition to federally reserved water rights, to provide future predictability and "understand the full extent of legal surface water use in a given area." *Adjudications and Registrations*, STATE OF OR., https://www.oregon.gov/owrd/programs/waterrights/adjudications/pages/default.aspx#:~:text=Adjudication%20is%20a%20statutory%20process,prior%20to%20August%203%2C%201955 (last visited Nov. 24, 2024).

26. *Klamath Irrigation Dist.*, 48 F.4th at 941 (citing Or. Rev. Stat. § 539.005).

27. *Id.* (citing Or. Rev. Stat. §§ 539.021, 539.100, 539.130).

28. *Id.* (citing OR. WATER RES. DEP'T, *supra* note 19, at 4); *see also* Brief of the Klamath Tribes, *supra* note 3, at 4 (The Amended Corrected Findings of Fact and Order of Determination "recognizes the Tribes' instream rights to water . . . to support their treaty rights to hunt, trap, gather and—as particularly relevant here—fish.").

29. *Klamath Irrigation Dist.*, 48 F.4th at 941 (citing Or. Rev. Stat. §§ 539.130, 539.150, 539.170).

30. *Id.* at 940 (citing 43 U.S.C. § 383); *cf. Projects & Facilities: Klamath Project*, Bureau of Reclamation, https://www.usbr.gov/projects/index.php?id=470 (last visited Nov. 24, 2024) (documenting the area within Reclamation's Klamath Project and the Project's history).

31. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1173.

32. *Klamath Irrigation Dist.*, 48 F.4th at 939-40. Indeed, the Department of the Interior states that these Tribal water rights guarantee the right to sufficient water quality and flows to support the fish. *See id.* at 939. The Hoopa Tribe, similarly, is entitled to the government's ESA compliance in a manner that does not degrade the existence of the Tribe's fish resources. Hoopa Valley Tribe's Motion to Dismiss Pursuant to FRCP 12(B)(7) and 19; and Memorandum in Support at 8, *Klamath Irrigation Dist.*, 48 F.4th 934 (Nos. 1:19-cv-00451-CL, 1:19-cv-00531-CL) (citing Baley v. United States, 942 F.3d 1312, 1337 (Fed. Cir. 2019)). The Tribes' federal reserved water rights take precedence over those of the irrigators. *See id.* at 6 (citing Klamath Water Users Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 2000)).

D. The Endangered Species Act

The ESA directs all federal departments and agencies to conserve endangered and threatened species.[33] More specifically, when a federal agency action may affect a listed species, federal agencies must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service (collectively "the Services").[34] A proposed federal action is assessed in a "Biological Assessment,"[35] and then the Services issue a "Biological Opinion" regarding the possible impacts of the action on protected species or habitats.[36]

In the Klamath Basin, Reclamation developed a Biological Assessment in 2018 as part of its water management operations, and Reclamation amended its action and adopted the Services' 2019 Biological Opinions, which examined potential impacts to the C'waam, Koptu, and Oregon/Northern California coho salmon.[37] In this amended action, Reclamation stated that it would satisfy both its ESA obligations and obligations to the Tribes, with the effect of restricting the water available to those with more junior rights, including the irrigation districts.[38]

II. KLAMATH IRRIGATION DIST. V. U.S. BUREAU OF RECLAMATION

A. The U.S. District Court of Oregon

On March 27, 2019, the Klamath Irrigation District and Shasta View Irrigation District, along with other water users, (collectively "the Irrigators") sued Reclamation.[39] The suit alleged that Reclamation's incorporation of the Services' Biological Opinion into its 2019 operating plan violated the Administrative Procedure Act (APA) and that Reclamation failed to adhere to the 2014 Klamath Basin Adjudication Order by allocating water for instream uses without having this water right under Oregon law.[40]

Plaintiffs sought declaratory and injunctive relief, [41] alleging that Reclamation's operations of the Klamath Project incorporating the 2019 Biological Opinion violated the APA.[42] The Irrigators claimed that their water supply would be reduced below demand, harming agricultural production and

33. 16 U.S.C. § 1531(c)(1)-(2).

34. 16 U.S.C. § 1536(a)(2); *Klamath Irrigation Dist.*, 48 F.4th at 941; KYNA POWERS ET AL., CONG. RSCH. SERV., RL33098, KLAMATH RIVER BASIN ISSUES AND ACTIVITIES: AN OVERVIEW 3 (2005).

35. 50 C.F.R. § 402.12(a).

36. POWERS, *supra* note 34, at 3.

37. *Klamath Irrigation Dist.*, 48 F.4th at 941.

38. *Id*. at 941-42.

39. *Id*. at 942.

40. *Id*.

41. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1168.

42. *Klamath Irrigation Dist.*, 48 F.4th at 942; *see also* Second Amended Complaint for Remand and Declaratory Relief, *supra* note 11, at 1 (arguing that Reclamation "acted arbitrarily and capriciously, abused their discretion, and acted in excess of statutory jurisdiction, authority, or limitation" under the Reclamation Act, APA, and ESA).

income.[43] Plaintiffs sought to enjoin Reclamation from releasing water to comply with the ESA and fulfilling its obligations to the Tribes, arguing that Reclamation itself did not have the right to use stored water.[44] The Irrigators maintained that their action was only procedural and that it did not involve the Tribes' rights.[45] However, the court disagreed, finding that the underlying challenge was that Reclamation fulfilled its other obligations before meeting the Irrigators' needs, and if granted, that plaintiffs' rights would "ultimately either extinguish or conflict" with Reclamation's ESA and Tribal treaty obligations.[46]

The Tribes recognized these implications and intervened as of right and then moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party per Rule 19.[47] The District Court granted the motion, finding that the Tribes were required because their fishing and water rights would be "significantly impaired" if the Irrigators prevailed.[48] The court stated that Reclamation would not be an adequate representative of the Tribes' interests because the federal government was focused on defending its action pursuant to the ESA and APA. In contrast, the Tribes were focused on preserving their treaty rights.[49] The Tribes' interests in protecting their sovereignty and their fish and water rights were not sufficiently aligned with Reclamation's interest in ESA and APA compliance such that the government would "adequately represent" the Tribes' interests.[50] Sovereign immunity prevented the Tribes from being joined, and the case could not continue in equity and good conscience because "judgment in the Tribes' absence would significantly prejudice their interest in fulfillment and protection of their reserved fishing and water rights."[51]

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43. Second Amended Complaint for Remand and Declaratory Relief, *supra* note 11, at 11-12.

44. *Klamath Irrigation Dist.*, 48 F.4th at 942; Nicole Pla, *United States Court of Appeals for the Ninth Circuit*, 26 U. DENVER WATER L. REV. 147, 147 (2023).

45. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1177.

46. *Id.* at 1178 (finding that "those ESA obligations are coextensive with the treaty water rights of the Klamath Tribes and Hoopa Valley Tribe").

47. *Klamath Irrigation Dist.*, 48 F.4th at 942; Pla, *supra* note 44, at 147-48; *see generally* Hoopa Valley Tribe's Motion to Dismiss Pursuant to FRCP 12(B)(7) and 19; and Memorandum in Support, *supra* note 32; The Klamath Tribes' Motion to Dismiss for Failure to Join a Party Under Rule 19, *Klamath Irrigation Dist.* (Nos. 1:19-cv-00451-CL, 1:10-cv-00531-CL).

48. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1179-80.

49. *Id.* at 1180; Christen T. Maccone, et al., *Chapter V: Water Resources*, A.B.A., ENV'T, ENERGY, & RES. L.: THE YEAR IN REVIEW, V-1, V-23 (Elizabeth P. Ewens et al. eds. 2022); *see also* Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs., 932 F.3d 843, 856 (9th Cir. 2019) (holding that a Tribal party's joinder was necessary because "no other party to the litigation can adequately represent [the Tribe's sovereignty] interests"); Kickapoo Tribe of Okla. v. Lujan, 728 F. Supp. 791, 797 (D.D.C. 1990) (holding that the federal government's interest in defending its own authorities were distinct from the Tribe's "interest in its own survival, an interest which it is entitled to protect on its own").

50. *Klamath Irrigation Dist.*, 489 F. Supp. 3d at 1180-81.

51. *Id.* at 1181. Plaintiffs also argued that their case involved the McCarran Amendment (43 U.S.C. § 666), which would waive federal sovereign immunity, including those rights reserved for Tribes, for state general stream adjudications. *Id.* The District Court quickly dismissed this assertion because the case did not adjudicate water rights as the Klamath Basin Adjudication did under state law. *Id.* The Ninth Circuit agreed. *See Klamath Irrigation Dist.*, 48 F.4th at 947. In Judge Bumatay's concurrence, he agreed that this case is not a McCarran Amendment case because the Hoopa Valley Tribe is a California tribe whose relative water rights in the Klamath Basin were not adjudicated under Oregon law. *Id.* at 949.

B. The Ninth Circuit

On appeal, the Ninth Circuit agreed that the Tribes were required parties because the Irrigators' requested relief would directly impact the Tribes' water rights and Reclamation's obligations under the ESA. Given the Tribes' sovereign immunity, the court similarly found that they could not be joined and that the case could not continue in equity and good conscience without them.[52] The court clarified that "an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted."[53] While the Irrigators' challenge centered on a procedural issue, the outcome would have had a significant impact on the Tribes' water and fishing rights.[54] Though the federal government serves as a trustee of the Tribes' reserved water and fishing rights, "a unity of some interests does not equal a unity of all interests."[55] Indeed, the Tribes had other active litigation with Reclamation that "would materially limit Reclamation's representation of the Tribes' interests."[56] The court concluded that the Irrigators' requested relief and the Tribes' interests were "mutually exclusive," affirming that no remedy could avoid prejudice to the Tribes if the case continued without them as parties.[57]

The Klamath Irrigation District petitioned the U.S. Supreme Court in May 2023, arguing that the Ninth Circuit's ruling would be disastrous for deciding water rights cases in the West if Tribes could essentially veto other water users from seeking to enforce their rights.[58] Despite this, the Supreme Court denied the petition for writ of certiorari in October 2023.[59]

III. ANALYSIS

The Ninth Circuit's decision in *Klamath Irrigation Dist.* represents a recent and long-overdue shift in courts favoring Tribes that represent their own interests and assert their sovereignty as independent, self-governing nations. Looking ahead, Rule 19 joinder will be a crucial tool for Tribes to intervene in cases that

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However, he argues it would be a McCarran Amendment case concerning the Klamath Tribes because it deals with the "administration" of previously adjudicated rights. *Id.* at 950.

52. *Klamath Irrigation Dist.*, 48 F.4th at 938; Pla, *supra* note 44, at 147.

53. *Klamath Irrigation Dist.*, 48 F.4th at 943 (quoting *Diné Citizens*).

54. *Id.* at 943-44.

55. *Id.* at 945; *see* William R. Norman, et al., *Chapter Q: Native American Resources*, A.B.A., ENV'T, ENERGY, & RES. L.: THE YEAR IN REV., Q-1, Q-4 (2022).

56. *Klamath Irrigation Dist.*, 48 F.4th at 945; *see, e.g.*, Klamath Tribes v. U.S. Bureau of Reclamation, 537 F. Supp. 3d 1183 (D. Or. 2021); Klamath Tribes v. U.S. Bureau of Reclamation, No. 1:22-CV-00680-CL, 2023 WL 7182281 (D. Or. 2023); Ali Sullivan, *Magistrate Says Feds Illegally Prioritized Irrigators Over Fish*, LAW360 (Sep. 12, 2023), https://www.law360.com/articles/1720366/magistrate-says-feds-illegally-prioritized-irrigators-over-fish.

57. *Klamath Irrigation Dist.*, 48 F.4th at 948; Pla, *supra* note 44, at 148; Jessica Holmes, et al., *2023 Ninth Circuit Environmental Review*, 53 ENV'T L. 747, 815 (2023).

58. Petition for Writ of Certiorari at i, Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 48 F.4th 934 (9th. Cir. 2022) (No. 22-1116), 2023 WL 3479609 at *i; Crystal Owens, *High Court Won't Hear Oregon Water Dispute*, LAW360 (Oct. 30, 2023), https://www.law360.com/articles/1738149.

59. Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 144 S. Ct. 342 (2023) (mem.).

implicate their rights. However, these protections are far less robust for non-federally recognized Tribes or Tribes without certain treaty rights.

Congress terminated the Klamath Tribes' federal recognition in 1954, and Oregon insisted that Tribal water and fishing rights ended then too.[60] Facing threats of arrest, the Klamath Tribes continued to exercise their treaty rights by fishing, insisting that the Treaty of 1864 remained enforceable.[61] Decades of self-determination advocacy restored the treaty rights in 1974 and federal recognition status in 1986.[62] At the time of writing, the Hoopa Valley Tribe maintains federal recognition.[63] The Klamath Tribes and Hoopa Valley Tribe's status as federally recognized is pivotal because the trust doctrine does not extend to non-federally recognized Tribes.[64]

By intervening as of right and then moving to dismiss for failure to join required parties under Rule 19, the Klamath Tribes and Hoopa Valley Tribe continued this history of legal advocacy to protect their treaty rights through exercising their sovereignty, even in cases in which they were not a named party. As a result, *Klamath Irrigation Dist*. gives Tribes a stake in cases that implicate their interests. Looking forward, this connection between Rule 19 joinder and Tribal sovereign immunity will be a key consideration for any party seeking to contest a government action that may implicate Tribal rights.[65]

In conjunction with *Klamath Irrigation Dist.*, *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*[66] and *Backcountry Against Dumps v. Bureau of Indian Affairs*[67] have created a growing body of caselaw for federally recognized Tribes to rely on when challenging actions that may impede their rights and interests.

In *Diné Citizens*, environmental and Tribal organizations challenged the Bureau of Indian Affairs' (BIA) approval to allow operations to continue at a

60. Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENV'T L. J. 197, 203 (2002); Monika Bilka, *Klamath Tribal Persistence, State Resistance: Treaty Rights Activism, the Threat of Tribal Sovereignty, and Collaborative Natural Resource Management in the Pacific Northwest, 1954–1981*, 48 W. HIST. Q. 255, 256 (2017).

61. Bilka, *supra* note 60, at 256.

62. *Our History: Klamath Tribal History*, THE KLAMATH TRIBES, https://klamathtribes.org/history (last visited Nov. 24, 2024).

63. *See About Hoopa Valley Tribe*, HOOPA VALLEY TRIBE K'IMA:W MED. CTR., https://www.kimaw.org/hvt (last visited Nov. 24, 2024) ("The Hoopa Valley Tribe is a federally recognized tribal entity.").

64. *See* RESTATEMENT OF THE L. OF AM. INDIANS §§ 2, 4 (AM. L. INST. 2024).

65. Benjamin Mayer et al., *Recent Rulings Affirm Tribal Sovereign Immunity And Joinder*, LAW360 (Mar. 30, 2023), https://www.law360.com/articles/1591070/recent-rulings-affirm-tribal-sovereign-immunity-and-joinder; *see also* Susan Smith et al., *2024 Litigation Look Ahead Series: SCOTUS' Pass on Cases Sets Up Continued Fight Over Tribal Water Rights, State Mineral Development Cases in Coming Year*, BEVERIDGE & DIAMOND (Mar. 27, 2024), https://www.bdlaw.com/publications/2024-litigation-look-ahead-series-scotus-pass-on-cases-sets-up-continued-fight-over-tribal-water-rights-state-mineral-development-cases-in-coming-year/ ("[P]arties seeking to challenge agency actions that implicate tribal water rights must involve the tribes in discussion and negotiation and ensure that all parties with established water rights can be joined in any litigation so that an adjudicating court can grant appropriate relief.").

66. 932 F.3d 843 (9th Cir. 2019).

67. No. 21-55869, 2022 WL 15523095 (9th Cir. 2022).

mine and power plant.[68] The Ninth Circuit found that the BIA's interest in compliance with the National Environmental Policy Act (NEPA) and ESA differed "in a meaningful sense" from the "sovereign interest" of the Navajo Nation and Navajo Transitional Energy Company[69] (NTEC) in profits from the mine and power plant.[70] The court reasoned that while more than a financial or future interest was needed to make NTEC a required party under Rule 19, the Navajo Nation and NTEC had a "legally protected interest" in controlling their own resources. [71] The Navajo Nation's sovereign interest in profits from the mine and power plant differed meaningfully from BIA's interest in protecting its actions under federal environmental laws, even considering the government's "general trust responsibility" to the Navajo Nation.[72] If the plaintiff's challenge was successful, the mine would close, and the "Navajo Nation would lose a key source of revenue." Both Arizona Public Service, the operator of the power plant, and BIA argued that they adequately represented the interests of the Navajo Nation. The court disagreed, holding that the "Navajo Nation's interest [was] tied to its very ability to govern itself, sustain itself financially, and make decisions about its own natural resources," which no other entity could adequately advocate on behalf of and represent.[73]

Similarly, in *Backcountry Against Dumps*, the Ninth Circuit found that the plaintiff's challenge of a lease approval by BIA implicated the sovereignty of the Campo Band of Diegueño Mission Indians ("Band").[74] The plaintiff argued that BIA and the development company working with the Band would adequately represent the Band's interests.[75] However, the court reasoned that even if the development company shared "the same interest as the Band in defending the lease, it does not share the Band's sovereign interest in self-governance and use of its natural resources."[76] Nor would BIA adequately represent the Band's "economic and sovereign interests" because BIA's interest centered only on defending its action under NEPA.[77] In assessing whether the case could continue in equity and good conscience under Rule 19(b) without the Band, the court

68. *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d at 847-49.

69. *Id.* at 855. Navajo Transitional Energy Company is a corporation "wholly owned by the Navajo Nation that owns the mine in question." *Id.* at 847.

70. *Id.* at 855.

71. *Id.* at 852-53, 856 (citing Makah Indian Tribe v. Verity, 910 F.2d 555, 558-59 (9th Cir. 1990)).

72. *Id.* at 855 (citations and quotations omitted).

73. *Id*. at 856.

74. Backcountry Against Dumps v. Bureau of Indian Affs., No. 21-55869, 2022 WL 15523095 at *1 (9th Cir. 2022).

75. *Id.*

76. *Id.*

77. *Id.* ("[A] successful outcome for the plaintiffs would affect not only the Band's rights . . . but also investments made in reliance on the agreement and expected jobs and revenue . . . even though the lawsuit only facially challenges the federal defendants' environmental-review processes.") (citations omitted)

stated that Tribal sovereign immunity is "the compelling factor," so the court granted the Band's motion to dismiss.[78]

These cases demonstrate that the Ninth Circuit is increasingly recognizing Tribes as sovereigns in their own right by not shying away from dismissing cases where Tribes are necessary parties but cannot be joined due to sovereign immunity.[79] While this sets an example for other Circuits to follow, these protections are much less robust for non-federally recognized Tribes and Tribes without these rights enshrined in treaties with the federal government.

CONCLUSION

Prolonged and severe droughts are the new normal in the western United States as a result of climate change.[80] With increasingly scarce water resources, disputes over water will only increase. In *Klamath Irrigation Dist*., the Ninth Circuit signaled that where government, private, and Tribal interests conflict, courts will be wary of non-Tribal entities alleging they adequately represent Tribal interests. The Court emphasized that Tribes could protect their treaty rights by asserting their sovereign immunity in cases that threaten those rights. Looking forward, Tribal treaty rights to water, fishing, and hunting can be affirmatively extended to protect species' inherent rights to thrive, especially in a world of climate disruption.[81]

Diego Antonio Morales

78. *Id.* at *2 ("Because this action seeks to vacate approval of the lease, it plainly threatens the Band's legal entitlements.").

79. Mayer, *supra* note 65.

80. *See Droughts and Climate Change*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/science/science-explorer/climate/droughts-and-climate-change#science (last visited Nov. 24, 2024) ("The southwestern U.S., in particular, is going through an unprecedented period of extreme drought [which] will have lasting impacts on the environment and those who rely on it.").

81. Tribal legal scholars have recognized that treaty rights, especially, offer a powerful method for advocating for the rights of nature precisely because Tribes can apply their resource rights, such as fishing and water rights, and these must be protected from interference by the federal government as trustees. *See* Noelia Gravotta, *A Great Nation Keeping Its Word: The Role of Tribal Treaty Rights in Climate Change Litigation*, 29 N.Y.U. ENV'T L. J. 118, 120 (2021); *Chapter Two Indigenous Interpretations: Invoking the Third Indian Canon to Combat Climate Change*, 135 HARV. L. REV. 1568, 1569 n.14 (2022). Though no U.S. federal law or court has embraced the rights-of-nature framework, through their constitutions and courts, Tribes have become centers for recognizing legal personhood or substantive rights for nature to combat environmental degradation. *See* Elizabeth Kronk Warner & Jensen Lillquist, *Laboratories of the Future: Tribes and Rights of Nature*, 111 CAL. L. REV. 325, 327-28, 353, 382 (2023). While this In Brief does not cover the rights-of-nature framework, future research could expand on the ways that Tribal treaty rights can uniquely be used to protect species and ecosystems and infuse concepts from the rights-of-nature framework in state and federal courts.

Seeing the Forest Through the Trees: A Look at *Murphy Company v. Biden* and the Reclassification of Federal Timberlands

INTRODUCTION

The Antiquities Act of 1906 grants presidents the authority to create and modify national monuments.[1] In his last month in office, President Obama used this power to enact Proclamation 9564, which added 48,000 acres to the Cascade-Siskiyou National Monument ("the Monument").[2] Scientific studies since 2000 had shown the Monument's ecosystems required "habitat connectivity corridors for species migration and dispersal," especially due to the increased frequency of "large-scale disturbance[s] . . . exacerbated by climate change." This reservation included 39,852 acres from a 2.4-million-acre area in Western Oregon ("O&C Lands").[3] The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 ("O&C Act") directs the governance of O&C timberlands in Western Oregon, including federal lands.[4] A controversy arose as the expansion of the Monument effectively prohibited logging on these previously available lands.[5] Murphy Timber Company and Murphy Timber Investments, LLC (collectively, "Murphy") claimed injury to their business resulting from the President's purported usurpation of Murphy's "wood basket," timberlands from which the BLM logs and then auctions wood to companies like Murphy.[6] Soda Mountain Wilderness Council, Klamath-Siskiyou Wildlands Center, Oregon Wild, and Wilderness Society (collectively, "Soda Mountain") intervened on the side of the government to argue in favor of upholding Proclamation 9564.

In *Murphy Company v. Biden*, the Ninth Circuit ruled that the O&C Act and the Antiquities Act did not conflict and that Proclamation 9564 was a proper use

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1. 54 U.S.C. § 320301(a)-(b).
2. Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017).
3. BUREAU OF LAND MGMT., ANALYSIS OF THE MANAGEMENT SITUATION RESOURCE MANAGEMENT PLAN FOR CASCADE-SISKIYOU NATIONAL MONUMENT 7 (2023), https://eplanning.blm.gov/public_projects/2023675/200549213/20081282/250087464/20230602_CSNMRMP_AMS-PC_Final_508c.pdf.
4. 43 U.S.C. § 2601.
5. Brief for Plaintiff-Appellant at 19, Murphy Co. v. Biden, 64 F.4th 1122 (2023), cert. denied, 144 S. Ct. 1111 (2024) (No. 19-35921).
6. *Id*.

of presidential authority.[7] The Ninth Circuit held that Proclamation 9564 was consistent with the O&C Act because the O&C Act grants "considerable discretion" to the Department of the Interior ("DOI").[8] The court should have found a lack of conflict due to the O&C Act's allowance for Proclamation 9564 to reclassify the land in controversy as timberlands. Nonetheless, the court's decision upheld a properly enacted presidential proclamation and will benefit the vital biodiversity of the area.

I. BACKGROUND

A. The O&C Act

In the 1860s, Congress granted the Oregon and California Railroad Company ("Railroad Company") six million acres of forested land in exchange for building a rail line.[9] Upon completion of the rail line, the Railroad Company was to sell the lands "only to actual settlers, in quantities not exceeding one hundred and sixty acres . . . and at prices not exceeding two dollars and fifty cents per acre."[10] Because the lands were poorly suited for farming and excellent for logging, the Railroad Company breached Congress's directive and sold the lands in large parcels to the highest bidder.[11] Following public outcry and numerous court proceedings, Congress revested the remaining lands ("O&C Lands") via the 1916 Chamberlain-Ferris Act.[12] Revesting removed O&C Lands from the local tax base, causing economic injury to local governments.[13] Despite multiple attempts to remedy this harm, Congress was unable to stabilize the area[14] due to the 20th Century logging practice of clear-cutting without consideration for regrowth and O&C Lands being considered worthless once the trees were gone.[15]

In 1937, Congress passed the O&C Act, limiting logging on O&C Lands and commencing a period of stability in the area.[16] The O&C Act requires that "lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands

7. *Murphy Co. v. Biden*, 65 F.4th at 1126.

8. *Id*. at 1131-32.

9. Taylor et al., *Follow the Money: A Spatial History of In-Lieu Programs for Western Federal Lands*, STANFORD CTR. FOR SPATIAL AND TEXTUAL ANALYSIS, https://web.stanford.edu/group/spatial history/FollowTheMoney//pages/O_C.html (last visited Dec. 3, 2024).

10. Or. & Cal. R.R. Co. v. United States, 238 U.S. 393, 396 (1915).

11. *Id.* at 408.

12. Chamberlain-Ferris Act, Pub. L. No. 86, ch. 137, § 2, 39 Stat. 218, 218-19 (1916).

13. HISTORY OF THE O & C LANDS: 1866 TO 1937, http://www.oandc.org/o-c-lands/history-of-o-c-lands/history-of-the-oc-lands-1866-to-1937/ (last visited Dec. 3, 2024) [hereinafter O & C HISTORY 1866-1937].

14. Initially, Congress set up a revenue distribution scheme, but no payments were made to local O&C Counties. Next, Congress passed the Stanfield Act of 1926, which also failed to help the struggling area. *Id.*

15. *See id.*

16. HISTORY OF THE O & C LANDS: 1937 TO 1990, http://www.oandc.org/o-c-lands/history-of-o-c-lands/history-of-the-oc-lands-1937-to-1990/ (last visited Dec. 3, 2024).

. . . shall be" harvested pursuant to the "sustained yield" principle.[17] That is, only what lumber that can be regrown in a year can be harvested.[18] Harvested lumber is auctioned and the revenue is split between local and federal governments as a proxy for the tax base.[19] The O&C Act's purpose is "providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities [sic]."[20] The O&C Act contains a non-obstante clause stating, "[a]ll Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act."[21]

Today, O&C jurisdictions continue to receive subsidies from the sale of O&C Land timber.[22] At times, those subsidies have made up 80 percent of local counties' discretionary funds.[23] When Federal logging policy changed in the early 1990s in the direction of conservation, the amount of timber harvested from O&C Lands declined, and the subsidies followed suit. Congress responded by providing the counties with "safety net" payments.[24] These payments too, continue to support the region today.[25]

Murphy argued that Proclamation 9564 is incompatible with the O&C Act, reading that the O&C Act requires that O&C timberlands be sustainably harvested. Murphy also asserted that Congress intended to repeal the Antiquities Act by including the non-obstante clause in the O&C Act.

B. The Antiquities Act

The Antiquities Act of 1906 "provide[s] an expeditious means to protect federal lands and resources" that are "owned or controlled by the Federal Government."[26] It delegates a "discretion[ary]" power to the President limited by the text of the Antiquities Act and by two subsequent Acts of Congress.[27] The text limits the size of a monument being created to "the smallest area compatible with the proper care and management of the objects to be protected."[28] The subsequent acts of Congress limit the President's Antiquities Act power specifically in Wyoming and Alaska.[29]

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17. Act Aug. 28, 1937, ch. 876, title II, 50 Stat. 876.

18. HISTORY OF THE O&C ACT, https://www.blm.gov/sites/blm.gov/files/Oregon_Flyer.pdf (last visited Dec. 3, 2024).

19. *Id.*

20. § 2601.

21. *Id.*

22. SUSTAINABLE COMMUNITIES, http://www.oandc.org/o-c-lands/sustainable-communities/ (last visited Dec. 3, 2024).

23. *Id.*

24. *Id.*

25. S. Rep. No. 118–163 (2024).

26. CAROL H. VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 6 (2024) [hereinafter CRS Report] (emphasis omitted).

27. *Id.*; 54 U.S.C. § 320301.

28. 54 U.S.C. § 320301.

29. CRS Report, *supra* note 26.

C. The Creation of the Cascade-Siskiyou National Monument

Proclamation 7318 established the Monument in 2000, reserving nearly 53,000 acres in Jackson County, Oregon.[30] In doing so, it acknowledged that the area was a "biological crossroads" at the intersection of three distinct ecoregions "with unmatched biodiversity" and historical and scientific importance. The reservation was made in recognition that the land constituted an irreplaceable natural heritage worthy of preservation. [31] The Bureau of Land Management ("BLM"), the DOI agency managing most multiple-use public lands,[32] retained jurisdiction over the land, though the proclamation modified BLM's management directive for those acres.[33] With the 2009 Omnibus Public Lands Management Act, Congress redesignated nearly 23,000 of those acres ("Soda Mountain Wilderness") to "wilderness" status,[34] giving them the "highest form of land protection."[35] In 2017, President Obama expanded the Monument via Proclamation 9564,[36] adding approximately 48,000 acres collectively from the Jackson and Klamath Counties in Oregon and Siskiyou County, California.[37] Of those 48,000 acres, 39,839 were O&C Lands; before Proclamation 9564, 16,448 of those 39,839 acres were classified as timberlands.[38] Proclamation 7318 directed, and Proclamation 9564 reaffirmed, that "no part of the monument shall be used in a calculation or provision of a sustained yield of timber."[39]

II. *MURPHY CO. V. BIDEN*

A. Murphy Co. v. Trump – *District Court of Oregon*

After Proclamation 9564 redesignated 16,448 acres from "timberlands" to "Monument," Murphy brought a challenge in Oregon District Court[40] claiming injury to their harvest. [41] Murphy moved for summary judgment on the grounds that the President lacked authority to reserve O&C Lands because the O&C Act

30. Proclamation No. 7318, 65 Fed. Reg. 37249 (June 13, 2000) [hereinafter Proc. 7318].

31. *Id.*

32. ABOUT THE U.S. AND ITS GOVERNMENT, https://www.usa.gov/agencies/u-s-department-of-the-interior (last visited Dec. 3, 2024).

33. BLM NATIONAL HISTORY AND TIMELINE, https://www.blm.gov/about/history/timeline (last visited Dec 3, 2024).

34. Rachel A. Werling, *Cascade-Siskiyou National Monument*, OR. ENCYC., https://www.oregonencyclopedia.org/articles/cascade-siskiyou-national-monument/ (last visited Dec. 3, 2024); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991.

35. *What is Wilderness*, THE WILDERNESS SOC'Y, https://www.wilderness.org/articles/article/what-wilderness (last visited Dec. 3, 2024).

36. Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017).

37. Werling, *supra* note 33.

38. Defendants' Cross Motion for Summary Judgment at 9-10, Murphy Co. v. Trump, No. 1:17-CV-00285-CL, 2019 WL 4231217 (D. Or. Sept. 5, 2019).

39. *Murphy Co. v. Biden*, 65 F.4th at 1126; Proclamation 7318 was enacted by President Bill Clinton. 65 Fed. Reg. 37249, 37249-50 (June 9, 2000).

40. Murphy Co. v. Trump, No. 1:17-CV-00285-CL, 2017 WL 979097, at *1 (D. Or. Mar. 14, 2017).

41. Complaint at 19 (Feb. 16., 2022) (No. 1:17-cv-00285-CL).

had repealed the Antiquities Act,[42] and that the DOI could not follow Proclamation 9564 because it directed the DOI to manage O&C Lands contrary to the O&C Act's "permanent forest production" mandate.[43]

Soda Mountain intervened on the government's side to argue in favor of upholding Proclamation 9564.[44] The Defendants and Soda Mountain cross-moved for summary judgment on the grounds that the O&C Act did not repeal the Antiquities Act, that the two acts did not irreconcilably conflict, and that the O&C Act did not remove federal lands from the President's Antiquities Act authority.[45] A magistrate judge recommended that the district judge grant the Defendants' cross-motion for summary judgment because "[t]he President did not exceed his congressionally delegated statutory authority" under the Antiquities Act and because "no irreconcilable conflict" exists between the acts.[46] In 2019 the United States District Court for the District of Oregon affirmed the magistrate judge's recommendation.[47]

B. Murphy Co. v. Biden – *9th Circuit*

Murphy appealed to the Ninth Circuit, which affirmed in a 2-1 decision.[48] Murphy then petitioned the court for rehearing en banc and received no votes.[49] The Supreme Court later denied certiorari.[50]

The Ninth Circuit majority ruled that the Antiquities Act and the O&C Act do not conflict.[51] First, the majority held that the O&C Act did not repeal the Antiquities Act because they are directed at different officials.[52] It quoted the Supreme Court: "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective."[53] The majority explained that the legislative intent behind the O&C Act's non-obstante clause was to overrule the "tangle" of prior O&C area legislation, not to overrule the Antiquities Act.[54] Second, the majority held that Proclamation 9564 was consistent with the O&C Act's "text, history, and purpose."[55] The O&C Act's text gave the DOI

42. Plaintiff's Motion for Summary Judgment at 20, *Murphy Co. v. Trump*, 2017 WL 4231217 (No. 1:17-cv-00285-CL).

43. *Murphy Co. v. Biden*, 65 F.4th at 1131-32.

44. Intervenor's Cross Motion for Summary Judgment at 2, *Murphy Co. v. Trump*, 2017 WL 4231217 (No. 1:17-cv-00285-CL).

45. *Id*.

46. *Murphy Co. v. Trump*, No. 1:17-cv-00285-CL, 2019 U.S. Dist. LEXIS 81597, at *6, *9 (D. Or. Apr. 2, 2019), aff'd sub nom. *Murphy Co. v. Biden*, 65 F.4th.

47. *Murphy Co. v. Trump*, No. 1:17-cv-00285-CL, 2019 U.S. Dist. LEXIS 151055, at *4 (D. Or. Sep. 5, 2019).

48. *Murphy Co. v. Biden*, 65 F.4th at 1138.

49. *See generally* Murphy Co. v. Biden, No. 19-35921, 2023 U.S. App. LEXIS 23033 (9th Cir. Aug. 30, 2023).

50. *Murphy Co. v. Biden*, 144 S. Ct. 1111, 218 L. Ed. 2d 348 (2024).

51. *Murphy Co. v. Biden*, 65 F.4th at 1131-32.

52. *Id.* at 1132.

53. *Id.*

54. *Id.*

55. *Id.* at 1133.

"significant discretion" in the stewardship of the lands for logging and for "economic, recreational, and environmental uses."[56] The history of the DOI's stewardship of the O&C Lands over the past decades combined with the O&C Act's conception both supported environmental protection purposes.[57] Thus, the Ninth Circuit held Proclamation 9564 to be a valid use of presidential authority under the Antiquities Act.[58]

III. ANALYSIS

The Ninth Circuit correctly upheld Proclamation 9564 and correctly found the Antiquities and O&C Acts to be consistent. However, the court overlooked perhaps the strongest argument for why Proclamation 9564 is valid. The Ninth Circuit should have found that Proclamation 9564 was consistent with the O&C Act due to the O&C Act's acknowledgment that timberlands may be reclassified.

A. The Ninth Circuit correctly held that the O&C Act did not statutorily repeal the Antiquities Act either expressly or by implication.

In general, later enacted statutes supersede former ones, though statutory repeal is nuanced.[59] Explicit repeal requires the later statute to name the former statute.[60] Implicit repeal covers all non-explicit repeals.[61] The Supreme Court has held that implicit repeals require either an "affirmative showing of an intention to repeal" or a showing that the statutes are "irreconcilable."[62]

The Antiquities Act was not explicitly repealed by the O&C Act as the Antiquities Act does not name the O&C Act. Additionally, the Supreme Court held in *PLIVA, Inc. v. Mensing* that non-obstante clauses suggest implied repeal, if any.[63] Thus, the court correctly rejected Murphy's claim that non-obstante clauses are an "express repeal of any and all prior inconsistent statutes."[64]

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56. *Id*. at 1135.

57. *Id*. at 1135-36.

58. *Id*. at 1132.

59. *See generally* Deborah A. Widiss, *Communication Breakdown: How Courts Do—and Don't—Respond to Statutory Overrides*, 104 JUDICATURE 51 (2020) (exploring the ineffectiveness of Congress's communicated intent in response to courts' interpretations of statutes).

60. *Cf.* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 664 (2007) ("While the language of § 7(a)(2) does not *explicitly* repeal any provision of the CWA (or any other statute), reading it for all that it *might* be worth runs foursquare into our presumption against implied repeals.") (emphasis added).

61. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 468 (1982) (holding that for an exception to a statute to exist, "a later statute" would need to contain either "an express or implied partial repeal").

62. The Supreme Court has been exceedingly clear that statutes are repealed only where legislatures are explicit or where no other option exists. *See* Morton v. Mancari, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); *see also* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018); United States v. Fausto, 484 U.S. 439, 452-53 (1988); United States v. Borden Co., 308 U.S. 188, 198-199 (1939); Wood v. United States, 41 U.S. 342, 363 (1842).

63. 564 U.S. 604, 622 (2011).

64. *Murphy Co. v. Biden*, 65 F.4th at 1132. Plaintiff's Motion for Summary Judgment at 16, *Murphy Co. v. Trump*, 2017 WL 4231217 (Sept. 5, 2019) (No. 1:17-cv-00285-CL).

Nor was the Antiquities Act impliedly repealed by the O&C Act. The Supreme Court has consistently held that courts have a duty to reconcile statutes if possible.[65] However, as Murphy argued, the Supreme Court has also said that non-obstante clauses indicate "the general presumption against implied repeals" should *not* be applied.[66] Thus, while the Ninth Circuit correctly found the O&C Act did not impliedly repeal the Antiquities Act, it misstated the standard for non-obstante, implied repeals.

The Ninth Circuit should not have said "Murphy 'faces a stout uphill climb' against the 'strong presumption that repeals by implication are disfavored.'"[67] That language insinuated the Ninth Circuit would employ the "general presumption against implied repeals," which would run afoul of the *PLIVA* court's holding.[68] However, despite naming the presumption, the Ninth Circuit in actuality embarked on a careful analysis of the O&C Act's lack of an implied repeal of the Antiquities Act.[69]

1. The Antiquities Act is not impliedly repealed because the O&C Act contains no "affirmative showing of an intention to repeal."

The Supreme Court has said that only statutes that are a "clearly intended [] substitute" of the prior statute can be an "affirmative showing of an intention to repeal."[70] The Antiquities Act "provide[s] an *expeditious* means to protect federal lands and resources" across the United States.[71] Thus, for the O&C Act to be a substitute it would have to expressly re-delegate that same national monument-creation power.[72] Additionally, the Congress that enacted the O&C Act actively engaged with Antiquities Act proclamations and conservation efforts. The Ninth Circuit could have explained that "it [would be] improbable, to say the least, that the same Congress [that funded habitat conservation would] condem[n]" the President's continued Antiquities Act power over O&C Lands.[73]

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65. *Morton*, 417 U.S. at 551 ("[W]hen two statutes are *capable* of co-existence, it is the *duty* of the courts . . . to regard each as effective.") (emphasis added); *see also Borden*, 308 U.S. at 198-99 (citing United States v. Tynen, 78 U.S. 88, 92 (1870), In re Henderson's Tobacco, 78 U.S. 652, 657 (1870), and Gen. Motors Acceptance Corp. v. United States, 286 U.S. 49, 61-62 (1932)) (noting that "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible;" holding that even when two acts "cover" all the same scenarios, they do not necessarily conflict because the new act could be "merely affirmative, or cumulative, or auxiliary" of the previous act; and holding that to characterize two acts as conflicting requires "positive repugnancy," and if that exists, the prior act is "repealed by implication only . . . to the extent of the repugnancy").

66. Plaintiff's Motion for Summary Judgment at 16, *Murphy Co. v. Trump*, 2017 WL 4231217 (No. 1:17-cv-00285-CL) (citing *PLIVA, Inc. v. Mensing*, 564 U.S. at 622).

67. *Murphy Co. v. Biden*, 65 F.4th at 1132 (citing *Epic Sys. Corp.*, 584 U.S. at 510).

68. *See id.; PLIVA, Inc. v. Mensing*, 564 U.S. at 622.

69. *Murphy Co. v. Biden*, 65 F.4th at 1132–33.

70. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982).

71. *See id.*; CRS Report, *supra* note 26; 54 U.S.C. § 320301.

72. *See Kremer*, 456 U.S. at 468; CRS Report, *supra* note 26.

73. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). The same 1937 Congress sat silent while President Franklin D. Roosevelt exercised his Antiquities Act power fourteen times before the O&C Act was passed in August of 1937. *See National Monument Facts and Figures*, NAT'L PARK SERV., https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm (last visited Nov. 26,

Thus, even with the O&C Act's non-obstante clause making implied repeal more attainable, an "affirmative showing of an intention to repeal" remains nonexistent.

The Ninth Circuit rightly found that Congress included the non-obstante clause in the O&C Act to clear the legislative slate of the "tangle" of prior O&C-area legislation.[74] That need, combined with the explicitness with which all other repeals of Antiquities Act power have been carried out,[75] evidenced that the O&C Act drafters would have specifically named the Antiquities Act had they intended to overturn it.[76]

2. The Antiquities Act was not impliedly repealed because the O&C Act and the Antiquities Act are not "irreconcilable."

The question of irreconcilability between the statutes necessarily implicates Proclamation 9564. Because the O&C Act did not repeal the President's Antiquities Act power over the O&C Lands, conflict cannot be discerned until a proclamation directed at O&C Lands is made.

B. The Ninth Circuit correctly held that the O&C Act does not conflict with Proclamation 9564.

Murphy contended the DOI could not simultaneously comply with both the O&C Act and Proclamation 9564.[77] The Ninth Circuit correctly held that the DOI could reconcile these directives. However, the Ninth Circuit needlessly discussed whether the two acts could be carried out simultaneously on the same land.[78] These discussions were unnecessary because Proclamation 9564 reclassified the 16,448 acres from a classification of "timberlands" to a classification of "national monument."[79]

1. The Antiquities Act and the O&C Act being nominally directed at different individuals is irrelevant to whether they conflict.

The majority held that the statute and the proclamation did not conflict because they were "directed at different officials: the Antiquities Act vests

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2024). Additionally, just four days before it passed the O&C Act, Congress abolished Presidential Proclamation 807 under the Antiquities Act and transferred nearly 1,500 acres in Montana to state control. *See* Proclamation No. 807, 35 Stat. 2187 (May 11, 1908). Finally, just five days after the O&C Act was passed, an Act was passed that worked to fund habitat conservation—the Pittman-Robertson Wildlife Restoration Act, now called the Federal Aid in Wildlife Restoration Act. *See The Federal Aid in Wildlife Restoration Act*, S.C DEP'T OF NAT. RES., https://www.dnr.sc.gov/wsfr/index.html (last visited Nov. 26, 2024).

74. *Murphy Co. v. Biden*, 65 F.4th at 1132.

75. *See, e.g.*, 16 U.S.C. § 3213 (prohibiting future reservations of over 5,000 acres of Alaska public lands by the Executive Branch).

76. *Murphy Co. v. Biden*, 65 F.4th at 1132-33; *see Morton*, 417 U.S. at 551.

77. Complaint at 27, *Murphy Co. v. Trump*, No. 1:17-CV-00285-CL, 2017 WL 4231217 (D. Or. Sept. 5, 2019) (No. 1:17-cv-00285-CL).

78. *Murphy Co v. Biden*, 65 F.4th at 1133-36.

79. Proc. 9564, 82 Fed. Reg. 6145.

authority in the President, while the [O&C] Act concerns the [DOI]."[80] Thus, the majority reasoned the O&C Act could not limit presidential power.[81] However, while the O&C Act names the DOI, in reality, the act guides the management of an area of land more than it vests power in an organization.[82]

Both the text and the history of the O&C Act support the contention that the O&C Lands and not the DOI were the focus of the O&C Act.[83] For years Congress struggled with the stewardship of the O&C Lands.[84] The O&C Act's purpose was to give stabilizing direction to the area, not to expand the DOI's power.[85] The DOI is the governmental entity that manages most multiple-use public lands, and so was put in charge when the lands were revested in 1937.[86] Conversely, the Antiquities Act's purpose was to expand presidential power, not to regulate a defined area of land.[87] Textually, the O&C Act uses the phrase "shall be," which is in passive voice.[88] The Supreme Court has consistently held that where passive voice is used, Congress was attempting to "fram[e] it to 'focu[s] on an event that occurs without respect to a specific actor.'"[89] Thus, the O&C Act does not solely apply to the DOI.[90]

2. Proclamation 9564 reclassified timberlands as National Monument lands.

Unlike the Antiquities Act, Proclamation 9564 *was* directed at a specific area of land.[91] Proclamation 9564 was a redesignation of federally held lands, but it did not prevent the DOI from continuing to follow the O&C Act's guidance because it did not change the rules for the management of O&C timberlands.[92]

The Ninth Circuit likened this case to *Portland Audubon Society v. Babbitt*, a Ninth Circuit case where the National Environmental Policy Act ("NEPA")

80. *Murphy Co. v. Biden*, 65 F.4th at 1132.

81. *Id.*

82. *See generally* 43 U.S.C. § 2601.

83. O & C HISTORY 1866-1937, *supra* note 13.

84. *Id.*

85. *See Murphy Co v. Biden*, 65 F.4th at 1133-34.

86. U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., O&C SUSTAINED YIELD ACT: THE LAND, THE LAW, THE LEGACY 11 (1987).

87. Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, NAT'L PARK SERV. HIST. E-LIBR., https://www.nps.gov/parkhistory/hisnps/npshistory/righter.htm (last visited Nov. 26, 2024) ("Disappointed by Congress, he was anxious to invest power in the presidency.").

88. 43 U.S.C. § 2601; *Changing a sentence into the passive voice when the active verb is in the simple future tense*, ENGLISHGRAMMAR, https://www.englishgrammar.org/changing-sentence-passive-voice-active-verb-simple-future-tense/ (last visited Nov. 26, 2024).

89. *See, e.g.*, Bartenwerfer v. Buckley, 598 U.S. 69, 75-76 (2023) (citing Dean v. United States, 556 U.S. 568, 572 (2009)).

90. *See id.*; 43 U.S.C. § 2601.

91. *The proclamation of National Monuments under the Antiquities Act, 1906-1970*, NAT'L PARK SERV., https://www.nps.gov/articles/lee-story-proclamation.htm (last visited June 24, 2024); Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017).

92. *See Murphy Co. v. Biden*, 65 F.4th at 1131-32; Proclamation No. 9564, 82 Fed. Reg.

seemed to clash with the O&C Act.[93] In *Babbitt*, the Ninth Circuit held that BLM "could not use 'an excessively narrow construction of its existing statutory authorizations' under the O&C Act to avoid compliance with NEPA."[94] Based on the precedent set in *Babbitt*, the Ninth Circuit reasoned in *Murphy* that "BLM has latitude to reserve [O&C] Act land from logging in light of competing directives."[95] However, the O&C Act and Proclamation 9564 did not provide the DOI with competing directives, and little was left to the DOI's discretion.[96] Congress empowered the President to designate national monuments under the Antiquities Act and the O&C Act did not overturn the Antiquities Act or forestall presidential proclamations on O&C Land.[97] Proclamation 9564 was simply a reclassification of timberlands to monument lands.

3. Proclamation 9564 is Auxiliary to the O&C Act.

In defining which of the O&C Lands "shall be managed . . . for permanent forest production," the O&C Act laid out a three-part test.[98] Lands must be managed "for permanent forest production" if they are 1) O&C Lands, 2) under the DOI's jurisdiction, and 3) classified as timberlands.[99] Notably, the statute uses the word "may," both when talking about lands coming under the jurisdiction of the DOI and when talking about lands being classified as timberlands.[100] "The word 'may,' when used in a statute, usually implies some degree of discretion."[101] Thus, it can be inferred that Congress foresaw the need for executive branch discretion regarding which lands were under DOI's jurisdiction and which were classified or unclassified as timberlands.[102] This implication is rebuttable "by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose" of the statute.[103]

As explained above, legislative intent and statutory inferences indicate that Congress wanted this land to be managed in ways that brought health and prosperity to O&C counties. In holding that "no portion of the monument shall be considered to be suited for timber production," Proclamation 9564 reclassified the 16,000 acres from timberlands to monument lands.[104] Because the language of the O&C Act does not limit who may classify/declassify timberlands, and the

93. *Murphy Co. v. Biden*, 65 F.4th at 1135; Portland Audubon Society v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

94. *Murphy Co. v. Biden*, 65 F.4th at 1135.

95. *Id*.

96. *Id*. at 1131-35; *see generally* Proclamation No. 9564, 82 Fed. Reg. at 6145.

97. *Murphy Co. v. Biden*, 65 F.4th at 1131-32; *see* 54 U.S.C. § 320301(a).

98. 43 U.S.C. § 2601 (referring to "such portions of the [O&C Lands] . . . as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands").

99. *Id*.

100. *Id.*

101. United States v. Rodgers, 461 U.S. 677, 706 (1983).

102. *See id.*; 43 U.S.C. § 2601.

103. *See Rodgers*, 461 U.S. at 706.

104. 65 Fed. Reg. 37247, 37250 (June 9, 2000).

O&C Act is directed at an area of land and not a specific actor, a presidential proclamation can modify the classification of timberlands.[105]

CONCLUSION

The Ninth Circuit correctly upheld Proclamation 9564 and correctly found that the Antiquities Act is consistent with the O&C Act. However, it did not consider several stronger arguments, and it should have found Proclamation 9564 to be consistent with the O&C Act due to the O&C Act's acknowledgment that timberlands may be reclassified.

The O&C counties' timber industry is struggling to modernize. This is a familiar struggle; old industries frequently fight change.[106] However, the O&C Lands were revested nearly a century ago and many other rural communities adjacent to national monuments sustain economies without relying on federal funds. Many small towns have lost relied-upon industries and yet have managed to reinvent themselves. The O&C counties, too, could move away from their traditional reliance on logging and timber production. Finally, environmental developments over the last century have shifted what constitutes a sustainable yield of timber. The O&C Lands' ecological needs have changed over the past century and ensuring a future yield of O&C Land timber requires different limits on logging than existed in 1937. Proclamation 9564, consistent with the purpose of the O&C Act, thus supports the local economy and future generations' ability to harvest timber.

Meg O'Neill

105. *See generally* 43 U.S.C. § 2601.

106. *See, e.g.*, Kate Roberts, *Taxi drivers fight back against Uber and Lyft*, CNBC (May 26, 2015), https://www.cnbc.com/2015/05/26/taxi-drivers-fight-back-against-uber-and-lyft.html; Nathaniel Popper et al, *The Silicon Valley Start-Up That Caused Wall Street Chaos*, N.Y. TIMES (Jan. 30, 2021), https://www.nytimes.com/2021/01/30/business/robinhood-wall-street-gamestop.html.

Major Federal Inaction: *Harrison County v. U.S. Army Corps of Engineers* and the Bonnet Carré Spillway

INTRODUCTION

Since the 1970s, the National Environmental Protection Act (NEPA) has required agencies to take a "hard look" at infrastructure's impact on the environment.[1] However, as the climate crisis progresses, understanding the environment's impact on infrastructure plays a key role in effective climate adaptation.[2]

In *Harrison County v. U.S. Army Corps of Engineers* (*Harrison County*), Mississippi counties, cities, and associations asked the Fifth Circuit to compel the U.S. Army Corps of Engineers (Corps) to prepare a supplemental environmental impact statement (EIS) analyzing the impacts of climate change on the Bonnet Carré Spillway (the Spillway) near New Orleans.[3] Increased incidents of extreme flooding in recent years have required the Corps to use the Spillway more regularly to divert water from the Mississippi River, resulting in severe environmental and economic impacts from the inundation of freshwater into local saltwater ecosystems.[4] The plaintiffs argued NEPA regulations required a supplemental EIS as increased usage of the Spillway constituted a "major federal action" operating under "significant new circumstances" caused by climate change.[5]

To decide *Harrison County*, the Fifth Circuit addressed the legal question of whether the Corps' increased operation of the Spillway constituted a "major federal action," despite no proposed or actual change to its operating procedures.[6] The Fifth Circuit correctly answered no.[7] Case law indicated that agencies do not have an obligation to prepare a supplemental EIS for completed

DOI: https://doi.org/10.15779/Z38CN6Z196

1. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989).
2. *See* Thierry Giodano, *Adaptive Planning for Climate Resilient Long-Lived Infrastructures*, 23 UTIL. POL'Y 80, 81 (2012); *Climate Resilient Infrastructure and Operations*, OFF. FED. CHIEF SUSTAINABILITY OFFICER, https://www.sustainability.gov/federalsustainabilityplan/resilience.html (last visited Apr. 23, 2024).
3. Harrison Cty. v. U.S. Army Corps Eng'rs, 63 F.4th 458, 460 (5th Cir. 2023).
4. *Id.*
5. *Id.* at 463; 40 C.F.R § 1502.9(d)(1)(ii).
6. *Harrison Cty.*, 63 F.4th at 463.
7. *Id.* at 466.

projects.[8] While the decision aligns with precedent, *Harrison County* is out of step with the urgent need for the Corps to incorporate climate change into its decision making. The case is a bright warning sign that NEPA's prospective framing makes it an insufficient tool for compelling agencies to prepare climate analyses on existing infrastructure projects.

I. LEGAL BACKGROUND

A. Administrative Procedure Act § 706(1)

Section 706(1) of the Administrative Procedure Act (APA) allows plaintiffs to challenge agency actions and seek judicial review.[9] It gives the explicit mandate that courts "shall decide questions of law [and] interpret constitutional and statutory provisions" relevant to the challenge.[10] If a court finds an agency action to be "unlawfully withheld or unreasonably delayed," § 706(1) requires the court to compel the agency to remedy its inaction.[11] However, to prove agency inaction, a plaintiff must point to a discrete non-discretionary action that the agency failed to perform.[12]

B. Duty to Prepare a Supplemental Environmental Impact Statement under NEPA

NEPA requires that federal agencies take a "hard look" at the environmental impacts of a project before taking action.[13] To do so, agencies prepare an EIS for all "major federal actions" which significantly impact the environment.[14] An EIS must provide information on an action's significant environmental impacts and reasonable alternatives that would limit adverse effects.[15] NEPA regulations state that major federal actions "tend" to include the approval of specific projects, such as construction or management activities, and the adoption of policy, plans, or programs.[16]

While an initial EIS is often sufficient, certain circumstances require a supplemental EIS. NEPA requires agencies to prepare a supplemental EIS when a "major federal action is incomplete or ongoing" and "substantial new circumstances or information" related to the action or its impacts arise.[17] Consequently, the Supreme Court has established that a federal agency must prepare a supplemental EIS if (1) a major federal action remains to occur, and (2) new information shows that the "remaining action" will negatively affect the

8. *See id.*
9. 5 U.S.C. § 706 (2001).
10. *Id.*
11. *Id.*
12. Norton v. S. Utah Wilderness All. [hereinafter SUWA], 542 U.S. 55, 64 (2004).
13. Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983).
14. 42 U.S.C. § 4332(2)(C) (2000).
15. 42 C.F.R. § 1501.2 (2024).
16. 40 C.F.R. § 1508.1(w)(1) (2024).
17. 40 C.F.R. § 1502.9(d)(1) (2024).

environment in "a significant manner or to a significant extent not already considered."[18]

There is no cause of action under NEPA itself, but plaintiffs can use the statute to establish a non-discretionary duty required to bring a claim under APA § 706(1).

II. CASE BACKGROUND

Nearly 100 years ago, relentless rains caused the Mississippi River to overflow, drowning hundreds of people and displacing thousands from their homes in Arkansas, Mississippi, and Louisiana. The Great Flood of 1927 pushed Congress to pass the Flood Control Act of 1928.[19] This legislation established the Mississippi River and Tributaries Project ("MR&T"), which authorized the Corps to implement a system of public works in the lower Mississippi River Valley that provided "unprecedented flood risk management."[20] Construction on the MR&T is still in progress with about $8.4 billion of authorized work left to complete.[21]

The plaintiffs' claims in *Harrison County* focus on damages related to the Corps' use of the Bonnet Carré Spillway, a key component of the MR&T's flood mitigation system constructed in 1931.[22] When the Mississippi River experiences major flooding, the Spillway redirects excess flows from the river to the nearby Lake Pontchartrain and then into the Gulf of Mexico, bypassing New Orleans.[23] Since 1927, the Corps' operating manual has provided that the Spillway should only be used when the Mississippi River is flowing faster than 1.25 million cubic feet per second (cfs).[24]

While this reduces flood risk for the people of New Orleans, releasing freshwater into Lake Pontchartrain and the Gulf of Mexico damages numerous environmental and economic interests. Impacts include disruptions to sea life, toxic algae blooms, seafood warnings, and beach closures.[25] The negative impacts have become more frequent as climate change increases the frequency of extreme storms and flooding.[26] In the last twenty years, people living along the Mississippi River have experienced successive 100-, 200-, and 500-year

18. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989) (alterations in original).

19. *See* Pub L. No. 70-391 (codified at 33 U.S.C. § 702(a)).

20. *Mississippi River and Tributaries Project*, U.S. ARMY CORPS ENG'RS, https://www.mvd.usace.army.mil/About/Mississippi-River-Commission-MRC/Mississippi-River-Tributaries-Project-MR-T/ (last visited Apr. 7, 2024).

21. Harrison Cty. v. U.S. Army Corps Eng'rs, 63 F.4th 458, 463 (5th Cir. 2023).

22. *Id.* at 460.

23. *Bonnet Carré Spillway*, U.S. ARMY CORPS ENG'RS 2 (Oct. 2014), https://www.mvn.usace.army.mil/Portals/56/docs/PAO/Brochures/BCspillwaybooklet.pdf.

24. *Harrison Cty.*, 63 F.4th at 461.

25. *Id.* at 460.

26. *See* CHIA-YU WU & EHAB MESELHE, UTILIZING UPPER DIVERSION IN RIVER WATER MANAGEMENT CASE STUDY: 2019 MISSISSIPPI FLOODS, PHASE I 5-6 https://news.tulane.edu/sites/default/files/EDF-Bonnet%20Carre%20Report%20-%20Phase%20I%202020-June%208-1.pdf (last visited Feb. 18, 2024).

floods.[27] While the Corps designed the Spillway to be a stop-gap measure used about once every five years, it has recently become more vital to the Mississippi River's flood infrastructure.[28] On average, the Spillway has been opened every six years over an eighty-nine year period.[29] However, six of the fifteen openings during this period happened over the past ten years, and four openings occurred between 2018 and 2020.[30]

The economic and environmental impacts of more frequent and prolonged openings are devastating to local communities and industries. In 2011, the Spillway opening decimated oyster populations, resulting in an estimated loss to commercial oyster fisheries of up to $46 million.[31] Communities lost hundreds of jobs in the years following because of the resulting downturn.[32] The prolonged 2019 Spillway opening forced Mississippi to pay out $6.57 million in assistance to commercial fisheries, seafood dealers, and others in the fishing industry.[33]

III. PROCEDURAL HISTORY

A. Claims

The plaintiffs in *Harrison County* were a group of municipalities and associations that experienced negative impacts related to recent Spillway openings.[34] They sued the Corps under APA § 706(1), alleging that the agency failed to supplement the MR&T's 1976 EIS to account for the negative environmental and economic impacts of the increased frequency and duration of Spillway openings.[35] The plaintiffs sought declaratory relief acknowledging the Corps' failure to prepare the supplemental EIS and an order requiring the agency to do so with "all due haste."[36]

To successfully sue the Corps under APA § 706(1), the plaintiffs had to demonstrate that the Corps had a non-discretionary duty to perform a supplemental EIS. NEPA regulations state that the agency "shall" prepare a supplemental EIS when a major federal action "is incomplete or ongoing" and

27. MISSISSIPPI RIVER CITIES & TOWN INITIATIVE, 2016 POLICY PLATFORM OF THE MAYORS ALONG THE MISSISSIPPI RIVER 2 (2016), https://static1.squarespace.com/static/5845a70859cc6819f2dfdb9e/t/585c1af6d1758e618c86dc12/1482431226742/2016+Policy+Platform.pdf.

28. *Harrison Cty.*, 63 F.4th at 461.

29. *Id.* (citing the district court's detailed review of the Spillway's history).

30. *Id.* (citing the district court's detailed review of the Spillway's history).

31. BENEDICT C. POSADAS, ECONOMIC IMPACTS OF THE OPENING OF THE BONNET CARRÉ SPILLWAY ON THE MISSISSIPPI OYSTER FISHERY 1 (2017), http://extension.msstate.edu/sites/default/files/publications/publications/p3038.pdf.

32. *Id.*

33. *2019 Mississippi Bonnet Carre Spillway Fisheries Disaster Recovery Program to Pay Out $6.57M to Eligible Commercial Fishermen and Seafood Dealers*, MISSISSIPPI DEP'T MARINE RES., (Nov. 1, 2013) https://dmr.ms.gov/2019-mississippi-bonnet-carre-spillway-fisheries-disaster-recovery-program-to-pay-out-6-57m-to-eligible-commercial-fishermen-and-seafood-dealers/.

34. *Harrison Cty.*, 63 F.4th at 461.

35. *Id.*

36. *Id.*

there are "substantial new circumstances or information" relevant to the action.[37] The plaintiffs argued that the increased usage of the Spillway was an ongoing major federal action impacted by the "significant new circumstances" of climate change.[38] Therefore, the Corps failed to perform its non-discretionary duty to prepare a supplemental EIS.[39]

To frame the Spillway as an ongoing major federal action, the plaintiffs made two claims in the alternative. First, they claimed that the Spillway played an essential part of the remaining $8.4 billion of authorized construction on MR&T's flood infrastructure system.[40] As a central part of the system, a supplemental EIS on the Spillway could influence Corps' decision-making on other in-progress aspects of the flood mitigation system that could reduce the usage of the Spillway.[41] Second, even if the Spillway was not ongoing in context of the MR&T, the Corps' increased use of the Spillway made its operation significantly different compared to when originally approved. [42] As a result, the Spillway itself required a new EIS to account for unanticipated changes in the frequency of operation.[43]

In response, the Corps shifted attention away from the plaintiffs' focus on the broader MR&T project. It zoomed in to focus specifically on the Spillway, emphasizing that the project had been fully constructed for over ninety years and still uses the same operational criteria established in its 1927 design documents and contemplated in the 1976 EIS.[44] The Corps argued that without a failure to perform a discrete duty, the agency's sovereign immunity required the court to dismiss the plaintiffs' APA §706(1) claims.[45]

B. District Court Decision

The Southern District of Mississippi granted the Corps' motion to dismiss the plaintiffs' NEPA claims with prejudice.[46] The court found that "no major federal action remains to occur" because the challenged action was completed pursuant to an adequate NEPA process.[47] Further, the agency had not deviated from the operating procedures contemplated by the 1976 EIS.[48] It reasoned that the Corps was "merely" responding to annual weather changes, and the court "cannot review the Corps' routine day-to-day operation" of the Spillway.[49] Thus,

37. 40 C.F.R. § 1502.9(d)(1) (2024).
38. *Harrison Cty.*, 63 F.4th at 463.
39. *Id.* at 461.
40. *Id.* at 463.
41. *Id.* at 464.
42. *Id.* at 465.
43. *Id.*
44. *Id.* at 463.
45. *Id.* at 461.
46. Watson Jr. v. U.S. Army Corps Eng'rs, No. 19-CV-00989, 2021 U.S. Dist. LEXIS 273695, at *17 (S.D. Miss. Sept. 13, 2021) (order granting the Corps' motion to dismiss).
47. *Id.* at *12.
48. *Id.* at *14.
49. *Id.*

the plaintiffs could not show the Corps had a duty to prepare a supplemental EIS, allowing the agency to maintain sovereign immunity.[50]

C. Fifth Circuit Decision

On appeal, the Fifth Circuit's *de novo* review found that this case's outcome "hinge[d] on a single factual question—namely, does the 'major Federal action' remain outstanding to necessitate the Corps' preparation of a supplemental EIS?"[51] Like the district court, the Fifth Circuit rejected both of the plaintiffs' attempts to characterize the increased use of the Spillway as an ongoing action.[52] It considered the Spillway to be a finalized "fixture" that had been "operational and materially unchanged for more than 90 years."[53] The court also agreed with the Corps argument that the increased frequency of openings did "not mark a shift in managerial philosophy or planning," only a change in the implementation of existing procedures.[54] The 1.25 million cfs threshold to open the Spillway had been sufficiently analyzed in the 1976 EIS.[55] Thus, the Fifth Circuit held that the Corps had not undertaken a major federal action that would trigger its obligation to prepare a supplemental EIS.[56]

IV. ANALYSIS

A. The Court Was Correct in Finding that the Operation of the Bonnet Carré Spillway was Not a Major Federal Action

The plaintiffs' attempts to characterize the increased operation of the Spillway as a major federal action fall short in light of precedent that limits the scope of "major federal actions" to ongoing projects. The Fifth Circuit correctly characterized NEPA as "requiring prospective environmental analysis rather than retrospective environmental analysis."[57] As NEPA is not expressly retroactive, the issue of whether or not NEPA obligations extended to completed projects was subject to much litigation and debate when the statute was first promulgated.[58] However, most courts found that NEPA did not apply retroactively, [59] setting the stage for the Supreme Court's decisions in *Marsh v. Oregon Natural Resources* (*Marsh*) and *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*") that

50. *Harrison Cty.*, 63 F.4th at 460.
51. *Id.* at 462.
52. *Id.*
53. *Id.* at 465.
54. *Id.* at 465-66.
55. *Id.* at 460.
56. *Id.*
57. *Id.* at 466.
58. Burk E. Bishop, *Applying the National Environmental Policy Act of 1969 to Ongoing Federal Projects*, 26 SW. L. J. 744, 755 (1972). *See also* Sunny J. Nixon, *The National Environmental Policy Act's Influence on Standing, Judicial Review, and Retroactivity*, 7 LAND & WATER L. REV. 115, 122 (1972).
59. *See* Nixon, *supra* note 58, at 122 ; *see also* Norton v. SUWA, 542 U.S. 55, 56 (2004) ("There is no ongoing 'major Federal action' that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised, see §§ 1610.5-5, 5-6).").

established completed projects only require a supplemental EIS if an agency proposes new plans or changes.[60]

In *Marsh,* the plaintiffs filed a NEPA claim against the Corps for failing to prepare a supplemental EIS for the Elk Creek Dam in Oregon. The plaintiffs asked the court to compel the Corps to review information discovered after the EIS had been finalized, but when only one-third of the dam construction had been completed.[61] The Court found that NEPA required agencies to analyze the "environmental effects of their planned action, even after a proposal has received initial approval." [62] An agency must prepare a supplemental EIS if new information shows that "the remaining action" will have environmental impacts in "a significant manner or to a significant extent not already considered."[63] Under this standard, the Court found that a major federal action remained to occur, and the Corps had to consider preparing a supplemental EIS for the remaining dam construction.[64]

Fourteen years after *Marsh*, the plaintiffs in *SUWA* contended that the Bureau of Land Management (BLM) failed to prepare a supplemental EIS to account for damages to public land from off-road vehicle use in its land use plan.[65] The Supreme Court could have used *SUWA* to further *Marsh*'s recognition that federal actions are often ongoing and NEPA obligations are not discontinued after initial approval, even if there is no ongoing construction.[66] Instead, the Court unanimously decided that an approved land use plan is no longer a major federal action.[67] This decision effectively terminated agencies' obligations to prepare a supplemental EIS until the agency deviates from the approved plan, regardless of whether significant new information or circumstances exist.[68] While legal scholars have criticized *SUWA* as improperly narrow, allowing BLM to ignore new information on off-road vehicle impacts and bypass its NEPA obligations, it is the controlling law in this case.[69]

In *Harrison County*, the Fifth Circuit correctly decided that the Spillway was not an ongoing major federal action.[70] The Spillway is a finalized "fixture" that has been "operational and materially unchanged for more than 90 years."[71]

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60. *See* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 375 (1989); *SUWA*, 542 U.S. at 72-73.
61. *Marsh*, 490 U.S at 368.
62. *Id.* at 374.
63. *Id.*
64. *Id.*
65. *SUWA*, 542 U.S. at 61.
66. Nicholas C. Yost & Gary Widman, *The "Action-Forcing" Requirements of NEPA and Ongoing Actions of the Federal Government*, 34 ENV'T L. REP. 10435, 10436 (2004).
67. *SUWA*, 542 U.S. at 73.
68. *See id.*
69. *See* Aaron M. Kappler, *Off-Roading Without a Map: The Supreme Court Drives Over NEPA in Southern Utah Wilderness Alliance*, 24 GA. ST. U. L. REV. 533, 550 (2007); Christopher M. Buell, Note, *Norton v. Southern Utah Wilderness Alliance: The U.S. Supreme Court Fails to Act on Agency Inaction*, 67 U. PITT. L. REV. 641, 641-42 (2006); Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENV'T L. & POL'Y F. 106, 138-47 (2007).
70. Harrison Cty. v. U.S. Army Corps Eng'rs, 63 F.4th 458, 464 (5th Cir. 2023).
71. *Id.* at 465.

Marsh's holding that agencies must prepare a supplemental EIS for impacts "not already considered" explicitly refers to "remaining" and "planned" actions.[72] *SUWA* further emphasized that courts cannot compel agencies to perform a supplemental EIS once plans are finalized.[73] Given this precedent, the Fifth Circuit correctly decided that NEPA's "forward-looking" mandate did not apply to the completed Spillway.[74] Regardless of ongoing construction on the broader MR&T, "any new information yielded by further analysis" would not affect the design of the Spillway.[75] There were no aspects of the Spillway "under consideration" that would benefit from new environmental analyses.[76]

Further, the Corps had not proposed any substantive changes to the Spillway's operating procedures.[77] The threshold of 1.25 million cfs has been the same since the original EIS in 1976 and was reaffirmed in 1984 and 1999.[78] While the flow rate of the Mississippi River may meet the 1.25 million cfs threshold more often, the Corps has used the original operating plan for nearly 100 years.[79] While the Fifth Circuit conceded that climate change imposed "significant new circumstances," the Spillway's operation had been "materially unchanged" with no "shift in managerial philosophy or planning." The Fifth Circuit correctly found that, as in *SUWA,* the plaintiffs could "identify no pending decisionmaking" that hinged on new analysis.[80]

Thus, the court correctly found that there was no "remaining major federal action" at the Spillway to trigger NEPA's requirement to prepare a supplemental EIS. Without this discrete non-discretionary duty, the plaintiffs could not meet the elements of a §706(1) claim. As the Fifth Circuit properly concluded: "Congress and the Corps have authority to act on the plaintiffs' dire environmental concerns. The federal courts do not."[81]

B. Harrison County *Indicates that NEPA is an Insufficient Tool for Addressing Climate Impacts on Existing Infrastructure*

Harrison County indicates that, under NEPA's prospective framework, agency inaction becomes the defense against allegations of agency inaction. This counterintuitive logic is supported by the Supreme Court's assertion in *SUWA* that an agency "*is* required to perform additional NEPA analyses if a plan is amended or revised" and the Fifth Circuit's focus on the Corps' "materially unchanged" operating procedures.[82] If the Corps *did* make changes to its

72. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373. 393 (1989).
73. *SUWA*, 542 U.S. at 73.
74. *Harrison Cty.*, 63 F. 4th at 464.
75. *Id.*
76. *Id.*
77. *Id.* at 466.
78. *Id.*
79. *Id.* at 466.
80. *See id.* at 464 (emphasis omitted).
81. *Id.* at 466.
82. *See id.* at 466; Norton v. SUWA, 542 U.S. 55, 64 (2004).

Spillway operations, the plaintiffs would have a strong case to compel the agency to prepare a supplemental EIS. [83] In cases in which the Corps is reluctant to perform additional NEPA analysis, *Harrison County* incentivizes the agency to abstain from proposing or implementing climate adaptation measures. By continuing to use 100-year-old procedures, the Corps ensures that a supplemental EIS remains discretionary and cannot be compelled under APA § 706(1).

Harrison County indicates that when, how, and if the Corps updates its decades-old analyses is at the agency's discretion.[84] While federal guidance and recommendations encourage the Corps to regularly evaluate its existing flood infrastructure, [85] the Corps will likely not do so without a legislative mandate. A 2022 House Committee report observed that the Corps was out of step with "clear direction from Congress" to address the resiliency and sustainability of future flood infrastructure projects.[86] *Harrison County* suggests the Corps has a similar tendency to maintain the status quo on existing projects.[87] The Corps convinced the Fifth Circuit that its increased use of the Spillway equated to "'routine managerial actions' of an agency tasked with operating a complex and important piece of infrastructure."[88]

If Congress does not establish a non-discretionary duty to review existing projects under NEPA or otherwise, impacted communities may wait indefinitely for the Corps to account for climate change. So long as the agency does not initiate any changes to its "routine" decision making, courts will likely have no authority to compel the preparation of a supplemental EIS. Instead, the burden will continue to fall on communities along the Mississippi River to "routinely" adapt to major environmental and economic losses.

CONCLUSION

The Fifth Circuit identified the underlying tension in the case: "The true culprit for the plaintiffs' environmental misfortunes is not the Corps or the Spillway, but the environment itself."[89] *Harrison County* provides an example of a perverse incentive for agencies to avoid litigation by maintaining the status quo during a time when agencies should be creatively and proactively adapting to the climate crisis. The case indicates that NEPA's prospective nature makes it insufficient to compel agency action on existing projects, eliminating a key tool in environmentalists' legal arsenal. Without new Congressional mandates to

83. *See Harrison Cty.*, 63 F.4th at 466.

84. *See id.* at 466.

85. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105496, CLIMATE CHANGE: OPTIONS TO ENHANCE THE RESILIENCE OF FEDERALLY FUNDED FLOOD RISK MANAGEMENT INFRASTRUCTURE 46 (Jan. 16, 2024); *see also* 43 C.F.R. § 46.415(b)(3) ("A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. . . . includ[ing] a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.").

86. H.R. REP. NO. 117-347, at 61 (2022).

87. *See Harrison Cty.*, 63 F.4th at 465.

88. *See id.*

89. *Id.*

establish that agencies have an affirmative duty to address climate impacts, more communities will face the adverse consequences of 100-year-old decisions while agencies fail to act.

Jordan Perry

Vacating Vacatur: How Remedies Are Fashioned Under the National Environmental Policy Act

INTRODUCTION

Native communities often face the degradation of their sacred land.[1] This is unsurprising, as there is a long history of American state and federal governments refusing to give Native American tribes the right to self-determination and depleting the political power of Tribal governments.[2] This power imbalance manifests itself in oil and gas transactions because parties who seek to profit off of oil and gas production on Native land can negotiate directly with state governments or federal agencies, rather than the tribes themselves.[3] A community-based organization, Diné Citizens Against Ruining our Environment, is working diligently to stop outside developers from disrupting Native communities with these kinds of transactions.[4]

Courts have the power to act as a backstop by vacating agency decisions that would otherwise promulgate these injustices. In *Diné Citizens v. Haaland*, groups representing the Navajo Nation alleged that the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) in its assignment of applications for permits to drill (APDs) into oil and gas wells in the San Juan basin and requested that the court vacate these APDs.[5] The court reviewed the environmental assessments (EAs) that BLM drafted about the impacts that the APDs would have on greenhouse gas (GHG) emissions, water resources, and air quality and ultimately decided that BLM acted arbitrarily and capriciously in some of their environmental impact calculations.[6] Instead of vacating BLM's APDs, the court remanded back to the district court for review.[7]

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1. Alexis Zendejas, *Deserving a Place at the Table: Effecting Change in Substantive Environmental Procedures in Indian Country*, 9 ARIZ. J. ENV'T L. & POL'Y 90, 97 (2019).
2. *Id.* at 98.
3. *Id.* at 104.
4. *See* Press Release, Ctr. for Biological Diversity, *18 Navajo Chapters Oppose Huge Pumped Storage Projects Threatening Arizona's Black Mesa* (July 14, 2023), https://biologicaldiversity.org/w/news/press-releases/18-navajo-chapters-oppose-huge-pumped-storage-projects-threatening-arizonas-black-mesa-2023-07-14/.
5. Diné Citizens Against Ruining Our Environment [hereinafter Diné Citizens] v. Haaland, 59 F.4th 1016, 1025 (10th Cir. 2023).
6. *Id.*
7. *Id.*

While the Tenth Circuit properly applied NEPA, it fashioned the wrong remedy. Failing to vacate the APDs was a missed opportunity to operate an effective check on agencies taking advantage of NEPA's broad language. NEPA and the standard of judicial review associated with NEPA challenges do not adequately protect natural lands, meaning that appellate courts should vacate decisions that clearly violate NEPA.

I. BACKGROUND

A. Statutory Background: NEPA

The National Environmental Policy Act (NEPA), signed in 1970, was the United States' first major environmental law.[8] NEPA requires agencies to "consider every significant aspect of the environmental impact of a proposed action, so as to inform the public that the agency has indeed considered environmental concerns in its decision-making process."[9] To satisfy this, federal agencies must prepare detailed statements about how their proposed actions or projects would impact the "quality of the human environment," and the alternatives that exist.[10] The black letter language of NEPA does not explicitly state what facts or methodologies should go into EAs. While NEPA "provides a process for agencies to follow in decision-making," it "does not impose a substantive outcome," meaning that agencies are not compelled to pursue environmentally conscious alternatives when finalizing their actions.[11]

NEPA does not provide a mechanism for judicial review, so plaintiffs must bring NEPA challenges against agencies that they believe to be noncompliant through the Administrative Procedure Act (APA).[12] One agency often subjected to these challenges is the BLM. BLM is responsible for maintaining public lands, a process that includes managing the energy development of a tract of land.[13] BLM is required to develop EAs when its actions—such as APDs—would have uncertain effects on the land.[14]

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8. LINDA LUTHER, CONG. RSCH. SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION 1 (updated 2011), https://crsreports.congress.gov/product/pdf/RL/RL33152.

9. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553 (1978); *accord* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 540 F. Supp. 3d 45, 51 (D.D.C. 2021).

10. KRISTEN HITE, CONG. RSCH. SERV., IF11932, NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL REVIEW AND REMEDIES (Sept. 22, 2021), https://crsreports.congress.gov/product/pdf/IF/IF11932.

11. *NEPA Environmental Review Requirements*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (last visited Apr. 7, 2024), https://eelp.law.harvard.edu/tracker/nepa-environmental-review-requirements/.

12. HITE, *supra* note 10.

13. *Our Mission*, BUREAU OF LAND MGMT., https://www.blm.gov/about/our-mission (last visited Apr. 7, 2024).

14. LUTHER, *supra* note 8, at 12, 19.

B. Leadup to Litigation

Diné Citizens Against Ruining Our Environment (Diné Citizens) is a Navajo Nation-based non-profit that defends the natural world in the New Mexico and Arizona area.[15] This area is an important spiritual and cultural hub for many Southwest tribes, including the Navajo Nation of New Mexico.[16] In 2021, Diné Citizens joined several environmental advocacy groups ("Citizen Groups") to bring a lawsuit against BLM, *Diné Citizens v. Bernhardt*, in the District Court of New Mexico about the APDs that BLM approved related to oil and gas wells in the Mancos Shale area.[17] It alleged that BLM authorized the drilling without adequately considering the indirect and cumulative environmental impacts that these APDs would have.[18]

II. *DINÉ CITIZENS V. HAALAND*

A. The District Court Case

The district court case, *Diné Citizens v. Bernhardt*, began in 2021 when Citizen Groups filed a Petition for Review of Agency Action in the United States District Court for the District of New Mexico.[19] At the time of filing, BLM had issued an EA addendum aimed at correcting defects in their prior EAs.[20] Once the addendum was available to Citizen Groups, it filed an Amended and Supplemented Petition for Review of Agency Action that challenged the eighty-one EAs and the 370 APD approvals analyzed in the addendum.[21] It sought judicial review of BLM's decision to approve the APDs in order to get the APDs vacated and enjoin BLM from approving any pending or future APD for horizontal drilling or hydraulic fracturing in the area.[22] BLM argued that any APD that had not yet been approved was not fit for court review, and it was not required to vacate the approved APDs while it conducted its supplementary analysis for the addendum.[23] It claimed that all its EAs were made in good faith using thorough analysis methods.[24]

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15. *About Us*, DINÉ C.A.R.E. (2023), https://www.dine-care.org/about-us.

16. *See generally* DINÉ CITIZENS, *Citizens Working Together – Some Barriers to Overcome* (1994) (articulating the struggle of pursuing true recognition, spiritual or otherwise, of the importance of Native lands).

17. *See* Diné Citizens v. Bernhardt, No. 1:19-CV-00703-WJ-JFR, 2021 WL 3370899, at *1 (D.N.M. Aug. 3, 2021). Note that this case is different from a Tenth Circuit decision in 2019 of the same name, 923 F.3d 831 (10th Cir. 2019).

18. *See Bernhardt*, at *1.

19. Diné Citizens v. Haaland, 59 F.4th 1016, 1027 (10th Cir. 2023).

20. *See id.* at 1024 (noting that BLM issued the addendum to correct five EAs with known defects and eighty-one other EAs with potential defects but not specifying the court holding that BLM's addendum was in response to).

21. *Id.* at 1027.

22. *Id.*

23. *See id.* at 1025–30.

24. *See id.* at 1034–40.

The district court ruled against Citizen Groups.[25] It refused to look at any unapproved APDs that were challenged, stating that they were "not ripe for consideration by the Court."[26] After looking at the approved APDs, the district court concluded that BLM took the requisite "hard look" at the true environmental impacts of the APD approvals.[27] The district court also held that BLM issued the EAs in good faith and retained the power to maintain, modify, and revoke the approval of the APDs.[28] The district court denied a request for preliminary injunctive relief to stop the drilling and dismissed Citizen Groups' claims with prejudice.[29]

B. The Tenth Circuit Case

Just as in *Bernhardt*, Citizen Groups alleged in *Diné Citizens v. Haaland* that all the EAs—including the new one—failed to account for the cumulative and indirect effects of GHG emissions, as well as impacts to air quality and water quality that would result from the drilling.[30] The Tenth Circuit agreed with the district court ruling that a deferential standard towards agency decisions was appropriate because NEPA challenges are brought under the APA, meaning that claims must be reviewed de novo.[31] This deferential standard means that the Tenth Circuit refuses to overturn an agency's decision unless it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[32] These terms were further defined in *Wyoming v. United States Department of Agriculture*, which defined this as the agency entirely failing to "consider an important aspect of the problem, offer . . . an explanation for its decision that runs counter to the evidence before the agency, or if the agency action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[33] The court divided its review of environmental impacts into roughly four categories: GHG emissions, cumulative impacts to water resources, impact on air quality and health, and impact from hazardous air pollutants (HAPs).[34]

The Tenth Circuit found that BLM took the requisite hard look at their cumulative impacts on water resources, air quality, and health.[35] Citizen Groups argued that BLM should have accounted for New Mexico's precarious

25. Diné Citizens v. Bernhardt, No. 1:19-CV-00703-WJ-JFR, 2021 WL 3370899, at *30 (D.N.M. Aug. 3, 2021).

26. *Id.* at *7 (citing Nat'l Wildlife Fed'n v. EPA, 945 F. Supp. 2d 39, 47 (D.D.C. 2013)).

27. *Id.* at *30.

28. *Id.* at *6.

29. *Id.* at *31.

30. Diné Citizens v. Haaland, 59 F.4th 1016, 1027 (10th Cir. 2023).

31. *Id.* at 1029.

32. *Id.* (citing Utah Env't Cong. v. Bosworth, 443 F.3d 732, 739 (10th Cir. 2006) and 5 U.S.C. § 706(2)(A)).

33. Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1227 (10th Cir. 2011) (internal quotation marks omitted).

34. *See Haaland*, 59 F.4th at 1034–47.

35. *See id.*

groundwater conditions and the wells' impacts on the Navajo Nation specifically, citing that 40 percent of the Navajo Nation lacks water.[36] The court, believing that this claim was "not supported by the record," ignored Citizen Groups' policy arguments and focused on whether the analysis that BLM used for calculating water usage—resulting in a percentage increase of estimated water usage of only 0.12 percent to 1.3 percent—was sufficient.[37] BLM took a different approach with its air quality analysis by comparing the proposed pollutant outputs of the APDs with two air quality standards.[38] Although Citizen Groups pointed out that BLM failed to differentiate between long-term effects and short-term effects and mischaracterized the pollution as a "temporary nuisance," the court found that BLM's benchmarking of its emissions against industry standards was sufficient.[39]

The court found that BLM failed to take a hard look at the remaining environmental impacts. It found that BLM unreasonably calculated GHG emissions by using only one year of data to project emissions for twenty years.[40] The court held that BLM should have used the carbon budget method, a more scientifically precise method for GHG calculations, in tracking its emissions.[41] The court also found that BLM's analysis of hazardous air pollutants (HAPs) was not adequate because it did not include the specific quantity of HAPs that would be emitted from drilling and construction or account for the "cumulative impact to HAP emissions."[42]

The Tenth Circuit reversed the district court's holding that the EA addendum was sufficient, yet rendered only the new APDs approved by BLM invalid.[43] It remanded back to the district court for a remedy regarding the remaining APDs; the district court has not yet fashioned a remedy.[44]

III. LEGAL ANALYSIS

A. Fashioning the Wrong Remedy

The Tenth Circuit properly applied NEPA in its evaluation of Citizen Groups' and BLM's arguments, however, it erroneously applied precedent from the D.C. Circuit in favoring a balancing test when it should have applied precedent from the Supreme Court prescribing vacatur as the only appropriate remedy. By remanding, the Tenth Circuit left it up to the district court to apply a balancing test to determine the appropriate remedy, increasing the likelihood that the APDs are approved without thorough environmental review.

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36. *Id.* at 1044-45.
37. *Id.* at 1045-46.
38. *Id.*
39. *Id.* at 1036-37.
40. *Id.* at 1043-44.
41. *Id.* at 1047.
42. *Id.*
43. *Id.* at 1050.
44. *Id.*

The Tenth Circuit applied a balancing test from the D.C. Circuit case *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 153 (D.C. Cir. 1993).[45] In *Allied-Signal*, the court held that vacatur can be prescribed only after weighing the seriousness of the agency's deficiencies against the administrative disruptions that vacatur would bring.[46] The Tenth Circuit relied on an Eleventh Circuit case, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers (Black Warrior Riverkeeper)*, in deciding to apply the *Allied-Signal* test. In *Black Warrior Riverkeeper*, the court held that potential disruption to the mining industry was a relevant factor in determining whether vacatur is appropriate and that district courts were best positioned to make this decision.[47] This case dealt with a federal agency's miscalculations of environmental impact resulting from surface mining operations.[48] The U.S. Army Corps of Engineers admitted that it committed an error in its calculation; however, the court was not able to determine how significant this error was under the requirements of the Clean Water Act and NEPA and wanted the Corps to determine the significance of the error on remand.[49]

The Tenth Circuit also considered *DHS v. Regents of the University of California (DHS)* in deciding on a remedy.[50] In *DHS*, the Supreme Court upheld a challenge to the Department of Homeland Security's recission of the Deferred Action for Childhood Arrivals (DACA) program under the APA, vacating the recission because it had discounted the effects on DACA recipients' families and the American labor force.[51] In *DHS*, the Court found that the district court was correct in giving DHS a choice between either explaining the rationale of the initial recission further or creating a new agency action altogether.[52] The basis for this was to prevent "impermissible" post hoc rationalizations that would let agencies avoid providing contemporaneous reasonings for their actions.[53] The Tenth Circuit concluded that applying *DHS* to this case was not appropriate because *DHS* was not a case about remedies and did not contain a robust discussion of whether vacatur was the only available remedy under NEPA.[54]

The Tenth Circuit's deference to the *Allied-Signal* test was inappropriate. Unlike in *Black Warrior Riverkeeper*, where neither the U.S. Army Corps of Engineers nor the court were able to quantify the significance of the Corps' error, the Tenth Circuit in *Diné Citizens* clearly adjudged and stated the merits and

45. *Id.* at 1024.
46. *Id.* at 1049.
47. Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1289 (11th Cir. 2015).
48. *Id.*
49. *Id.*
50. *Haaland*, 59 F.4th at 1048.
51. Dep't of Homeland Sec. [DHS] v. Regents of the Univ. of Cal., 591 U.S. 1, 3 (2020).
52. *Id.* at 4.
53. *Id*.
54. *See Haaland*, 59 F.4th at 1049.

deficiencies of BLM's methodologies in the EAs.[55] The inability to quantify the deficiency in the analysis led the *Black Warrior Riverkeeper* court to deem the record "incomplete," which is how it justified remanding rather than vacatur. In a dissenting opinion, District Court Judge Totenberg recognized that many D.C. Circuit cases where vacatur was not granted for environmental administrative challenges were "consistent with the statutory goals at issue" because balancing considerations arose when the agency's enforcement of environmental protections had to be weighed against conflicting policy or statutes; this is unlike the legislative context presented in *Diné Citizens*.[56] Given that the scientific record from the EAs in *Diné Citizens* was not found to be incomplete and vacating the APDs would not go against any statutes, the Tenth Circuit should have recognized that the facts of this case were not aligned with the Eleventh Circuit's logic in *Black Warrior Riverkeeper*.

The Tenth Circuit should have disregarded cases from its sister circuits and followed the Supreme Court's logic in *DHS*. Both *DHS* and *Diné Citizens v. Haaland* involved agencies violating the APA for failure to include relevant information in their memorandums, thereby inadequately justifying their decisions.[57] While DHS's relationship to DACA is quite different from BLM's assignment of APDs,[58] both courts were tasked with reviewing the process that the agency followed under the language of the APA and whether it was enough.[59] However, the Tenth Circuit found instead that *DHS* was a narrow holding that only addressed the "importance of following procedures," not the necessity for vacatur.[60]

Further, the Tenth Circuit should have read the Supreme Court's limited discussion of vacatur in *DHS* to mean that vacatur is the obvious remedy when an agency decision is found to be arbitrary or capricious. The Tenth Circuit came to the opposite conclusion, finding instead that the lack of discussion about vacatur in *DHS* meant that the Court was not precluding the Tenth Circuit from fashioning their own remedy.[61] Citizen Groups argued that the purpose of vacatur is to not only punish agencies for acting arbitrarily and capriciously, but also to remind agencies that they cannot treat the EAs as merely bureaucratic tasks.[62] Citizen Groups stated that vacatur is the only remedy that "serves

55. Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1289 (11th Cir. 2015); *see Haaland*, 59 F.4th at 1034–48.

56. *Black Warrior Riverkeeper*, 781 F.3d at 1296 n.6.

57. *Compare Haaland* (agency failed to articulate meaningful consideration of relevant environmental implications), *with* DHS v. Regents of the Univ. of Cal., 591 U.S. 1 (cabinet department failed to provide adequate lawful reasoning for nonenforcement)

58. *Compare DHS*, 591 U.S. at 21-22 (presenting an openly hostile attitude of DHS toward DACA), *with Haaland*, 59 F.4th at 1047-48 (presenting BLM as an errant administrator in its responsibilities under NEPA).

59. *Compare DHS*, 591 U.S. at 30-31, *with Haaland*, 59 F.4th at 1041–41.

60. *Haaland*, 59 F.4th at 1049.

61. *Id.*

62. Brief of Plaintiff-Appellant at 25, Diné Citizens v. Haaland, 59 F.4th 1016 (2021), No. 21-2116, 2021 WL 6048805, at *25.

NEPA's fundamental purpose," and a remand without vacatur would not provide adequate relief.[63] The court ignored these arguments and remanded the case to the district court to apply the *Allied-Signal* test.[64]

B. Implications of Remand

At the Tenth Circuit level, Citizen Groups faced a panel of judges who were receptive to nuances in scientific calculations and enjoined BLM from approving any further APDs until the EAs were fixed. However, by not prescribing vacatur, the Tenth Circuit sent the decision back to the same district court that found all of BLM's methodologies to be sufficient in the first place, making it possible that the district court will not vacate any APDs. This means that plaintiffs like Diné Citizens and the rest of Citizen Groups must keep suing to get the agency actions vacated, since vacatur is not a guaranteed remedy.

NEPA's lack of explicit guidance on what an EA should prioritize means that bringing a NEPA challenge is likely to be a litigious process. In fact, Diné Citizens is often the plaintiff in cases against BLM; in a separate 2019 case also titled *Diné Citizens v. Bernhardt*, the District Court of New Mexico "declined to stop the BLM from approving any drilling permits until the agency complied with the law," pushing Diné Citizens to partner with the Natural Resources Defense Council (NRDC) to appeal the decision to the Tenth Circuit and win.[65] The basis for agency decision-making comes from documents such as circulars, memorandums, and executive orders (EOs). However, these guidelines include language requiring agencies to consider the "adverse effects" of their actions on local communities from an environmental justice standpoint, "[t]he rule does not prohibit agencies from approving proposed actions with unmitigated adverse environmental effects."[66] Negligent execution of procedural duties is easy to get away with because the law does not provide a proactive inspection mechanism; this puts the onus on plaintiffs to challenge the agency's actions and increases the importance of heavy-handed remedies like vacatur.[67]

CONCLUSION

Diné Citizens v. Haaland is simply one of the latest in a long list of NEPA-related cases about the inadequacy of the environmental assessments that agencies are required to evaluate. Agencies are currently protected by both broad statutory discretion and courts' deference under the presumption that they are best positioned to decide whether to vacate their own decisions. It remains to be

63. *Id.* at *52.

64. *Haaland*, 59 F.4th at 1050.

65. *Diné Citizens Against Ruining Our Environment et al. v. U.S. Bureau of Land Management et al.*, NAT. RES. DEF. COUNCIL (Jan. 20, 2021), https://www.nrdc.org/court-battles/dine-citizens-against-ruining-our-environment-et-v-us-bureau-land-management-et (updated Feb. 1, 2023).

66. Hannah Perls, *Key Changes in CEQ's Phase 2 Regulations Implementing NEPA* (Aug. 8, 2024), https://eelp.law.harvard.edu/nepa-phase2-final/.

67. Zendejas, *supra* note 1, at 103.

seen how the overruling of *Chevron v. Natural Resources Defense Council* in 2024 will impact remedies under NEPA and whether vacatur as the default remedy for NEPA violations has been vacated for good.

Varsha Ramachandran

Forbearing to Vacate: Grizzly Consequences of the *Allied-Signal* Test in the Tenth Circuit

INTRODUCTION

In *Western Watersheds Project v. Haaland* ("*Western Watersheds*"), the Tenth Circuit Court of Appeals evaluated the United States Forest Service's 2019 approval of ten-year permits for horse and cattle grazing on a portion of land known as the Upper Green River Area Rangeland ("UGRA Project") near Yellowstone National Park in Wyoming.[1] The Forest Service's Record of Decision (ROD) authorizing the project relied on a biological opinion by the U.S. Fish and Wildlife Service which concluded that the project "would not jeopardize the continued existence of grizzly bears" in the Greater Yellowstone Ecosystem.[2] The U.S. Fish and Wildlife Service (FWS) listed grizzly bears as threatened under the Endangered Species Act in 1975, identifying livestock grazing practices as one key threat to the species.[3]

Western Watersheds Project and accompanying environmental advocacy organizations (the Appellants) argued that agencies' assessment and approval of the UGRA Project violated the Endangered Species Act and the National Forest Management Act.[4] The court agreed in part.[5] Appellants requested that the court vacate the ROD authorizing the project.[6] Instead, the court remanded to the FWS and the U.S. Forest Service (USFS) *without* vacatur or other injunctive relief, allowing livestock grazing to continue despite potential harms to grizzlies.[7] The court provided limited support for its reasoning that remand to the agencies without vacatur was the appropriate remedy in this case, merely pointing to the consequences of a vacatur which were raised by USFS and FWS and which

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1. 69 F.4th 689, 697, 702 (10th Cir. 2023).
2. *Id.* at 698.
3. *Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species*, 40 Fed. Reg. 31,734 (July 28, 1975). Grizzlies were found to meet the criteria for a threatened species under the Endangered Species Act in part based on "livestock depredations on public and private lands," noting that "[i]ncreasing human use of Yellowstone . . . National Park[ ], as well as livestock use of surrounding national forests . . . will exert increasing detrimental pressures on grizzly bears unless management measures favoring the species are enacted." *Id.*
4. *See Western Watersheds*, 69 F.4th at 698.
5. *Id.* at 723.
6. Petitioners-Appellants' Opening Brief at 2, *Western Watersheds* (No. 22-8031, No. 22-8043).
7. *Id.*

Appellants had not addressed.[8] Nowhere in its decision did the court consider other injunctive relief.[9] With this disposition, the court deviated from general practice of the Tenth Circuit and other circuits of remanding cases to district courts for evaluation of the appropriateness of vacatur or other injunctive relief. Given the substantive nature of the agency deficiencies of concern in *Western Watersheds*, this disposition sets an improper precedent and indicates that projects that seriously violate critical protective statutes may plunge ahead before being corrected.

I. LEGAL BACKGROUND

A. Endangered Species Act

The Endangered Species Act (ESA) requires government agencies to mitigate the risk of agency action jeopardizing the viability of listed endangered or threatened species.[10] Under the ESA, an agency proposing an action which poses risks to the continued existence of listed species is required to consult with FWS. FWS must produce a biological opinion evaluating whether the agency action will likely jeopardize the viability of listed species.[11] If FWS's biological opinion finds the proposed agency action unlikely to jeopardize listed species, but finds that the action is "reasonably certain" to result in a "take" of a listed species, FWS is required to produce an Incidental Take Statement (ITS) in addition to its biological opinion.[12] The ITS provides an acceptable limit for take of a listed species; take within this limit is lawful under Section 10 of the ESA provided that the project complies with a conservation plan.[13] If the ITS's take limit is exceeded, however, the permit allowing incidental take is revoked.[14]

B. National Forest Management Act

The National Forest Management Act (NFMA) mandates that every unit of the National Forest System have a land and resource management plan ("forest plan").[15] The NFMA requires USFS to develop and implement site-specific projects under each forest plan.[16] When a party challenges a project under the NFMA, the court evaluates whether the project is consistent with the relevant unit's forest plan; a project that is inconsistent with the unit's forest plan is in

8. *See Western Watersheds*, 69 F.4th at 722.
9. *See id.* at 722-23.
10. 16 U.S.C. § 1536(a)(2).
11. *Western Watersheds*, 69 F.4th at 699.
12. *Id.* (quoting Appalachian Voices v. United States Dep't of Interior, 25 F.4th 259, 264-65 (4th Cir. 2022)). "Take" is defined by the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).
13. *Western Watersheds*, 69 F.4th at 699; 16 U.S.C. § 1539(a)(1)(B); 16 U.S.C. § 1539(a)(2)(A-B).
14. 16 U.S.C. § 1539(a)(2)(C).
15. 16 U.S.C. § 1604(a); *Western Watersheds*, 69 F.4th at 700.
16. *Western Watersheds*, 69 F.4th at 700.

violation of the NFMA.[17] The forest plan for the Bridger-Teton National Forest, the location of the UGRA Project, includes an objective "[r]equir[ing] that suitable and adequate amounts of forage and cover are retained for wildlife and fish" when USFS authorizes livestock grazing.[18]

C. Administrative Procedure Act

Courts apply the Administrative Procedure Act (APA) in assessing ESA and NFMA claims, as these statutes provide no private cause of action.[19] Under the APA, courts defer to agency decisions except when those decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[20] Among other provisions, the APA requires agencies to document their reasoning to enable courts to evaluate agencies' decision-making.[21]

II. CASE BACKGROUND

The Upper Green River Area Rangeland comprises of six allotments totaling 170,643 acres near Yellowstone in Wyoming.[22] It provides critical habitat for sensitive amphibians, migratory birds, and threatened grizzly bears.[23] In 2017, the Greater Yellowstone Ecosystem was home to an estimated 718 grizzly bears, with the population having an estimated annual growth of between 0 and 2 percent.[24] Since the early 1900s, the region has also been a seasonal grazing land for thousands of head of livestock annually, with USFS issuing grazing permits.[25] Use of the land around Yellowstone National Park

17. *Id.*

18. FS Bridger-Teton National Forest Land Resource Management Plan (U.S.D.A. 2015) [hereinafter FS Bridger-Teton], 150-51.

19. *Western Watersheds*, 69 F.4th at 700.

20. *See id.*; 5 U.S.C. § 557(c)(3)(A). The Tenth Circuit has articulated that agency action is "arbitrary and capricious" if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or if the agency action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Western Watersheds*, 69 F.4th at 700 (quoting Wyoming v. United States Dep't of Agric., 661 F.3d 1209, 1227 (10th Cir. 2011)) (internal quotation marks omitted).

21. 5 U.S.C. § 557(c)(3)(A).

22. *Western Watersheds*, 69 F.4th at 700.

23. Petitioners-Appellants' Opening Brief at 1, *Western Watersheds* (No. 22-8031, No. 22-8043).

24. *Id.* at 10, *Western Watersheds* (No. 22-8031, No. 22-8043). The population grows slowly in part because of the extended time it takes for female grizzlies to reach sexual maturity, the fact that grizzly litters are generally small, and the "lengthy periods between litters." *Id.* Quoting FWS, Petitioners note that "'providing maximum protection for females is essential to [the] recovery' of grizzly bears because females and dependent cubs are key to the species' survival." *Id.* The population of grizzly bears in the Greater Yellowstone Ecosystem "is more sensitive to annual survival of adult females than to any other single vital rate." *Id.* at 11.

25. *Western Watersheds*, 69 F.4th at 700; Brief for Federal Respondents-Appellees at 6, *Western Watersheds* (No. 22-8031, No. 22-8043). *See generally* FS Bridger-Teton National Forest Land Resource Management Plan (U.S.D.A. 2015) at 39 (discussing the reduction in livestock use of the Bridger-Teton National Forest).

(Yellowstone) for livestock grazing is the "economic base" for communities across Western Wyoming.[26]

This use of land in the Greater Yellowstone Ecosystem has come at a cost, particularly to grizzly bears in the Upper Green River Area Rangeland. Grazing within grizzlies' habitat in the UGRA Project area has led to fatal standoffs between bears and ranchers protecting their livestock.[27] In the twenty-year period directly preceding the UGRA Project's approval (1999-2019), thirty-five grizzly bears within the UGRA Project zone were killed due to livestock conflicts.[28] Between 2010 and 2014, more than half of all grizzly bear fatalities related to cattle grazing across the whole of Western Wyoming—an area of over 5.4 million acres—occurred in the UGRA Project area.[29] These takings occurred against a backdrop of an already precarious bear population. As of 2022, five out of the six land allotments comprising the UGRA Project area experienced female grizzly mortality rates that either exceeded or nearly exceeded female grizzly survival rates—a phenomenon known as a "sink habitat."[30]

The UGRA Project approved ten-year livestock grazing permits in the Upper Green River Area Rangeland.[31] FWS's biological opinion provided "conservation measures to help prevent conflicts between livestock and grizzly bears," yet FWS's accompanying ITS permitted incidental take of up to seventy-two grizzlies over that period.[32] This incidental take limit amounted to more than quadruple the rate of livestock-related lethal grizzly bear take of the preceding twenty years.[33] The ITS did not specify a limit or reporting requirements for take of female grizzlies.[34]

A. District Court Cases

In March 2020, the Center for Biological Diversity and the Sierra Club (collectively, "CBD") and the Western Watersheds Project, the Alliance for the Wild Rockies, and Yellowstone to Uintas Connection (collectively, "WWP") separately filed suits in the U.S. District Court for the District of Columbia raising claims that the UGRA Project violated the ESA.[35] The Petitioners

26. FS Bridger-Teton at 38-39.

27. Petitioners-Appellants' Opening Brief at 11, *Western Watersheds* (No. 22-8031, No. 22-8043).

28. *Id.*

29. *Id.*

30. *Id.* at 11-12.

31. *Western Watersheds*, 69 F.4th at 701.

32. *Id.* at 703.

33. There were thirty-five lethal takes of grizzlies within the UGRA Project area between 1999 and 2019. *Id.*; Petitioners-Appellants' Opening Brief at 11, *Western Watersheds* (No. 22-8031, No. 22-8043).

34. *Western Watersheds*, 69 F.4th at 707. Appellants argue that this lack of take limit or reporting requirements for female grizzlies is unlike "nearly every previous [biological opinion] for the [UGRA] allotments since 1999," a reflection of "females' vital importance to the species' survival." Petitioners-Appellants' Opening Brief at 18, *Western Watersheds* (No. 22-8031, No. 22-8043).

35. *Western Watersheds*, 69 F.4th at 703. *See* Center for Biological Diversity v. Bernhardt, No. 20-cv-00855 (APM) and No. 20-cv-00860 (APM), 2020 WL 12674077 (D.D.C. Nov. 28, 2020); W. Watersheds Project v. Bernhardt, 468 F. Supp. 3d 29 (D.D.C. 2020).

claimed FWS's biological opinion was arbitrary and capricious and violated the ESA because it (1) did not sufficiently address lethal take of female grizzly bears; (2) failed to adequately consider the project's potential to exacerbate the area's existing mortality sink for female grizzles; (3) relied on flawed conservation measures; and (4) did not consider broader take of grizzly bears throughout the Greater Yellowstone Ecosystem.[36] Petitioners further claimed that USFS's reliance on the flawed biological opinion was a violation of the ESA.[37] The State of Wyoming and various rancher groups joined the suit on the side of the government.[38] The court declined WWP's motion for a preliminary injunction, consolidated the cases, and granted the defendants' motion to transfer the case to the District of Wyoming.[39]

In August 2021, WWP and CBD filed an amended petition with the district court for the District of Wyoming, reiterating the ESA violation claims and adding claims that USFS had violated the NFMA in greenlighting the UGRA Project.[40] With this new claim, Petitioners argued that USFS's ROD violated the NFMA by not complying with the relevant unit plan in failing to "provide adequate forage and cover for sensitive amphibians and migratory birds."[41] The district court dismissed the petition.[42]

B. Tenth Circuit Appellate Case

Petitioners appealed to the Tenth Circuit Court of Appeals.[43] The court applied the APA's arbitrary and capricious standard in assessing Appellants' ESA and NFMA claims.[44] Ultimately, the court affirmed the lower court's ruling in part, reversed in part, and remanded the matter to USFS and FWS without vacatur, citing disruption to cattle grazing that would result from vacatur.[45]

In partially reversing the district court's holding, the appellate court found that FWS's biological opinion was arbitrary and capricious in failing to set a limit on lethal take of female grizzly bears and inadequately considering the project's potential to exacerbate the area's existing mortality sink for female grizzles.[46] The court further held that USFS's ROD was arbitrary and capricious because it failed to consider whether the project allowed adequate forage and cover for migratory birds.[47] However, the court affirmed the lower court's decision that the biological opinion was not arbitrary and capricious for relying on the

36. *Western Watersheds*, 69 F.4th at 704.
37. *Id.*
38. *Id.* at 703-04.
39. *Id.* at 703.
40. *Id.* at 704. *See* Center for Biological Diversity v. Haaland, 603 F.Supp.3d 1094, 1097-98 (D. Wyo. 2022).
41. *Western Watersheds*, 69 F.4th at 703.
42. *See Center for Biological Diversity v. Haaland*, 603 F.Supp.3d at 1111.
43. *Western Watersheds*, 69 F.4th at 698.
44. *Id.* at 700.
45. *Id*. at 722-23.
46. *Id.* at 700.
47. *Id.* at 698.

conservation measures, and further held that the biological opinion adequately considered lethal take of grizzlies in the Greater Yellowstone Ecosystem as part of its analysis.[48] Finally, the court found that the ROD's analysis of the project's impact on sensitive amphibians was not arbitrary and capricious.[49]

The court applied the *Allied-Signal* test in determining whether vacatur was the appropriate remedy for the identified agency deficiencies.[50] While *Allied-Signal* was decided twenty years prior, the Tenth Circuit did not adopt the test until 2023.[51] *Allied-Signal* provides a two-factor test for vacatur under which courts consider "(1) the seriousness of the agency action's deficiencies (and thus the extent of doubt whether the agency chose correctly), and (2) the disruptive consequences of an interim change that may itself be changed."[52] The court here reasoned that vacatur was inappropriate "because the deficiencies in the biological opinion and the ROD [were] curable upon remand to the agencies, and vacatur would cause disruption."[53]

III. ANALYSIS

Under the *Allied-Signal* test, agencies' deficiencies in assessing and approving the UGRA Project were sufficiently serious for the Court of Appeals to order injunctive relief, which could have meant vacatur of the ROD or remand to the district court to consider vacatur with injunction of the project in the meantime. Courts' use of remand to agencies without injunction of the project at issue should be limited to cases in which only agencies' explanations are deficient. To uphold the purpose of the ESA, the NFMA, and other federal statutes, courts in the future should order injunctive relief and particularly vacatur as the appropriate remedy where agency action has substantively violated federal law.

48. *Id.* at 704.

49. *Id.* at 698.

50. *Id.* at 722; *see* Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993). In *Allied-Signal*, the D.C. Circuit reviewed a Nuclear Regulatory Commission action in the context of a petition claiming that the Commission had violated the Omnibus Reconciliation Act, acting in an arbitrary and capricious manner and failing to allocate costs "fairly and equitably" among those who receive the Commission's "regulatory services." 988 F.2d at 148. Relying on *International Union, UMW v. FMSHA*, the *Allied-Signal* court articulated a test to determine the appropriateness of vacatur in a case of agency deficiencies. *Id.* at 150-52; *see* Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin., 920 F.2d 960, 966–67 (D.C. Cir. 1990).

51. The test was first adopted by the Tenth Circuit in February 2023, in Diné Citizens Against Ruining Our Env't v. Haaland. *See* 59 F.4th 1016, 1025 (10th Cir. 2023). As of the date that Appellants and Appellees in *Western Watersheds* submitted their final briefs to the court in late 2022, the *Allied-Signal* test had yet to be adopted by the Tenth Circuit. *See* Reply Brief of Appellants Center for Biological Diversity and Sierra Club at 21, *Western Watersheds* (No. 22-8031, No. 22-8043).

52. *Western Watersheds*, 69 F.4th at 722; *see also Allied-Signal*, 988 F. 2d at 150-151.

53. *Western Watersheds*, 69 F.4th at 722-23.

A. Remand with Vacatur is the Typical Disposition for Deficient Agency Action

The Supreme Court has reasoned that an agency decision which "is not sustainable on the administrative record made . . . must be vacated and . . . remanded for further consideration."[54] As the Tenth Circuit Court of Appeals itself wrote in another 2023 opinion, many courts consider vacatur to be the "preferred remedy under the APA" for unlawful agency action.[55] Within the Federal, District of Columbia, First, Fifth, Ninth, Tenth, and Eleventh circuits, disposing of cases through remand *without* vacatur is a less common but not unheard-of practice in cases involving agency actions that are inadequately explained or otherwise procedurally deficient.[56]

In *Western Watersheds*, the court remanded directly to the agencies (FWS and USFS) and declined to vacate.[57] Direct remand to agencies without vacatur is a departure for the Court of Appeals for the Tenth Circuit.[58] In *Diné Citizens*, the first Tenth Circuit Court of Appeals case which adopted the *Allied-Signal* test and which was decided mere months prior to *Western Watersheds*, the court noted that "[i]n the event the district court concludes vacatur is not appropriate under that test, it should determine whether injunctive relief is warranted."[59]

The agency action at issue in *Western Watersheds* was *substantively* deficient under federal law rather than being deficient merely in terms of explanation.[60] In holding USFS's reliance on FWS's biological opinion to be arbitrary and capricious, the court pointed to the fact that the biological opinion

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54. *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973)).

55. *Diné Citizens*, 59 F.4th at 1048; *see also WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017) (noting that "[v]acatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts"); Sierra Club v. Van Antwerp, 526 F.3d 1353, 1369 (11th Cir. 2008) (Kravitch, J., concurring in part and dissenting in part) (referring to vacatur as the "ordinary APA remedy"); Southeast Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 654 (9th Cir. 2007), *rev'd on other grounds* 557 U.S. 261 (2009) (referring to vacatur and remand to the agency as "the normal remedy for an unlawful agency action [under the APA].").

56. *See, e.g.*, Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380 (Fed.Cir. 2001); *Allied-Signal*, 988 F.2d at 150; Cent. Me. Power Co. v. Fed. Energy Regul. Comm'n, 252 F.3d 34, 48 (1st Cir. 2001); Cent. & S.W. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000); Cal. Cmtys. Against Toxics v. EPA, 688 F.3d 989, 994 (9th Cir. 2012) (per curiam); *Diné Citizens*, 59 F.4th at 1029; Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1290 (11th Cir. 2015).

57. 69 F.4th at 723. Indeed, CBD specifically requested that the court "temporarily enjoin the . . . [p]roject and remand to the district court to apply the *Allied-Signal* test to determine if vacatur is appropriate." *Id.* at 722 n.20. The court "decline[d] to do so based on [its] determination of remedy." *Id.*

58. When the court has found agency deficiencies in other cases similar to *Western Watersheds*, the cases are typically remanded to district courts to reconsider whether vacatur is an appropriate remedy under the *Allied-Signal* test or remanded to district courts with instructions to vacate. *See, e.g. Diné Citizens*, 59 F.4th at 1050 (remanding to district court "to apply the *Allied-Signal* factors and the test for injunctive relief"); *WildEarth*, 870 F.3d at 1239-40 (remanding to district court at district court's discretion to vacate); Utah Env't Cong. v. Bosworth, 439 F.3d 1184, 1195 (10th Cir. 2006) (remanding to district court with instructions to vacate).

59. *Diné Citizens*, 59 F.4th at 1025.

60. *See Western Watersheds*, 69 F.4th at 698.

"*failed to consider* (1) a limit on lethal take of female grizzly bears, and (2) the UGRA Project's likely contribution to the already-existing mortality sink for female grizzly bears in the Project area."[61] This failure is distinct from a failure to adequately explain.[62] Furthermore, regarding the NFMA violation of insufficient forage and cover for migratory birds, the court explicitly noted "this was not a matter of diversity of opinion among the [US]FS's experts . . . [rather,] the [US]FS *ignored its own expert*[ ] by failing to address the concerns."[63] Nowhere in its reasoning did the court stipulate that these violations constituted insufficient explanation on the part of agencies.[64] Rather, the arbitrary and capricious agency actions were substantive failures to consider and address concerns that cast doubt on whether the agencies "chose correctly."[65]

B. Remand to Agencies Without Vacatur is Overly Permissive of Violations of Federal Law

The court nominally applied the *Allied-Signal* test in reaching its decision to remand to agencies without vacatur, but in fact gravely departed from the *Allied-Signal* test by practically ignoring the test's first factor: "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)."[66] The court cited precedent from the D.C. Circuit that "[a] strong showing of one factor may obviate the need to find a similar showing in another."[67] Taking this invitation, in considering *Allied-Signal*'s first prong the

61. *Id.* at 716 (emphasis added). Compare this finding to the court's treatment of the Appellants' claim that FWS's biological opinion was arbitrary and capricious based on lethal take of grizzly bears elsewhere in the Greater Yellowstone Ecosystem. The court rejected the latter claim, noting that "[a]lthough the [biological opinion] *could have been more complete* by including an accounting of all concurrently authorized lethal takes in the [Greater Yellowstone Ecosystem], this deficit does not amount to FWS's *entirely fail[ing] to consider* anticipated take elsewhere in the [Greater Yellowstone Ecosystem]." *Id.* at 715 (internal citation omitted) (emphasis added).

62. Other circuit courts generally remand without vacatur directly to agencies only when the deficiency in agency action is a matter of insufficient explanation rather than a substantive deficiency, as "[a]n inadequately supported rule . . . need not necessarily be vacated." *Allied-Signal*, 988 F.2d at 150*; see also Cent. Me. Power Co.*, 252 F.3d at 47-48 (noting that "a remand is appropriate for further explanation."); *Nat'l Org. of Veterans' Advocates*, 260 F.3d at 1380 (reasoning that "[i]t may be that the agency can provide a reasonable explanation for its decision."). In these cases, courts remanded without vacatur, reasoning that the agency deficiencies at issue were a matter of the agencies failing to fully explain their actions. *Allied-Signal*, 988 F.2d at 150*; Cent. Me. Power Co.*, 252 F.3d at 47-48; *Nat'l Org. of Veterans' Advocates*, 260 F.3d at 1380.

63. *Western Watersheds*, 69 F.4th at 721 (emphasis added).

64. Only one of the deficiencies held by the court—the biological opinion's lack of consideration of a limit on take for female grizzlies—was held arbitrary and capricious based on a lack of explanation. *See Western Watersheds*, 69 F.4th at 708 (noting that "[t]he [biological opinion] did not contain the explanation now offered in the Federal Appellees' brief . . . [a]nd without such an explanation in the [biological opinion] itself, we cannot credit a post-hoc rationalization stated by counsel in briefs.") (internal quotation omitted).

65. *See Allied-Signal*, 988 F.2d at 150.

66. *See id.* (quoting Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin., 920 F.2d 960. 967 (D.C. Cir. 1990)).

67. *Western Watersheds*, 69 F.4th at 722 (quoting Am. Bankers Ass'n v. Nat'l Credit Union Admin., 934 F.3d 649, 674 (D.C. Cir. 2019)).

court merely quoted the Appellee Brief: the "FWS or the Forest Service would be able to cure such deficiencies on remand."[68] The court provided no further support for this contention.

The court then relied heavily on *Allied-Signal*'s second factor to arrive at its decision not to vacate: "the disruptive consequences" of vacatur.[69] While the Appellees raised concerns regarding the consequences of a vacatur, including disruption to the seasonal pattern of rotation of cattle grazing and crop growing, Appellants did not directly respond to these concerns.[70] Instead, Appellants "argue[d] that vacatur would adhere to the [plain] language of the APA that courts shall hold unlawful and set aside agency action found to be arbitrary or capricious."[71] The court was unconvinced, dispensing with Appellants' argument by citing to *Diné Citizens*: "vacatur is not always the appropriate remedy."[72] Having carefully weighed Appellants' claims of the potential disruptive consequences *of the project* and agreed that USFS and FWS acted arbitrarily and capriciously and violated the ESA and NFMA over the course of the preceding thirty-three pages, the court dispensed with the question of whether vacatur or other injunctive relief was an appropriate remedy in a matter of perfunctory sentences.[73]

CONCLUSION

The Tenth Circuit Court of Appeals granted FWS and USFS significant leeway for post hoc due diligence in this case, allowing the UGRA Project to proceed despite substantive violations of the ESA and the NFMA. At least two bear deaths have already occurred under the UGRA Project as affirmed by this decision.[74] The UGRA Project allows for quadrupled lethal take of grizzlies over the rate seen in the last two decades in the Upper Green River Area Rangeland, one of the few remaining habitats for grizzlies in the contiguous United States and already a hotbed site for fatal rancher/bear conflict.[75] More conflict is sure to come.

Western Watersheds is the first full application of the *Allied-Signal* test in the Tenth Circuit.[76] With this circuit constituting over 15 percent of the United States' total area and over 18 percent of the nation's federal land, the case sets

68. *See id.* (quoting Brief for Federal Respondents-Appellees at 53, *Western Watersheds* (No. 22-8031, No. 22-8043)).

69. *See Allied-Signal*, 988 F.2d at 150.

70. *Western Watersheds*, 69 F.4th at 722.

71. *Id.* (internal quotation omitted).

72. *Id.* (quoting *Diné Citizens*, 59 F.4th at 1049).

73. *See Western Watersheds*, 69 F.4th at 722.

74. Petitioners-Appellants' Opening Brief at 18, *Western Watersheds* (No. 22-8031, No. 22-8043).

75. The Greater Yellowstone Ecosystem is one of five population areas for grizzlies, accounting for an estimated 718 bears in 2017 out of a total population of "more than 2,000." *Western Watersheds*, 69 F.4th at 705.

76. The first application was *Diné Citizens*. *See* 59 F.4th at 1050 (adopting *Allied-Signal* test but remanding to the district court to apply the test). The case was remanded in February 2023, *see generally id.*, and the district court has not yet ruled on the remanded case.

an immensely important – and problematic – precedent for how *Allied-Signal* is applied across a large swath of the American Mountain West moving forward.[77] If replicated in future decisions, *Western Watershed*'s primary focus on the *Allied-Signal* test's second factor at the expense of its first factor will mean that substantively flawed agency actions negatively impacting listed species are cleared to proceed by courts.

While injunctive relief is not always warranted by agency deficiencies under the ESA and the NFMA and remand without vacatur can be a useful approach to achieve a tailored remedy, remand to agencies without vacatur or any other injunction in the context of substantive deficiencies sets an inadvisable precedent. Future applications of the *Allied-Systems* test for remand without vacatur should clarify the standard under which courts should evaluate other forms of injunction.

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77. The Tenth Circuit states (CO, KS, NM, OK, UT, WY) total 355,890,560 acres in area, with the United States' total area being 2,271,343,360 acres. Federally-held land in the Tenth Circuit totals 112,108,572 acres, out of a total of 615,311,596 federal acres nation-wide. Within the contiguous United States/lower forty-eight states, the Tenth Circuit accounts for 18.7 percent of total landmass (355,890,560 acres out of 1,901,756,160 total acres in the lower 48 states) and 28.6 percent of federally owned land (112,108,572 acres out of 391,815,186 total federal acres in the lower 48 states). CAROL HARDY VINCENT & LAURA A. HANSON, R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7-9 (Cong. Rsch. Serv. 2020).

Stripping the Bear's Necessities: A Grizzly Future for Species Recovery Plans

INTRODUCTION

In *Center for Biological Diversity v. Haaland* (*Center v. Haaland*), the Ninth Circuit severely limited the power of organizations to subject agency recovery plans to judicial review. Holding that a grizzly bear recovery plan was not "final agency action," the Ninth Circuit effectively barred litigation against government agencies' recovery plans for threatened and endangered species. In the case's aftermath, government agencies have no obligation to act on or respond to public comments petitioning for review of species recovery plans. This holding severs the relationship between the public and government agencies for endangered species protection. *Center v. Haaland* has stripped away even more power from already ineffective recovery plans, leaving it unclear when–if ever–agency recovery plans can be subjected to judicial review.

I. BACKGROUND

A. The Endangered Species Act

The Endangered Species Act (ESA) requires the Secretary of the Interior to adopt a recovery plan for any endangered or threatened species.[1] These recovery plans are intended to promote the "conservation and survival" of these species by laying out a series of measures and objectives that aim to eventually remove the species from the endangered or threatened list. The ESA requires the Secretary to "provide public notice and an opportunity for public review and comment" before approving a new or revised recovery plan.[2] Agencies are "obligated to work toward the goals set in . . . recovery plan[s]."[3] The U.S. Fish and Wildlife Service (the "Service"), a bureau within the Department of the Interior, is one of the agencies that implements recovery plans.

B. The Administrative Procedure Act

The Administrative Procedure Act (APA), which governs the procedures of federal administrative agencies, binds the Service in its implementation of these

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1. 16 U.S.C. § 1533(f)(1).
2. *Id.* § 1533(f)(4).
3. Ctr. for Biological Diversity v. Haaland (*Center v. Haaland*), 58 F.4th 412, 418 (9th Cir. 2023) (quoting Friends of Blackwater v. Salazar (*Blackwater*), 691 F.3d 428, 437 (D.C. Cir. 2012)).

recovery plans.[4] The APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[5] The term "rule" is "defined broadly"[6] as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."[7] When an interested person petitions for the "issuance, amendment, or repeal of a rule," the APA grants courts jurisdiction to review a rule that is a "final agency action for which there is no other adequate remedy in a court . . . ."[8] In assessing whether an agency action is final, courts ask whether the action both "mark[s] the consummation of the agency's decisionmaking process" and "determines rights or obligations . . . from which legal consequences will flow."[9] When a final agency action is reviewed, courts determine whether the agency acted in a way that was "arbitrary [or] capricious."[10] In that case, the agency's action is remanded and the agency must reconsider its decision and, at the very least, provide further reasoning and justification for its action.[11]

C. Ursos arctos horribilis

Ursus actos horribilis, or the grizzly bear, once ranged throughout most of western North America.[12] By the 1930s, however, targeted efforts to eradicate the grizzly bear and other large carnivores reduced the grizzly bear's range to less than two percent of its original size. Its population declined from over 50,000 bears to less than 1,000 in the lower 48 states.[13] The Service identified the grizzly bear as "threatened" in 1975.[14] In 1982, the Service adopted the original Grizzly Bear Recovery Plan (the "Plan"), identifying four initial recovery zones of the grizzly bear's historical range with the goal of reintroducing grizzly bears to those zones.[15] The Service revised the Plan in 1993, issuing a Plan Supplement that added two more geographic regions.[16] The Service has since issued additional Supplements detailing recovery criteria for the grizzly bear,[17] and

4. *See* 5 U.S.C. §§ 556-58 (codifying necessary procedures for hearing evidence before establishing a new rule).

5. *Id.* § 553(e).

6. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 95 (2015).

7. 5 U.S.C. § 551(4).

8. *Id.* § 704.

9. Bennett v. Spear, 520 U.S. 154, 178 (1997) (internal quotation marks omitted) (citing Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 72 (1970)).

10. 5 U.S.C. § 706(2)(A).

11. *Center v. Haaland*, 58 F.4th at 428 ("Further, when a court concludes that an agency's denial of a rulemaking petition was arbitrary and capricious, the remedy is limited to remanding the matter to the agency to further explain or reconsider its decision to deny the petition.").

12. U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY PLAN ii (1993).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 167.

17. *See* Endangered and Threatened Wildlife and Plants; Draft Supplement to the Grizzly Bear Recovery Plan: Habitat-Based Recovery Criteria for the Northern Continental Divide Ecosystem, 82 Fed.

published a five-year review of the Plan in 2011, noting that other areas of the grizzly bear's historic range "should be evaluated to determine their habitat suitability for grizzly bear recovery."[18] However, the Service has not revised the Plan since 1993 to include any additional regions of the grizzly bear's historic range. As of the Service's 2021 Report, fewer than 3,000 grizzly bears remain in the lower 48 states.[19]

II. LEGAL HISTORY

A. Center for Biological Diversity v. Bernhardt

In 2014, the Center for Biological Diversity (the "Center") petitioned the Service to revise the Plan under the APA on the grounds that the Plan was inadequate to conserve grizzly bear populations.[20] The Center contended that the Service's Plan would leave grizzly bears "endangered across significant portions of their range," so it asked the Service to revise and update the Plan to include the grizzly bear's historic range.[21]

The Service denied this petition, asserting that "neither the ESA nor the APA authorizes petitions to create or revise recovery plans."[22] The Service added that it had satisfied its "statutory responsibilities" in planning and implementing the Plan.[23] The Center then brought suit, asking the court to find that the Service's denial was a "final agency action" subject to judicial review and to remand the issue back to the Service to reconsider its denial of the Center's petition.[24] The District Court for the District of Montana granted summary judgment for the Service on the grounds that an agency recovery plan was not a rule "because it does not, in and of itself, create change."[25] Because the Plan was not a "rule," the court held that it had no authority to review whether either the Plan or the Service's denial were "arbitrary and capricious" final agency actions.[26]

Reg. 58,444, 58,445 (Dec. 12, 2017) ("Supplements to the Recovery Plan were approved in 1997, 1998, 2007, and 2017.").

18. U.S. FISH & WILDLIFE SERV., 5-YEAR REVIEW: SUMMARY AND EVALUATION 107 (2011).

19. U.S. FISH & WILDLIFE SERV., *Grizzly Bear Recovery Program: 2021 Annual Report* 3-9 (2021) (estimating 1,069 in the Yellowstone area, 1,114 in northwest Montana, at least 50 near the border of Idaho and Montana, and at least 44 near the intersection of Idaho, Washington, and British Columbia).

20. *Center v. Haaland*, 58 F.4th at 415.

21. *Id.*

22. *Id.* at 416.

23. *Id.*

24. *Cf. id.* at 416-17 ("Because the Center does not claim that the Service's denial of its petition was otherwise 'made reviewable by statute,' the sole issue for decision is whether denial of the petition is 'final agency action.'").

25. Center for Biological Diversity v. Bernhardt, 509 F. Supp. 3d 1256, 1267 (D. Mont. 2020).

26. *Id.* at 1265.

B. Center for Biological Diversity v. Haaland

The Center appealed the district court's ruling to the Ninth Circuit Court of Appeals,[27] which rejected the district court's reasoning that the Plan was not a rule under the APA.[28] The Ninth Circuit held that the APA's definition of rule, "the whole or a part of an agency statement … designed to implement, interpret, or prescribe law or policy,"[29] is a "broad" definition which applies to "nearly every statement an agency may make."[30] Species recovery plans fall under that "broad umbrella."[31]

However, the Ninth Circuit upheld the district court's decision on other grounds, holding that neither the Service's grizzly bear recovery plan nor the Service's denial of the Center's petition to amend the Plan was "final agency action."[32] The court reasoned that the issuance of Plan Supplements indicated that the Service had not treated the 1993 version of the Plan as its "last step" and held that, consequently, the Plan was not "final agency action."[33] Essentially, because the Service's denial of the Center's petition did not "bind anyone to anything," the court held that the denial was not "final agency action."[34] Because neither the Plan nor the Service's denial was "final agency action" subject to review, the Ninth Circuit held that it had no authority to review whether either was arbitrary and capricious and held for the Service.[35]

In coming to its decision, the Ninth Circuit relied on its prior decision in *Conservation Congress v. Finley* (*Conservation Congress*), where it held that recovery plans are not "binding authorities."[36] In *Conservation Congress*, the Ninth Circuit held that because the Service had "specifically considered" information in the Spotted Owl Recovery Plan, it had fulfilled the statutory obligations the ESA imposed.[37] The *Conservation Congress* opinion went on to broadly state that while recovery plans "provide guidance[,] … they are not binding authorities," holding that agencies have no obligation to adopt every recommendation made in recovery plans.[38]

In both *Conservation Congress* and *Center v. Haaland*, the Ninth Circuit cited *Friends of Blackwater v. Salazar* (*Blackwater*) as authority that a recovery plan is a "non-binding document."[39] In *Blackwater*, the D.C. Court of Appeals reviewed the Service's decision to delist the West Virginia Northern Flying

27. *See Center v. Haaland*, 58 F.4th. at 413.
28. *Id.* at 416.
29. 5 U.S.C. § 551(4).
30. Batterton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980).
31. *Center v. Haaland*, 58 F.4th at 416.
32. *Id.* at 420.
33. *Id.* at 417.
34. *Id.* at 419.
35. *Id.*
36. Conservation Congress v. Finley (*Conservation Congress*), 774 F.3d 611, 614 (9th Cir. 2014).
37. *Id.* at 620.
38. *Id.* at 614.
39. *Id.*; *Center v. Haaland*, 58 F.4th at 418; *see Blackwater*, 691 F.3d at 434.

Squirrel (the "Squirrel") from the endangered species list.[40] In *Blackwater*, the Service had determined that the Squirrel was no longer endangered, even though all the "objective, measurable" criteria that had been set out in the initial recovery plan for the Squirrel had not been met.[41] The court in *Blackwater* held that although a recovery plan constituted a binding obligation while the species was still endangered, the Service's decision to delist the Squirrel based on criteria other than what was initially laid out in the Service's recovery plan was not arbitrary or capricious.[42]

The court in *Center v. Haaland* followed *Conservation Congress*'s interpretation of *Blackwater*. It held for the Service, declaring that it had no jurisdiction to review whether the Service's refusal to amend its recovery plan was "arbitrary and capricious."

III. ANALYSIS

In *Conservation Congress*, the Ninth Circuit fundamentally misinterpreted *Blackwater* and the ESA, weakening species recovery plans. *Center v. Haaland* took this misinterpretation even further, severely limiting environmental advocates' ability to petition for changes to recovery plans.

In both *Conservation Congress* and *Center v. Haaland*, the Ninth Circuit relied on *Blackwater* to support the proposition that recovery plans are non-binding.[43] *Blackwater* held that the Service could delist the Squirrel from the endangered species list, even though all the "objective, measurable criteria" set forth in the species recovery plan had not been met.[44] However, *Blackwater* also explicitly held that recovery plans do have binding effects prior to the delisting of a species.[45] The ESA places a "mandatory obligation[]" upon the Secretary, who "must implement the plan" set out in a recovery plan.[46] *Blackwater* stated that "as long as a species is listed as endangered, the agency is obligated to work toward the goals set in its recovery plan."[47] While *Conservation Congress* accurately stated that agencies are not required to follow through with every recommendation laid out in their initial recovery plans, the court fundamentally erred in *Center v. Haaland* by holding that recovery plans themselves are never binding documents.[48]

In *Center v. Haaland*, the Ninth Circuit stretched its misinterpretation of *Blackwater* even further. In *Center v. Haaland*, the court took *Blackwater*'s holding that recovery plans do not have binding effects when determining whether to delist a species and concluded that recovery plans in their entirety are

40. *Blackwater* at 429.
41. *Id.* at 432.
42. *Id.* at 429.
43. *Conservation Congress*, 774 F.3d at 614; *Center v. Haaland*, 58 F.4th at 418; *see Blackwater*, 691 F.3d at 434.
44. *Blackwater*, 691 F.3d at 433.
45. *See id.* at 429.
46. *Id.* at 436-37.
47. *Id.*
48. *See Conservation Congress*, 774 F.3d at 614.

"non-binding document[s]."[49] This interpretation that recovery plans are non-binding led to the conclusion that decisions made by agencies relating to recovery plans are non-reviewable.[50] *Blackwater*, however, explicitly held that the Service has "statutory obligations to create and to implement a recovery plan and to use notice and comment in order to revise such a plan."[51] This language clearly indicates that the ESA has a binding effect upon agencies and that agencies are not only obligated to create recovery plans but to follow through with them.[52] The court in *Center v. Haaland* disregarded and directly contradicted *Blackwater*'s conclusion that agencies are obligated to create and implement recovery plans, instead barring organizations from petitioning agencies to "revise such a plan."[53] Both *Conservation Congress* and *Center v. Haaland* fundamentally misinterpreted *Blackwater*, applying *Blackwater*'s analysis for delisting a species and applying it to the implementation of recovery plans while a species is still endangered.[54]

Center v. Haaland leaves the Service's obligation to develop recovery plans for endangered species intact.[55] However, the decision results in the agencies having no actual obligation to follow through with recovery plans and leaves environmental groups powerless to petition agencies for change. In evaluating whether an agency's decision is "final agency action," courts ask whether an action was "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[56] When the Service decided that the Center did not have the right to petition to amend the Plan, it determined that neither the Center, nor any other environmental organization, nor any interested member of the public, has the right to petition for improvements to species recovery plans.[57] In *Center v. Haaland*, the Ninth Circuit upheld that denial, severing public engagement from the agency's decision making.

CONCLUSION

The court's decision in *Center v. Haaland* effectively severed public involvement from agency decision making when it comes to recovery plans. The fate of endangered species, which Congress declared to have "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,"[58] are left to the unchecked whims of agencies. By holding that

49. *Blackwater*, 691 F.3d at 434; *see Center v. Haaland*, 58 F.4th at 416 (9th Cir. 2023).

50. *See Center v. Haaland*, 58 F. 4th at 418.

51. *Blackwater*, 691 F.3d at 434.

52. *See id.*

53. *Compare Center v. Haaland*, 58 F.4th at 417-18 (providing no opportunity to petition), *with Blackwater*, 691 F.3d at 434 (requiring notice-and-comment period).

54. *See Conservation Congress*, 774 F.3d at 614 (conflating *Blackwater's* discussion of recovery plans and its treatment of delisting analysis); *Center v. Haaland*, 58 F.4th at 418 (same).

55. *See Center v. Haaland*, 58 F. 4th at 414.

56. *Bennett v. Spear*, 520 U.S. at 178 (1997) (quoting *Port of Boston Marine Terminal Ass'n*., 400 U.S. at 72).

57. *See Center v. Haaland*, 58 F. 4th at 426 (Sung, J, dissenting).

58. 16 U.S.C. § 1531.

the public cannot petition for changes to recovery plans and that agencies are not obligated to follow through with them, *Center v. Haaland* strips away the final obligations mandated by the ESA for recovery plans in the Ninth Circuit. In coming to its conclusion, *Center v. Haaland* leaves recovery plans both non-binding and impossible to review in the courts. Are they arbitrary? Are they capricious? The Ninth Circuit has declined to find out, leaving ultimate power unchecked in the hands of government agencies.

Ben Shipman