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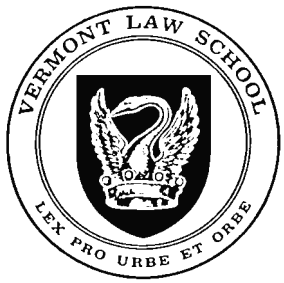

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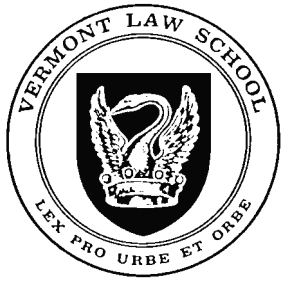

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PROPRIETARY AND SOVEREIGN PUBLIC TRUST OBLIGATIONS: FROM JUSTINIAN AND HALE TO *LAMPREY* AND OSWEGO LAKE

Michael C. Blumm[*†] & Courtney Engel[**]

ABSTRACT

The public trust doctrine (PTD) has sometimes been mischaracterized as applicable only to state-owned resources. But this "proprietary PTD" is only half of the scope of the PTD, for the doctrine also contains a "sovereign" component. The latter has been recognized for over a century and is not dependent on state ownership of the public trust res.

This article examines the evolution of both the proprietary and sovereign PTDs. We first trace the development of the former from Roman and English law through several prominent and recent decisions of the U.S. Supreme Court. We then turn to the lesser-recognized sovereign PTD, which grew out of a largely overlooked, but highly influential, decision of the Minnesota Supreme Court. The article explains the legacy of that case, Lamprey v. Metcalf*, which established the now-dominant state-law view that the PTD applies to waterbodies whose beds are privately owned. Unlike the proprietary PTD, which employs the federal test for title navigability, the sovereign usufructuary PTD is not tethered to the federal title test, but is instead the product of state definitions of navigability, which often are much broader than the federal test.*

The article assesses the implications of widespread judicial recognition of the sovereign PTD as distinct from the proprietary PTD, spotlighting a case pending before the Oregon Supreme Court involving a 400-acre Oregon lake, Oswego Lake, in suburban Portland. But the implications are much broader than that controversy and point to the application of the PTD to all resources of public concern like wildlife, groundwater, and the atmosphere.

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[*] Jeffrey Bain Faculty Scholar & Professor of Law, Lewis & Clark Law School.

† A draft of this article was presented to the public trust symposium held at George Washington University Law School on March 16, 2018. Thanks to Lee Paddock for the invitation and to co-panelists Rick Frank and Dan Siegel for their comments.

[**] 3L, Lewis & Clark Law School; B.A. 2005 Boston College.

INTRODUCTION

The public trust doctrine (PTD), an ancient precept widely recognized in both civil and common law jurisdictions,[1] has been often misunderstood as a threat to private property[2] or an unwarranted authorization of judicial allocation of natural resources.[3] In truth, the PTD is an inherent limit on sovereign authority recognized in constitutions and statutes throughout the

1. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876); MAGNA CARTA of 1215, ch. 33, https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1 (providing a full-text translation of the 1215 edition of the Magna Carta); MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 333–64 (2d ed. 2015) (discussing how courts in various countries have applied the PTD); Lord Chief-Justice Hale, *A Treatise In Three Parts*, *in* A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 9 (Francis Hargrave ed., T. Wright 1787) [hereinafter Hale, *A Treatise*]; Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 760–801 (2011) (discussing the PTD in India, Pakistan, Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 428–29 (1989) (tracing the roots of the PTD to 13th century Spain, 11th Century France, the Ch'in dynasty 200 years before Christ, and beyond).

2. *See* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 666 (2010) [hereinafter Blumm, *Public Trust and Private Property*] (casting the PTD as "not so much an anti-privatization concept as a vehicle for mediating between public and private rights in important natural resources"); *see also infra* text accompanying notes 131–34 (discussing *Movrich v. Lobermeier*, a recent PTD decision of the Wisconsin Supreme Court ruling that the PTD added rights to a private landowner).

3. *See, e.g.*, James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 544 (1989) (contending that the PTD undermines the democratic choices of public officials).

world.[4] Its widespread appeal is due to its dual purposes of avoiding monopoly control of essential natural resources[5] and requiring sovereign protection of those resources.[6]

Although the PTD has a sound basis in the sovereign's proprietary ownership of natural resources, its scope is not limited to resources owned in fee by governments. Failure to understand the scope of the PTD has led some jurisdictions—like the state of Oregon—to erroneously claim no trust duties absent state ownership.[7] This article shows that the PTD has not been limited to proprietary ownership but instead extends to public rights in non-governmentally owned resources by imposing sovereign duties of ensuring access and resource protection. Understanding the nature of these sovereign duties clarifies the essential usufructuary nature of the PTD's *jus publicum* and illustrates how and why the PTD coexists with private property.

Thus, there are actually two parts to the PTD: a proprietary land ownership side and a sovereign usufructuary side. This analysis compares and contrasts the two in an effort to provide a coherent explanation of the public's PTD rights and the sovereign's obligations to protect those rights and the dependent resources.

The article begins with an explanation of the proprietary side of the PTD as public rights to navigate and to fish that have long been thought to be rights ancillary to public ownership. As public rights became synonymous

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4. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 447 (Haw. 2000) (interpreting the Hawai'ian Constitution to protect all natural resources under the PTD, including groundwater allocation); Juliana v. United States, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) ("In its broadest sense, the term 'public trust' refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers."), *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017); Waweru v. Republic (2006) K.L.R. 1, 10, 12 (H.C.K.) (Kenya); Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (S.C., July 30, 1993) (Phil.) (en banc) (recognizing the express right of the people to a "balanced and healthful ecology" in the Philippines' 1987 Constitution); *Cf.* S. AFR. CONST., 1996, § 24, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf (recognizing a right "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures . . .").

5. *See* Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENVTL. AFF. L. REV. 1, 2 (2017) ("[A]ntimonopoly is the essence of the PTD, preventing privatization of certain resources used by the public . . . .").

6. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983); *Waiahole Ditch*, 9 P.3d at 447–48 (extending the PTD to all water resources in the state); Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 938 (Pa. 2017) (protecting dedicated state environmental trust funds from proprietary dissipation).

7. *See infra* notes 147–57 and accompanying text (criticizing the state's argument that the PTD applies only to land owned by the sovereign).

with waters that were navigable,[8] the definition of navigable waters became determinative, as evidenced in numerous 19th century decisions.[9] Moreover, the U.S. Supreme Court, in what is now widely known as the PTD's lodestar case,[10] ruled that public rights in navigable waters were not easily extinguished.[11] The proprietary ownership side of the PTD still generates considerable case law, as the ownership of the beds of waterways often has substantial pecuniary consequences.[12]

But the sovereign usufructuary side of the PTD—which is not dependent on public land ownership—was evident even before the end of the 19th century. The U.S. Supreme Court established public ownership of wildlife regardless of land ownership in 1896.[13] Moreover, in a remarkable decision three years earlier, the Minnesota Supreme Court decided that navigability was a concept of state law, and that recreational use was sufficient to establish the navigability of a waterbody irrespective of the ownership of the underlying lakebed.[14] The decision led to widespread judicial recognition that the public had rights to access and use waterbodies whose beds were privately owned.[15] Both cases, widely adopted in American states,[16] should have established the sovereign usufructuary nature of the PTD. However, as evidenced by the position of the Oregon government in an ongoing case involving lake access, they apparently have been misunderstood.[17] This article aims to correct that error.

Section I begins with an analysis of the ancient articulation of the PTD in the Justinian Institutes over 1500 years ago because that proclamation

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8. Bertram C. Frey, *The Public Trust in Public Waterways*, 7 URBAN L. ANN. 219, 224 n.22 (1974) (quoting *The River Banne*, 80 Eng. Rep. 540 (K.B. 1611)); *see infra* notes 34, 41–44 and accompanying text (discussing public rights in navigable waters). *But see infra* notes 34, 41 (discussing how the link between public rights in waterways and ownership of the underlying bedlands may have been based on a misinterpretation of English law).

9. *See infra* text accompanying notes 39–44 (discussing the development of the definition of navigable waters).

10. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970) [hereinafter Sax, *Effective Judicial Intervention*] (describing the *Illinois Central* case as the "[l]odestar in American Public Trust Law").

11. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

12. *See, e.g.*, *infra* notes 56, 78, 83 (discussing several cases addressing ownership of the beds of waterways).

13. Geer v. Connecticut, 161 U.S. 519, 529 (1896), *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

14. Lamprey v. Metcalf, 53 N.W. 1139, 1143–44 (Minn. 1893).

15. *See infra* Part III.B (describing how numerous state courts adopted *Lamprey*'s reasoning).

16. *See infra* notes 117–30 and accompanying text (explaining that California, South Dakota, North Dakota, Arkansas, Ohio, Missouri, Maine, Montana, and Wisconsin adopted *Lamprey*'s recreational boating test); Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1451 (2013) (discussing *Geer*'s widespread adoption by states).

17. Kramer v. City of Lake Oswego (*Kramer II*), 395 P.3d 592, 597 (Or. Ct. App. 2017).

contains the seeds of the dual PTD. The discussion briefly examines both the Magna Carta and the Forest Charter—which brought Justinian's principles to Britain—as well as Lord Matthew Hale's interpretation of the sovereign's trust obligations—which proved influential to American courts. Section II supplies some background on the evolution of the proprietary side of the PTD in the U.S. in the 19th century, culminating in the non-alienation rule the Supreme Court articulated in *Illinois Central Railroad v. Illinois*. Section III then focuses on the Minnesota Supreme Court's unheralded decision in *Lamprey v. Metcalf*, in what should be recognized as the sovereign usufructuary PTD's lodestar case. Section IV explains *Lamprey*'s considerable legacy in protecting and promoting public access to public resources. The article concludes with a comparative assessment of the proprietary and sovereign PTDs, revisiting the venerable concepts of *jus publicum* and *jus privatum*.

I. THE JUSTINIAN PROCLAMATION AND ITS LEGACY

The origins of the PTD lie at least as far back as the Roman Emperor Justinian's Institutes in the 6th century:

> By the law of nature these things are common to [all] mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations.[18]

Although this dictum is frequently quoted, it warrants some examination, as there are several items worthy of note. First, as often observed, Justinian's declaration includes air, as noted by the Oregon federal district court in the recent decision of *Juliana v. United States* concerning climate change.[19] Second, the recognition of private property in the form of "habitations, monuments, and buildings"[20] is a reminder that the PTD can and does coexist with private ownership of property. Charges that

18. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876).

19. Juliana v. United States, 217 F. Supp. 3d 1224, 1255 n.10 (D. Or. 2016); *see generally* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 9, 21–30 (2017) (discussing *Juliana* and its implications).

20. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876).

the PTD undermines private property are hyperbolic.[21] This peaceful coexistence is the basis of the sovereign PTD, as explained below.

A third observation concerns the reference to the shores of the sea, suggesting that the scope of the PTD should include access rights from uplands to trust waters.[22] Access rights have not been widely recognized in modern interpretations of the PTD.[23] Recognition of the sovereign usufructuary PTD might change that, however, through public easements, providing public access to public trust resources.

Finally, the Justinian proclamation recognized the PTD as part of the "law of nations" that includes waterways of public importance—undoubtedly highways of commerce—which might help explain why the PTD has been so widely adopted in other countries.[24] These waterways, especially the Mediterranean Sea—which was shared by numerous countries even in Justinian's day—were subject to international law.[25] Private property on the shorelands, however, was governed by domestic property law.[26] This distinction reinforces the importance of recognizing the sovereign PTD, which imposes sovereign obligations on governments but coexists with private property.

II. THE MAGNA CARTA, MATHEW HALE, AND THE EVOLUTION OF THE PROPRIETARY PTD

Justinian's prescriptions reached England, and some were codified in the Magna Carta of 1215, which recognized public rights in important waterways.[27] The amended Magna Carta soon included the Forest Charter, which also recognized public rights in important uplands.[28] Lord Matthew Hale's writings and decisions proved to be important vehicles in

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21. *See* Blumm, *Public Trust and Private Property*, *supra* note 2, at 660–65 (giving examples of how the PTD and private property coexist).

22. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876) (declaring public access rights to sea shores).

23. *But see infra* note 83 (discussing *Nies v. Town of Emerald Isle* and *Long Branch v. Liu*, in which courts recognized public access rights).

24. *See* Blumm & Guthrie, *supra* note 1, at 760–801 (discussing the PTD in various foreign jurisdictions).

25. *See* Gordon W. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065, 1069 (1983).

26. *Cf.* J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876) (explaining that, although shorelands were theoretically subject to international law, the Roman people bore responsibility for protecting international principles through their own laws).

27. MAGNA CARTA of 1215, ch. 33, https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1.

28. CHARTER OF THE FOREST of 1225, chs. 9, 11–13, 16 http://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster/.

transporting public rights to America, which became Supreme Court doctrine in the 19th century.[29]

A. The Magna Carta and the Forest Charter

The Magna Carta of 1215 and ensuing amendments[30] implemented some of the Justinian principles by requiring the removal of weirs that interfered with public fishing and navigation on the Thames and other rivers.[31] These provisions, unlike most of the 1215 Charter that benefited only the Norman nobility,[32] gave rights to commoners who fished—for subsistence and commerce—and navigated—for travel and commerce.[33] Public rights in what came to be called navigable waters were thus first entrenched over eight centuries ago.[34]

The Magna Carta included several provisions related to forest uses, which evolved into a Forest Charter a couple of years later.[35] The Forest

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29. *See* Martin v. Waddell's Lessee, 41 U.S. 367, 367, 412–13, 428 (1842) (applying principles from Lord Matthew Hale's writings on public rights of navigable waters in formulating American common law).

30. The Magna Carta (also known as the Magna Charta) was almost immediately annulled by Pope Innocent III because he thought the nobles coerced King John into signing it. *See* Daniel Magraw & Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10,934, 10,934 (2017). But the Charter was reissued the next year, after John died, and again a year later in 1217, when the Forest Charter first appeared. *Id.* at 10,935. The two charters, whose recognition of public rights were often controversial, were reissued a half-dozen times by the end of the 13th century. *Id.* at 10,934–36.

31. MAGNA CARTA of 1215, ch. 33, https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1 (calling for the removal of all fish-weirs from "the Thames, the Medway, and throughout the whole of England, except on the sea coast"); *see also id.* ch. 48 ("All evil customs relating to forests . . . or river-banks and their wardens, are at once to be investigated in every county . . . [and] are to be abolished completely and irrevocably.").

32. S. Colin G. Petry, *The Regulation of Common Interest Developments as it Relates to Political Expression: The Argument for Liberty and Economic Efficiency*, 59 CASE W. RES. L. REV. 491, 499 (2009) (recounting that King John signed the Magna Carta "to protect the English nobility's property and privileges").

33. *See* Magraw & Thomure, *supra* note 30, at 10,939–40 (attributing the enduring principles of the "ecosystems' role in preserving wildlife, the interdependence of nature, intergenerational equity, public participation, sustainable use, the value of biodiversity, and the maxim 'sic utere tuo alienum non laedas'" (use your land so as not to damage the land of another) to the Forest Charter).

34. The distinction between navigable and non-navigable waters was first judicially articulated in the *River Banne* case. *See* Frey, *supra* note 8, at 224 n. 22 (concluding that navigable waters were owned by the sovereign in trust for the public; on the other hand, the beds of non-navigable waters were privately owned without public rights (citing *The River Banne*, 80 Eng. Rep. 540 (K.B. 1611))). Whether American courts' drawing on this dichotomy was an accurate reflection of English law is unclear. *See* Patrick Deveney, *Title,* Jus Publicum*, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 55–58 (1976) (questioning *Arnold v. Mundy*'s conclusion that English common law based public rights on the distinction between navigable and non-navigable waters).

35. The original Magna Carta included provisions calling for a rollback of royal forests—so-called "disafforest[ation]" declared by King John—an investigation of pernicious forest customs, and

Charter, part of the amended Magna Carta in 1217, contained directives rolling back royal-forest restrictions on the use of those forests by commoners and guaranteeing public access rights to forage, graze animals, plant crops, and gather wood.[36] These access rights were cabined, however, by the first recognition of the golden rule—to not injure neighbors—now the foundation of nuisance law.[37] Like the waterways provisions of the Magna Carta, these forest rights applied to everyone, not just the nobility—the beneficiaries of most of the Magna Carta's provisions.[38] Thus, the Forest Charter gave the public rights in common resources owned by the Crown, the foundation of the proprietary PTD, some 800 years ago.

B. The Influence of the Matthew Hale

The evolution of the PTD continued with Lord Chief Justice Matthew Hale's interpretations of the PTD.[39] In his treatise, *De Jure Maris*—first published in 1787, but written long before[40]—Hale interpreted chapter 33 of

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procedural protections for non-forest dwellers in forest courts. MAGNA CARTA of 1215, chs. 44, 47–48, https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1.

36. *See* Magraw & Thormure, *supra* note 30, at 10,936 (citing CHARTER OF THE FOREST of 1225, chs. 1, 9, 12–13).

37. *See id.* (citing CHARTER OF THE FOREST of 1225, ch. 12). The Forest Charter also banned capital punishment for poaching game and provided procedural protections in forest courts. *Id.* at 10,936–37 (citing CHARTER OF THE FOREST of 1225, chs. 2, 7–8).

38. *See id.* at 10,937 (noting that the Magna Carta only applied to some whereas the Forest Charter applied to all).

39. Matthew Hale (1609–76) was a successful barrister who helped negotiate the end of the English Civil War in 1645. *Sir Matthew Hale, 1609-1676*, INST. FOR NEW ECON. THINKING, http://www.hetwebsite.net/het/profiles/hale.htm (last visited Nov. 25, 2018) [hereinafter *Hale*, ECON. THINKING]; David Eryl Corbet Yale, *Sir Matthew Hale: English Legal Scholar*, ENCYCLOPEDIA BRITTANICA (June 20, 2017) [hereinafter Corbet, *Hale*], https://www.britannica.com/biography/Matthew-Hale. Although Hale was a defender of the beheaded Charles I, Oliver Cromwell, due to Hale's reputation for incorruptibility, Oliver Cromwell appointed him to head a law reform commission (which became known as the Hale Commission). *Id.*; Mary Cotterell, *Interregnum Law Reform: The Hale Commission of 1652*, 83 ENG. HIST. REV. 689, 690–91 (1968). Cromwell subsequently appointed Hale to the Court of Common Pleas, where he served from 1653 to 1658. *Hale*, ECON. THINKING, *supra*. He was then elevated to Chief Baron of the Exchequer, where he served from 1660 to 1671, and from there to Chief Justice of the King's Bench from 1671 until he retired in 1676. Corbet, *Hale*, *supra*.

40. *See* City of New York v. Hart, 95 N.Y. 443, 451 (1884) (observing that Hale's three-part manuscript, including *De Jure Maris*, went unpublished for more than a hundred years, and that Hale had willed many of his writings to the library of Lincoln's Inn, and its publisher, Hargrave, later obtained the essay from the solicitor-general to the queen). Hale left a wealth of unpublished writings, and it is likely that his manuscripts went unpublished for so long because his will expressly forbade their posthumous publication without prior authorization. *See* J.B. WILLIAMS, MEMOIRS OF THE LIFE, CHARACTER, AND WRITINGS, OF SIR MATTHEW HALE 348 (1835) ("I do[] expressly declare that I will have nothing of my own[] writing printed after my death, but [only] such as I shall, in my life time,

the Magna Carta to give the public rights to fish in all waters that were "common highways."[41] Hale discussed a case where a claimant asserted a right to operate a ferry because he owned both the ferry and the surrounding shorelands.[42] Hale maintained that the landowner had no "privilege or prerogative" over the river in which the whole people depended for transportation; instead, the king had jurisdiction over waterways, to be exercised "not primarily for his profit, but for the protection of the people and the promotion of the general welfare."[43] The river was therefore a commons not subject to any landowner's exclusive control because doing so would result in monopoly control of a resource on which the whole people depended for transport and other vital services.[44] Hale's treatise perceptively laid down the reason why the trust doctrine became a central principle of Anglo-American law over the next five centuries.

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deliver out to be printed."); *see also* GILBERT BURNET, THE LIFE AND DEATH OF SIR MATTHEW HALE 100 (W. Baynes 1805) (listing manuscripts that remained unpublished at the time of Hale's death).

41. *See* Hale, *A Treatise*, *supra* note 1, at 1, 9, 21–22. There is some question whether public rights in waterways were actually limited to navigable waters, but American courts thought the *River Banne* decision's distinction between navigable and non-navigable waters was determinative of public rights. *See* Arnold v. Mundy, 6 N.J.L. 1, 85–86 (1821) (explaining that the *River Banne* court ruled navigable rivers belonged to the king and non-navigable rivers belonged to the owners of land abutting the river); *see also supra* note 8 (discussing the *River Banne* decision). Some scholars interpreting Hale claim he defined the *jus publicum* as an easement applicable to all waters useful for transportation of goods regardless of ownership of the bed. *See, e.g.*, James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 30 (2007) (footnote omitted) (citing Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 567 (1975)). *See also* Palmer v. Mulligan, 3 Cai. 307, 319 (N.Y. 1805), in which Chancellor Kent cited Hale's treatise in deciding that:

> [F]resh rivers, as well as those which ebb and flow, may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, [etc.], and in that sense may be regarded as common highways by water . . . . They are called public rivers, not in reference to the property of the river, but to the public use.

(citing Hale, *A Treatise*, *supra* note 1, at 5, 8–9).

42. Hale, *A Treatise*, *supra* note 1, at 6–7.

43. Munn v. Illinois, 94 U.S. 113, 126 (1876) (citing Hale, *A Treatise*, *supra* note 1, at 6). For a modern take on Hale, *see* Kevin D. Williamson, *Masterpiece Cakeshop: The Slope Is, in Fact, Slippery*, NAT'L REV. (Dec. 28, 2017), https://www.nationalreview.com/2017/12/masterpiece-cakeshop-slippery-slope-anti-discrimination-law (claiming that in *De Portibus Maris*, Hale established that private wharves may cease to be wholly private when "affected with a public interest" (quoting Hale, *A Treatise*, *supra* note 1, at 78)).

44. *See* Hale, *A Treatise*, *supra* note 1, at 6; *see also* Blumm & Moses, *supra* note 5, at 2 (arguing that preventing monopoly control has been a persistent goal of public trust law).

C. The Origins of the U.S. Public Trust Doctrine

Hale became a central (albeit posthumous) figure in what was arguably the first American PTD decision: Chief Justice Andrew Kirkpatrick's famous 1821 decision in *Arnold v. Mundy*.[45] In that landmark decision, Robert Arnold attempted to exclude Benjamin Mundy and other fishers from harvesting oysters in a tidal bed in New Jersey's Raritan River on the ground that he owned the adjacent riparian land.[46] Reviewing his own trial court decision for the New Jersey Supreme Court, Justice Kirkpatrick reaffirmed that adjacent landowners did not own the lands submerged under navigable waters.[47] Instead, the state owned the beds, and therefore the public could not be excluded by monopolist landowners.[48]

Kirkpatrick relied heavily on Hale's language in reaching his decision. For example, he quoted Hale to the effect that "the common people of England have regularly a liberty of fishing in the sea [or the] creeks [or] the arms thereof, as a public common piscary, and may not, without injury to their right, be restrained [thereof]."[49] He referred to the public's rights as being "transient usufructuary possession, only" and, citing Hale, concluded that the public had a "common piscary" that enabled Mundy and his colleagues to harvest oysters over the objection of the adjacent landowner.[50]

Some two decades after the *Arnold* decision, the U.S. Supreme Court adopted it as federal law in a case amounting to a collateral attack on Kirkpatrick's decision, as it involved another oystering conflict on the very same Raritan River. A landowner again sought to exclude an oyster-harvester, Merrit Martin.[51] The landowner surprisingly prevailed in the New Jersey Circuit Court below, but the U.S. Supreme Court reversed in an opinion by Chief Justice Roger Taney.[52] According to Taney, the issue was

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45. Arnold v. Mundy, 6 N.J.L. 1, 8 (1821). There is an argument that the first American PTD decision was *Carson v. Blazer*, in which the Pennsylvania Supreme Court ruled that a shoreside landowner had "no exclusive right to fish in the river immediately in front of his lands [because] the right to fisheries in [a large freshwater river not subject to tidal influence] is vested in the state, and open to all." Carson v. Blazer, 2 Binn. 475, 478 (Pa. 1810). But *Arnold v. Mundy* has proved more influential in other courts.

46. *Arnold*, 6 N.J.L. at 65, 67.

47. *Id.* at 79.

48. *Id.* at 42.

49. *Compare id.* at 74 (providing an update to Hale's Old English language), *with* Hale, *A Treatise*, *supra* note 1, at 11 (resulting in the following alterations: "the common people of England have regularly a liberty of fi[s]hing in the [s]ea [or the] creek[]s [or the arms] thereof, as a public[] common . . . pi[s]cary, and may not [] without injury to their right [] be re[s]trained [thereof]").

50. *Arnold*, 6 N.J.L at 71, 74.

51. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 367 (1842).

52. The decision reversed the federal Circuit Court of New Jersey. *Id.* at 418. *Martin* drew a dissent from Justice Thompson because, while he agreed with the notion of public rights to navigate and

whether navigable waters "were intended to be a trust for the common use."[53] Citing Hale for the proposition that "the common people of England have regularly [had] a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary," the Chief Justice ruled that those waters were "held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery."[54]

The *Martin* decision expressly ratified the result in *Arnold*, considering that decision sound and "unquestionably entitled to great weight."[55] The case established the public's right to fish and navigate in navigable waters, at least in the original states, which inherited the Crown's rights due to the Revolution.[56]

The Supreme Court quickly extended those public rights to non-original states just three years later in *Pollard v. Hagan*, which involved a dispute over the ownership of submerged lands in Mobile Bay.[57] The Taney Court, in an opinion by Justice John McKinley, ruled that the new states of the West would have the same ownership rights and public obligations as the original states because they entered the Union on an "equal footing" with the original states.[58] *Pollard* thus extended *Martin*'s recognition of the PTD nationwide.

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fish in navigable waters, he thought that the right to fish extended only to "floating fish," not to shellfish. *Id.* at 434.

53. *Id.* at 411.

54. *Compare id.* at 412–13 (updating Hale's Old English language), *with* Hale, *A Treatise*, *supra* note 1, at 11 (resulting in the following alterations: "the common people of England have regularly [had] a liberty of fi[s]hing in the [s]ea[], or creek[s], or arms thereof, as a public[] common of pi[s]cary").

55. *Martin*, 41 U.S. (16 Pet.) 367 at 417–18. *But see* Gough v. Bell, 22 N.J.L. 441, 469 (1850) (holding that a riparian landowner could "wharf[] out" so long as the wharf did not interfere with public navigation, but noting that "any encroachment upon the shore, or other part of the public domain, may at all times be restricted and controlled by legislation").

56. *See* North Carolina v. Alcoa Power Generating Inc., 853 F.3d 140, 149 (4th Cir. 2017) (explaining that equal footing and associated federal title rules apply to the original states like North Carolina, despite the fact that they did not benefit from the equal footing conveyance of submerged lands and had long before developed their own law of title navigability), *reh'g denied*, June 9, 2017, *cert. denied*, 138 S. Ct. 981 (2018); *see also infra* note 83 (discussing recent cases applying the equal footing doctrine).

57. Pollard v. Hagan, 44 U.S. (3 How.) 212, 219, 228–29 (1845). The decision was not unanimous, as Justice John Catron dissented, suggesting that the question of land ownership of submerged lands should be left to the political arena. *Id.* at 232 (Catron, J., dissenting).

58. *Id.* at 228–29 (majority opinion). *Pollard*'s reference to equal footing has been misinterpreted by opponents of federal public lands. *See* John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 531–41, 551–53 (2018) (describing *Pollard*'s oft-cited language as non-precedential, politically-charged *dicta* surrounding a relatively narrow holding); Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 ECOLOGY L.Q. 781, 790–91 (2016) ("[T]he Supreme Court [has] clearly confined its holding in *Pollard* to submerged lands beneath navigable waters.").

D. The Expansion of Navigable Waters

The issue of which waters were subject to the PTD, however, remained unsettled. Navigable waters were key to federal Commerce Clause jurisdiction,[59] and later the scope of the PTD became entwined with federal admiralty authority. In its *Genesee Chief* decision in 1852, the Supreme Court expanded the scope of federal admiralty jurisdiction beyond tidal waters to include waters that were actually navigable (so-called *navigable-in-fact* waters).[60] The Court emphasized that the geography of North America was markedly different from England, as the former contained thousands of miles of waters that were actually navigable without tidal influence; England largely lacked such waterways.[61]

A quarter-century later, in 1876, the Court applied its expanded federal admiralty jurisdiction, a sovereign regulatory concept, to proprietary ownership under equal footing in *Barney v. Keokuk*.[62] Thus, the public had navigation and fishery rights to all navigable-in-fact waterbodies because the state owned those submerged lands in trust for the public.[63] This

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59. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824) ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation.").

60. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457 (1851). *The Genesee Chief*, a propeller boat, collided with and sank *The Cuba*, a cargo-laden schooner on Lake Ontario in 1847. *Id.* at 450. *The Cuba*'s owners sued to collect damages. *Id.* The litigation in their favor culminated in the U.S. Supreme Court's untethering admiralty jurisdiction from tidal waters alone, overruling *The Thomas Jefferson*. *Id.* at 457, *overruling* The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825).

61. *Id.* at 454–57. The *Genesee Chief* Court stated:

> [I]n England . . . there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide.

Id. at 454–55.

62. Barney v. Keokuk, 94 U.S. 324, 336 (1876) ("In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and its principal branches."). In *Barney*, the City of Keokuk filled submerged lands below the high-water mark of the Mississippi River, creating a 250-foot wharf for rail and steamboat use. *Id.* at 325–27. The Supreme Court rejected claims of riparian landowners to the wharf, citing Iowa law that private ownership of the banks of the Mississippi "extend[ed] only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state." *Id.* at 336.

63. Navigable waters also include tidal waters. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475–76 (1988) (rejecting a claim that the extension of navigable waters to all waterbodies that are navigable-in-fact supplanted tidal waters as navigable).

substantial expansion in the scope of public rights—accomplished through a judicial borrowing from admiralty law—occurred over 140 years ago.

E. The Effect of the Illinois Central Railroad Decision

A long-running dispute over control of Chicago Harbor[64] led to an 1892 Supreme Court decision that Professor Sax anointed as the PTD's lodestar case.[65] The validity of the Illinois legislature's 1869 decision to grant a railroad company the bed of Lake Michigan adjacent to the city—a decision the legislature revoked four years later—eventually reached the Supreme Court more than two decades later.[66]

The Court upheld the legislature's revocation of the earlier grant on antimonopoly grounds, making clear that the state's ownership was "in trust for the people . . . that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[67] Justice Stephen J. Field, writing for the Court, distinguished submerged lands from state lands held for sale, saying that the former had "a title different in character," one in fact held in trust.[68] That trust, Justice Field averred, required "management and control" by the state, a sovereign obligation that could not be lost through a proprietary conveyance any more than a state could renounce its police power.[69]

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64. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 800–01 (2004) (providing a detailed historical analysis of the Supreme Court's 1892 decision in *Illinois Central Railway*).

65. *See* Sax, *Effective Judicial Intervention*, *supra* note 10, at 489 (describing *Illinois Central* as "[t]he most celebrated public trust case in American law"). Actually, the decision became a celebrated one because of Professor Sax's article.

66. Kearney & Merrill, *supra* note 64, at 913–19 (explaining why the case took so long to reach the Supreme Court); *see also id.* at 887–95, 927–30 (noting the probable corruption of the Illinois legislature in making the grant).

67. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

68. *Id.* ("But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale.").

69. *Id.* at 453. The Court specified:

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, except in [two] instance[s] . . . [(1)] for the improvement of the navigation and use of the waters [i.e., conveyances serving trust purposes], or [(2)] when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers . . . .

Without the trust, "every harbor in the country [would be placed] at the mercy of a majority of the legislature in the state where the harbor is situated."[70] The *Illinois Central* decision confirmed that the PTD was a sovereign governmental obligation that was largely inalienable, seemingly universal, and protected by searching judicial review.[71]

Two years after *Illinois Central*, the Supreme Court returned to the PTD in a case involving tidelands in Astoria, Oregon.[72] Two landowners asserted ownership to the same lands, a federal grantee who received a patent and a later state grantee.[73] The Court retraced the English origins of the PTD, citing Lord Hale and distinguishing private proprietary rights—the *jus privatum*—from the inalienable public trust rights—the sovereign *jus publicum*—and interpreting the federal grant not to include tidelands, which were reserved for the state by the equal footing doctrine.[74] The

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Id.; *see also id.* at 455–56 ("The trust . . . is governmental and cannot be alienated, except . . . [for] parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.").

70. *Id.* at 455.

71. On close judicial review in PTD cases, Professor Sax observed that:

> [T]he Court [in *Illinois Central*] articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to relocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

Sax, *Effective Judicial Intervention*, *supra* note 10, at 490. *But see supra* note 69, noting the exceptions to the general inalienable rule.

72. Shively v. Bowlby, 152 U.S. 1, 9 (1894).

73. *Id.*

74. *Id.* at 11 (explaining that the *jus publicum* in England was reserved to the king "as the representative of the nation and for the public benefit"); *see also id.* at 48–49 (citing Lord Hale's explanation that the *jus publicum* was to ensure "common commerce, trade and intercourse," and Justice Taney (in *Martin*) to the effect that the king's *jus publicum* obligations "vested absolutely in the people of each state" at the American Revolution and was "incidental to the sovereignty of the State"); *see also* Hardin v. Jordan, 140 U.S. 371, 381 (1891) (upholding state law as to the ownership of lands submerged beneath non-navigable waters). The *Hardin* Court stated:

> With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state— . . . held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States.

Id. (citing Pollard v. Hagan, 44 U.S. (3 How.) 212, 216 (1845)). This statement suggested that state ownership of navigable waters was a federal doctrine, as *Pollard* ruled that the federal government had a pre-statehood trust obligation to deliver ownership of navigable waters and their beds to subsequently admitted states. *Pollard*, 44 U.S. (3 How.) at 216; *see infra* note 92 (discussing the equal footing doctrine).

Shively Court's recognition that the PTD lands are conceptually divided between proprietary *jus privatum* and a sovereign *jus publicum* was a key insight in the evolution of the PTD.

F. Ascertaining Navigable Waters

By the end of the 19th century, the contours of the PTD were thus fairly well established. Cases like *Shively* involving pre-statehood grants—and consequently federal-state disputes over proprietary ownership—generally favored the states, as the Supreme Court allowed only narrow exceptions from the rule that the federal government was to preserve lands submerged under navigable waters due to the equal footing doctrine for later conveyance to states at statehood.[75] For example, the federal government failed to show that a pre-statehood reservation of reservoir sites on a Utah Lake defeated an equal footing conveyance to the State of Utah.[76] Only occasionally did the federal government prevail, as in the cases of the submerged lands in the Arctic National Wildlife Refuge[77] and part of the lakebed of Lake Coeur d'Alene, reserved for the Coeur d'Alene Tribe.[78]

But what was a navigable water subject to equal footing and the PTD remained unclear. Nearly a century ago, the Supreme Court determined that the definition of "navigable" was grounded in federal law and applied to identified river segments, not the entirety of a river.[79] The Court applied this definition in 2012, when it overruled the Montana Supreme Court, which held that three rivers were navigable-in-fact and therefore state-owned.[80] Justice Kennedy, writing for a unanimous Court, faulted the state

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75. Under *Shively*, pre-statehood conveyances could defeat equal footing if they either (1) responded to a "public exigency" or (2) fulfilled an international duty. *Shively*, 152 U.S. at 49–50.

76. Utah Div. of State Lands v. United States, 482 U.S. 193, 197, 203 (1987) (presuming Congress did not intend to defeat a state's title, in light of the longstanding federal policy of holding land under navigable waters for the benefit of future states, absent exceptional circumstances).

77. United States v. Alaska, 521 U.S. 1, 4, 40 (1997) (finding a "clear intent" to segregate the submerged lands in both the refuge and the National Petroleum Reserve prior to statehood).

78. Idaho v. United States, 533 U.S. 262, 265, 280–81 (2001) (holding that Congress "intended to bar passage to Idaho of title to" certain "lands underlying portions of Lake Coeur d'Alene and the St. Joe River").

79. United States v. Utah, 283 U.S. 64, 89 (1931) (concluding that certain "sections of the Green, the Grand, and the Colorado Rivers" were navigable). The federal test for navigable-in-fact streams and lakes is met when they are used in their ordinary condition at statehood as highways for commerce. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871) ("[Rivers] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.").

80. PPL Mont. LLC v. Montana, 565 U.S. 576, 580–81 (2012).

court for failing to employ a segment-by-segment analysis and interpret historic portages to disqualify rivers as navigable at statehood.[81]

All of these cases are proprietary PTD cases concerning which waterways are owned by the state due to the equal footing conveyance. That is, the PTD in these cases stems from the state's ownership of the lands, through the equal footing conveyance at statehood. Ironically, federal law determines the scope of these equal footing lands, and therefore the state's proprietary PTD obligations.[82] There continue to be a number of important proprietary PTD cases.[83]

But the PTD extends to waterways and other resources in which the state does not have a proprietary interest. This is the sovereign side of the PTD, which the next section explores.

III. *LAMPREY V. METCALF* AND THE RISE OF THE SOVEREIGN USUFRUCTUARY PTD

The sovereign usufructuary PTD is not grounded on public ownership of lands.[84] Instead, it derives from sovereign duties to protect select resources from monopolization and development.[85] Because state law provides these protections, there is no uniform interpretation of the sovereign PTD's scope, unlike the proprietary public trust, which is largely a question of federal law under the equal footing doctrine.[86]

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81. *Id.* at 580, 594, 598.

82. *Id.* at 590; *see supra* note 74 and accompanying text (discussing *Pollard*, in which the Supreme Court held that all states receive title to beds underlying navigable waterways on equal footing).

83. For example, the Fourth Circuit recently ruled that the equal footing doctrine determined the ownership of North Carolina's Yadkin River—even though the state was an original state that was not subject to the Constitution's Admissions Clause—rejecting the state's claim that state law determined navigability for title in the original states. The Fourth Circuit refused to rehear the case on an 8–7 vote. *See* North Carolina v. Alcoa Power Generating Inc., 853 F.3d 140, 149 (4th Cir. 2017), *reh'g denied*, June 9, 2017, *cert. denied*, 138 S. Ct. 981 (2018). On the other hand, the North Carolina Court of Appeals decided that the public owned—and therefore had access rights to—replenished beaches, and the North Carolina Supreme Court refused to review the case. *See* Nies v. Town of Emerald Isle, 780 S.E.2d 187, 194, 196 (N.C. Ct. App. 2015), *appeal docketed*, 784 S.E.2d 171 (2016), *appeal denied*, 793 S.E.2d 699 (2016). Similarly, the New Jersey Supreme Court affirmed that an adjacent landowner's property was not unconstitutionally taken when a beach replenishment project included public access rights to the new publicly provided beach. City of Long Branch v. Liu, 4 A.3d 542, 546–47, 554–55 (N.J. 2010); *see* Gunderson v. State, 90 N.E.3d 1171, 1188 (Ind. 2018) (concluding that the public's right to walk on the Lake Michigan shore extended to the ordinary high-water mark, regardless of the existing water level).

84. *See infra* notes 99–109 and accompanying text (describing the origins of the sovereign usufructuary PTD).

85. *See infra* notes 110–11 and accompanying text (discussing *Lamprey*'s widespread influence on public rights in waterbodies).

86. *See infra* note 92 (explaining that state ownership of navigable waters derives from federal law and the equal footing doctrine).

A. The Lamprey *Decision*

The foundation case of the sovereign PTD is the Minnesota Supreme Court's 1893 decision in *Lamprey v. Metcalf*, an otherwise uneventful case concerning title to 300 acres of an unnamed dry lakebed.[87] The federal government conveyed the lands bordering this meandered lake to various private parties in 1856, and Uri Lamprey and his partner, Oscar Metcalf, acquired the lands sometime before 1873.[88] Lamprey filed suit against Metcalf to partition their co-tenancy.[89] The lower court ruled that the two possessed a tenancy in common.[90] The state, made party to the suit by statute,[91] claimed ownership of the now dry lakebed on the ground that the land had been submerged beneath a navigable water at statehood.[92]

A unanimous Minnesota Supreme Court rejected the state's claim, determining that the relicted lakebed was owned by Lamprey and Metcalf, not the state.[93] Had the *Lamprey* Court stopped there, the case would have

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87. Lamprey v. Metcalf, 53 N.W. 1139, 1140 (Minn. 1893). The first case to recognize public rights in waterbodies that were not state-owned was the Supreme Judicial Court of Massachusetts decision in *Inhabitants of West Roxbury v. Stoddard*, in which the Court held that the town of West Roxbury could not exclude the public from Jamaica Pond—one of that state's Great Ponds—to prevent the removal of ice blocks. Inhabitants of West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 171–72 (1863) ("Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds . . . ."). The *Lamprey* Court cited *West Roxbury* in its decision, but because "the Great Pond case" involved an interpretation of the Colonial Ordinances of 1641 and 1647, it had less influence on the evolution of navigability than *Lamprey*'s common law interpretation.

88. *Lamprey*, 53 N.W. at 1140. In 1860, after the lake had begun to dry up, apparently due to natural causes, the government again surveyed the land, this time between the original meander line and the diminished lake. *Id.* In 1873, the government issued a land patent to Lamprey and Metcalf's predecessor. *Id.*

89. *Id.*

90. *Id.* Lamprey owned a 49/50 share of 300 acres; Metcalf owned the remaining 1/50 as a tenant in common. *See* Hobart v. Hall, 174 F. 433, 463–64 (C.C.D. Minn. 1909), *aff'd*, 186 F. 426 (8th Cir. 1911).

91. MINN. STAT. § 74.45 (1866) ("The state may be made a party to an action for the sale or partition of real property, in which case the summons and complaint shall be served upon the attorney general, who shall appear on behalf of the state.").

92. *Lamprey*, 53 N.W. at 1140. The Supreme Court created the proprietary equal footing doctrine in *Pollard*. Pollard v. Hagan, 44 U.S. (3 How.) 212, 223, 228–30 (1845) (ruling that the Constitution's Admissions Clause (art. IV, § 3, cl. 2), governing the admission of new states, requires all states to have the same title to the beds of navigable waters); *see also* Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 391 (1842) (adopting the reasoning of *Arnold v. Mundy*).

93. *Lamprey*, 53 N.W. at 1144. Reliction is the gradual recession of water from the ordinary high-water mark; the newly uncovered land is the property of the adjoining riparian landowner. *See* Joseph W. Dellapenna, *Boundaries Along a Waterbody*, *in* 1 WATERS AND WATER RIGHTS § 6.03(b)(2) (Amy K. Kelley ed., Matthew Bender & Co. 3d ed. 2018) ("Generally, accretion, reliction, and erosion carry the boundary along with the change, a rule accepted in virtually every state, and sometimes termed the 'doctrine of accretion.'").

been long forgotten. But Justice William Mitchell (later the namesake of the law school that is now Mitchell-Hamline) decided to propound on the nature of public rights in navigable waters in Minnesota.

According to Justice Mitchell, navigability—which he recognized as a vehicle for dividing public and private rights[94]—(1) was a matter of state law;[95] (2) was determined by waterways that were navigable-in-fact;[96] and (3) for non-navigable waters, littoral owners owned to the middle of the waterbody.[97] Although the state owned all navigable waters and their beds, that ownership was "in its sovereign capacity, as trustee for the people, for public use."[98] Because the lakebed at issue was dry due to reliction, it was clearly not navigable; therefore, the Minnesota Court decided there were no public rights.[99]

Justice Mitchell proceeded to expound on the meaning of navigability, declaring that although unnecessary to resolve the case, some clarification would help "to avoid misconception."[100] He explained that due to changed conditions in America, courts redefined navigability to embrace non-tidal, navigable-in-fact waters because they were "public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year."[101] Justice Mitchell concluded that the existing case law seemed to indicate that navigability was neither a function of the size of the boats nor "that navigation . . . be by boats at all," only that "the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure."[102] But he challenged this limited view, averring that "we fail to see why [bodies of water used for public uses other than mere commercial navigation] ought not to be held to be public waters, or navigable waters."[103] This declaration

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94. *Lamprey*, 53 N.W. at 1143.

95. This statement is no longer true under the now prevailing federal test for title navigability. *See supra* notes 80–82 and accompanying text (discussing *PPL Mont. LLC v. Montana*, where the Supreme Court applied the federal test for title navigability in determining that lands were not owned by Montana).

96. Judge Mitchell erroneously rejected the tidal ebb and flow test for navigable waters, a mistake the Supreme Court later corrected. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988) (describing "the American decision to depart from . . . the English rule limiting Crown ownership to the soil under tidal waters").

97. *Lamprey*, 53 N.W. at 1143.

98. *Id.*

99. *Id.* at 1144. The Court was concerned that if relicted land did not inure to the littoral owner, the owner would lose the "fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of access to the water." *Id.* at 1142.

100. *Id.* at 1143.

101. *Id.*

102. *Id.*

103. *Id.*

marked the beginning of a significant evolution of the PTD to embrace lands not owned by the sovereign.[104]

In words that would have considerable influence over the years, Justice Mitchell wrote "we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit."[105] Looking toward the future, the court recognized that many of Minnesota's lakes "probably will never be used to any great extent for, commercial navigation."[106] But population increases will cause them to be used:

> [B]y the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. *To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time*.[107]

Although the immediate result in *Lamprey* was to recognize private rights in relicted littoral lands, its long-term significance lay in its expansion of the definition of navigability to include recreational and other uses that had not been previously considered to be commercial uses.[108] This expansion of navigable waters—for avowedly anti-monopolistic purposes—recognized public rights in waterbodies whose beds were not owned by the

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104. *Lamprey* was soon followed by Geer v. Connecticut, 161 U.S. 519, 529 (1896) (recognizing state ownership of wildlife regardless of land ownership). The Minnesota Supreme Court later clarified that *Lamprey* public rights applied to privately owned submerged lands. State v. Korrer, 148 N.W. 617, 622 (Minn. 1914) ("Under the law of this state the state owns the soil under public waters in a sovereign, not a proprietary, capacity, but still the state owns it and the shore owner does not."). Similarly, the beaches in New Jersey and Oregon have public rights of access, despite underlying private ownership, as a version of ancillary rights to access public tidelands and the ocean. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1994) (establishing a four-factor test to determine the public's rights in privately owned beaches); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 113, 121–22 (N.J. 2005) (applying the four-factor test to uphold public access rights to a privately owned beach); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 673 (Or. 1969) (upholding public rights to use private beaches on the basis of customary rights); Stevens v. City of Cannon Beach, 854 P.2d 449, 453 (Or. 1993) (en banc) (reaffirming *Thornton*).

105. *Lamprey*, 53 N.W. at 1143.

106. *Id.*

107. *Id.* (emphasis added).

108. *See* Harrison C. Dunning, *The Pleasure Boat Test*, *in* 2 WATERS AND WATER RIGHTS § 32.03(a.01) (Amy Kelley ed., Matthew Bender & Co. 3d ed. 2018) (describing the expansion of the test from 1893 into the modern day).

state under equal footing.[109] Due to its widespread acceptance by other courts, Justice Mitchell's opinion became the foundation of the sovereign usufructuary PTD.

B. Lamprey*'s Legacy*

The *Lamprey* decision has proved to be a landmark. Its expansive state-law definition of navigability unmoored public rights from public proprietary ownership and has been widely emulated.[110] In *Lamprey*'s wake, states began to adopt broad definitions of waterways to which the public had access rights irrespective of public riverbed or lakebed ownership.[111] Because private ownership of such submerged bedlands was widespread, liberating public waterway rights from land ownership led to a considerable extension of public rights under what a leading treatise on water rights has referred to as "the pleasure boat" theory of navigability.[112] This interpretation of navigability, now the dominant rule, is fundamental to the non-proprietary, sovereign usufructuary PTD.[113]

Lamprey's legacy has been widespread. Courts across the country have examined Justice Mitchell's definition in some detail. For instance, in *Guilliams v. Beaver Lake Club*, the Oregon Supreme Court quoted extensively from *Lamprey* in concluding that a small lagoon—approximately 50-feet in width, capable of floating only small skiffs and scows—was navigable-in-fact.[114] In *Luscher v. Reynolds*, the same court again quoted *Lamprey* in deciding the public had the "paramount right" to use Blue Lake for the purposes of transportation and commerce regardless of ownership of the bed.[115] Echoing *Lamprey*, *Luscher* declared that "'[c]ommerce' has a broad and comprehensive meaning" beyond pecuniary profit, so public rights extended even to lakes with privately owned beds.[116]

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109. *See id.* (noting that the *pleasure boat* test defined navigability without regard to commercial use).

110. *See id.* § 32.03(a) n.35 (listing several states that have adopted state law definitions of navigability).

111. *See id.* (providing examples of state's adoption of the pleasure boat test).

112. *Id.* § 32.03(a).

113. *Id.* § 32.03(a) n.35.

114. Guilliams v. Beaver Lake Club, 175 P. 437, 442 (Or. 1918).

115. Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936).

116. *Id.*

Many other states have also relied on the language of *Lamprey* to recognize the recreational boating test, including California,[117] South Dakota,[118] North Dakota,[119] Arkansas,[120] Ohio,[121] Missouri,[122] Maine,[123] Montana,[124] and Wisconsin.[125] A prominent example is *People ex rel. Baker v. Mack*, in which the California Court of Appeal announced in 1971 that "[t]he federal test of navigation does not preclude a more liberal state test establishing a right of public passage whenever a stream is physically navigable by small craft."[126] Arkansas followed suit in 1980, in *State v.*

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117. People *ex rel.* Baker v. Mack, 97 Cal. Rptr. 448, 451 (Cal. Ct. App. 1971); *see also* Bohn v. Albertson, 238 P.2d 128, 135 (Cal. Dist. Ct. App. 1951) (holding that waterways used for recreational purposes, without heavy commercial traffic, are navigable under *Lamprey*).

118. Flisrand v. Madson, 152 N.W. 796, 800 (S.D. 1915) ("And when we say that the state is the owner of the bed of said lake we do not mean that the state is the proprietary owner, in the sense that the state might sell or otherwise dispose of . . . , but that the state holds the title to such lake bed in trust for the benefit of the public." (citing Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893))); *see also* Hillebrand v. Knapp, 274 N.W. 821, 822 (S.D. 1937) ("[W]hether or not waters are navigable depends upon the natural availability of waters for public purposes . . . ." (citing *Lamprey*, 53 N.W. at 1143)); *cf.* Parks v. Cooper, 2004 SD 27, ¶ 1, 676 N.W.2d 823, 825 ("[W]e conclude that all water in South Dakota belongs to the people in accord with the public trust doctrine and as declared by statute and precedent, and thus, although the lake beds are mostly privately owned, the water in the lakes is public and may be converted to public use, developed for public benefit, and appropriated, in accord with legislative direction and state regulation.").

119. Roberts v. Taylor, 181 N.W. 622, 626 (N.D. 1921) ("A public use may not be confined entirely within a use for trade purposes alone." (emphasis omitted)).

120. State v. McIlroy, 595 S.W.2d 659, 664–65 (Ark. 1980) (holding that a river was navigable because it could "be used for a substantial portion of the year for recreational purposes"), *cert. denied*, 449 U.S. 843 (1980).

121. *Lamprey*'s application in Ohio has been uneven. For example, in 1955, the Ohio Supreme Court quoted *Lamprey* with approval in upholding the navigability of a waterbody suitable for use by small pleasure craft and were so used for 14 years by a boat rental business. Coleman v. Schaeffer, 126 N.E. 2d 444, 446–47 (Ohio 1955) (referring to *Lamprey* with approval for the trend in the law towards defining navigability more broadly). But 50 years later, in *Portage County*, the Ohio Supreme Court decided that Lake Rockwell was non-navigable—even though it was situated between two navigable areas of the Cuyahoga River—because recreational boating was not, standing alone, a dispositive factor in determining navigability. Portage Cty. Bd. of Comm'rs v. City of Akron, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, 498–99, at ¶ 109. The surprised dissenter, Justice Pfiefer, claimed that the majority's reasoning was inconsistent with *Coleman v. Schaeffer*. *Id.* ¶ 115–16 (Pfeifer, J., dissenting).

122. Elder v. Delcour, 269 S.W.2d 17, 26 (Mo. 1954).

123. Smart v. Aroostook Lumber Co., 68 A. 527, 532 (Me. 1907).

124. *Compare* Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 169, 171 (Mont. 1984) (holding, based on *Lamprey*, that "under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public"), *with* Mont. Coal. for Stream Access, Inc., v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984) (approving of *Curran* and stating the applicable test in Montana is "capability of use of the waters for recreational purposes"), *overruled on other grounds by* Gray v. City of Billings, 689 P.2d 268 (Mont. 1984).

125. Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 520 (Wis. 1952).

126. People *ex rel.* Baker v. Mack, 97 Cal. Rptr. 448, 452 (Cal. Ct. App. 1971).

McIlroy, holding that navigable waters included all waters floatable by "oar or motor propelled small craft."[127]

Other courts adopting the so-called *pleasure boat* test often relied on cases premised on *Lamprey*. For example, in 1973, the Idaho Supreme Court used the logic of the *Mack* decision to uphold public rights to boat and wade in a privately owned creek bed in *South Idaho Fish & Game Ass'n v. Picabo Livestock, Inc*.[128] The *Picabo* court expressly affirmed the lower court's interpretation of navigability under Idaho law to include any natural stream "capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes."[129] Similarly, in 2013, the Alabama Supreme Court, relying on *Mack*, decided that the Cahaba River was navigable-in-fact wherever it was capable of being used for recreational canoeing.[130]

A recent example of *Lamprey*'s legacy is *Morvich v. Lobermeier*, a 2018 Wisconsin Supreme Court decision that closely examined both PTD rights and the rights of an owner of submerged lands in an artificial waterbody.[131] The Court concluded that an adjacent landowner claiming access rights had no riparian rights due to prior private conveyances.[132] But the Court nonetheless decided that the PTD gave that adjacent landowner access rights even absent riparian rights,[133] illustrating how the PTD can *add to* as well as limit private rights. All parties in the case conceded—and the Court announced—that the public possessed access rights to the artificial waterbody, even though its bedlands were privately owned.[134]

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127. State v. McIlroy, 595 S.W.2d 659, 664–65 (Ark. 1980); *see* Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738, 742 (Ark. 2003) (extending the Arkansas PTD to waterbodies created by dams).

128. S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1297–98 (Idaho 1974).

129. *Id.* at 1297–98 ("Any stream which, in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable. . . . [T]he basic question of navigability is simply the suitability of a particular water for public use.").

130. City of Irondale v. City of Leeds, 122 So. 3d 1244, 1250 (Ala. 2013) (citing *People ex rel. Baker*, 97 Cal. Rptr. at 451).

131. Movrich v. Lobermeier, 2018 WI 9, ¶¶ 4, 8–9, 379 Wis. 2d 269, 905 N.W.2d 807.

132. *Id.* ¶¶ 54–55.

133. *Id.* ¶ 6. However, with no riparian rights, the landowner lacked the ability to install a pier on the submerged lands owned by his neighbor. *Id.* ¶ 5.

134. *Id.* ¶ 10 ("Lobermeiers concede that the Wisconsin public trust doctrine grants Movriches, and all other members of the public, access to the Flowage's waters for navigation and recreation purposes."); *see* State v. Bleck, 338 N.W.2d 492, 497–98 (Wis. 1983) (recognizing the state's ability to restrict private rights by authorizing "limited encroachments upon the beds of [navigable waters held in trust] where the public interest will be served"); *see also* Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 520 (Wis. 1952) ("Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit." (quoting Lamprey v. Metcalf, 53

Lamprey foreshadowed this result 125 years earlier, when Justice Mitchell uncoupled the PTD from sovereign proprietary ownership and announced the sovereign usufructuary PTD.[135]

IV. MISUNDERSTANDING THE SOVEREIGN USUFRUCTUARY PTD: THE STATE OF OREGON'S POSITION IN THE OSWEGO LAKE CASE

Oswego Lake is a large, approximately 400-acre lake, located about eight miles south of Portland, Oregon, in the suburb of Lake Oswego, a city with one of the highest average incomes in the state.[136] For roughly the last six decades, the lake has been closed to the public and managed by a private corporation whose members are either shoreside landowners or those possessing easements to reach and use the lake.[137] Although the Lake Corporation claims to own the lake,[138] the bed of the lake is likely owned by the state as a navigable waterbody because it was meandered at statehood.[139] Even if the state does not own the lakebed, it clearly owns the water in the lake.[140]

N.W. 1139, 1143 (Minn. 1893))), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952); Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914) (asserting the PTD must be interpreted with a "broad and beneficent spirit" sufficient to allow for "the full and free use of public waters").

135. *Lamprey*, 53 N.W. at 1143.

136. *Lake Oswego (Clackamas)*, ATLAS OF OR. LAKES, http://aol.research.pdx.edu/lakes/17090012000369 (last visited Nov. 25, 2018); *Income in Lake Oswego, Oregon (City)*, STATISTICAL ATLAS, https://statisticalatlas.com/place/Oregon/Lake-Oswego/Household-Income (last visited Nov. 25, 2018).

137. Brief on the Merits of Respondent on Review, State of Oregon at 6, Kramer v. City of Lake Oswego, 395 P.3d 592 (Or. Ct. App. 2017) (No. SC S065014), 2018 WL 1240191 [hereinafter *Appellate Brief of State of Oregon*]; Defendant-Respondent City of Lake Oswego's Answering Brief and Supplemental Excerpt of Record at 8, Kramer v. City of Lake Oswego, 395 P.3d 592 (Or. Ct. App. 2017) (No. A156284), 2014 WL 9865510 ("The City acquired title to the Swim Park property in the 1930s, pursuant to deeds restricting use of the property to the children of the City of Oswego." (internal quotations omitted)).

138. *Appellate Brief of State of Oregon*, *supra* note 137, at 4.

139. *City of Lake Oswego*, 395 P.3d at 597 n.8. The practice of meandering all lakes of over 25 acres in size originated in the Land Ordinance of 1785, which established the rectangular survey system as part of an effort to survey all of the lands in the Northwest Territory. *Cf.* ALBERT WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 12 (1983) (explaining the theory and history of the rectangular surveying method); *Northwest Ordinances*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/event/Northwest-Ordinances (last visited Nov. 25, 2018). Federal surveyors drew straight lines (*meander lines*) between points on a shore to more accurately estimate the quantity of land available for sale. WHITE, *supra*, at 103. Today, some states give meandered lakes and streams a presumption of navigability. Dellapenna, *supra* note 93, § 6.03(a)(2). In Oregon, the presumption is a conclusive one. OR. REV. STAT. ANN. § 274.430(1) (2017).

140. OR. REV. STAT. ANN. § 274.430(1) (2017) ("All meandered lakes are declared to be navigable and public waters. The waters thereof are declared to be of public character. The title to the submersible and submerged lands of such meandered lakes, which are not included in the valid terms of a grant or conveyance from the State of Oregon, is vested in the State of Oregon.").

Even though roughly two-thirds of the residents of Lake Oswego are excluded from the lake (as well as the rest of the public),[141] the city council enacted ordinances enforcing Lake Oswego Corporation's claim that only its members have access rights to the lake.[142] In 2012, two individuals—one a member of the city's planning commission at the time and the other a resident of Portland—challenged the city's exclusionary ordinances.[143] The plaintiffs sought non-motorized access from public parklands adjacent to the lake for swimming and kayaking under the state's PTD.[144]

The city, the Lake Oswego Corporation, and the state all opposed their use.[145] The trial court rejected the access claim, largely on the basis of the state's argument that the PTD did not apply to uplands like the city's parklands.[146] The Oregon Court of Appeals affirmed in 2017, but the state's Supreme Court agreed to review that decision, heard oral argument in May 2018, and will issue a decision soon.[147]

The state's successful argument in the lower courts reflected a fundamental failure to understand the sovereign usufructuary PTD, as the state maintained that the PTD applies only to submerged or submersible state-owned lands.[148] In short, the state of Oregon claims to recognize only the proprietary PTD, despite apparent Oregon Supreme Court authority to the contrary.

Although the Oregon Supreme Court has twice quoted language from *Lamprey* recognizing the sovereign usufructuary PTD,[149] the state's

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141. Hannah Leone, *Planning Commissioner Ousted Over Oswego Lake Public Access Lawsuit*, OREGONIAN (May 22, 2015), https://www.oregonlive.com/lake-oswego/index.ssf/2015/05/planning_commissioner_ousted_o.html.

142. LAKE OSWEGO, OR. RES. 12-12 (2012); *see* LAKE OSWEGO CORP., RULES & REGULATIONS HANDBOOK art. 1.7 (2017) ("'Lake Oswego Swim Areas' means the City of Lake Oswego Swim Area, located at the eastern end of the East Arm of Oswego Lake, which is designated for use for swimming by *all holders of Lake privileges and residents of the City of Lake Oswego*; and the Lake Grove Swim Park, designated for use only by owners whose property lies within the boundaries of the Old Lake Grove School District." (emphasis added)).

143. Kramer v. City of Lake Oswego (*Kramer I*), No. CV12100913, 2014 WL 8817709, at *1 (Or. Cir. Ct. Jan. 24, 2014); Leone, *supra* note 141.

144. Kramer v. City of Lake Oswego (*Kramer II*), 395 P.3d 592, 594 (Or. Ct. App. 2017), *review allowed*, 403 P.3d 776 (Or. 2017).

145. *Kramer I*, 2014 WL 8817709 at *1.

146. *Id.* at *3 ("Although the [public use] doctrine may allow temporary touching or access to uplands where necessity requires it, the doctrine cannot serve as a basis for preventing upland owners from restricting access to the water.").

147. *Kramer II*, 395 P.3d at 610, 612; *Entry Form*, *Mark Kramer v. City of Lake Oswego*, OR. JUD. DEP'T, https://www.ojd.state.or.us/records/sccalendar.nsf/b29dd44d01dffea088256c91005b3a5b/d976b0e71bfa229b882581b7007eb2bf?OpenDocument (last modified Apr. 16, 2018).

148. *Appellate Brief of State of Oregon*, *supra* note 137, at 15–16.

149. Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936); Guilliams v. Beaver Lake Club, 175 P. 437, 442 (Or. 1918).

attorney general issued a 2005 opinion that attempted to create a new kind of public right—a so-called "public use doctrine"—distinguished from the sovereign usufructuary PTD.[150] According to that opinion, where the bed of a waterbody is not state-owned, the public has a right to use the water if it is capable of supporting recreational watercraft.[151] However, the attorney general's opinion made no mention of the state's obligation to protect public access under the Statehood Act and implied that the Oregon PTD was limited to submerged and submersible lands owned by the state.[152]

The state's position is now under challenge before the Oregon Supreme Court. The plaintiffs claim that (1) the PTD applies to Oswego Lake as a navigable-in-fact water that supports numerous recreational watercraft on any sunny summer day and (2) the public may access those trust waters from city-owned public parklands adjacent to the lake.[153] The plaintiffs are supported by amicus briefs from over sixty law professors and several public access and fishing groups.[154] The law professors not only claim that the state's position is inconsistent with the Oregon Supreme Court's embracing of the sovereign usufructuary PTD over a century ago, but also overlooks both the Oregon courts' recognition of public access rights to and from public parklands and the Statehood Act's promise that the navigable waters in the state would remain as "common highways" and "forever free."[155]

A problem for the state before the Oregon Supreme Court may be inconsistency. In litigation over the Superfund site that is the Lower Willamette River, the state has claimed that:

> The State holds in trust for the public the bed and banks, and waters between the bed and banks, of *all waterways* within the State. By virtue of its public trust responsibilities, all such lands are to be preserved for public use . . . . *The state is also the trustee of all natural resources—including land, water, wildlife,*

150. Op. Or. Att'y Gen. 8281, 2005 WL 1079391, at *16–17, *24 (Apr. 21, 2005).

151. *Id.* at *21–24 (discussing *Lamprey*, *Guilliams*, and *Luscher*).

152. *See id.* at *27 ("[I]t is unclear how Oregon appellate courts . . . will take into account the essential nullification of the right to use a navigable waterway worked by an inability to access the uplands.").

153. Appellant's Opening Brief and Excerpt of Record at 18–19, 21, Kramer v. Lake Oswego, No. A156284 (Or. July 8, 2014), 2014 WL 9865507.

154. *See* Brief on the Merits of Law Professors, et al. as Amici Curiae in Support of Petitioners, Kramer v. Lake Oswego, No. A156284 (Or. Dec. 12, 2017), 2017 WL 6805171 [hereinafter *Law Professors Amicus*]; Amicus Brief of the Association of Northwest Steelheaders, Inc., Kramer v. City of Lake Oswego, No. A156284 (Or. Dec. 11, 2017), 2017 WL 6605507.

155. *Law Professors Amicus*, *supra* note 154, at 12–14, 24–25, 30–31 (quoting Oregon Admission Act, ch. 33, § 2, 11 Stat. 383, 383–84 (1859)).

> *and habitat areas—within its borders.* As trustee, the State holds these natural resources in trust for all Oregonians—preserving, protecting, and making them available for all . . . .[156]

This statement directly contradicts the state's position in the Oswego Lake case, in which the state has denied trust responsibility for a waterbody that clearly meets the state's navigability test—being capable of navigation by recreational watercraft.[157] The Oswego Lake case will test the viability of the sovereign usufructuary PTD in Oregon. Oregon courts are also being asked to apply the PTD to destabilizing atmospheric pollution threatening the planet's climate.[158]

CONCLUSION

As the New Jersey Supreme Court recognized close to a half-century ago, the PTD is not static.[159] Instead, as Justice Holmes articulated concerning common law decision making, the PTD reflects the "[f]elt necessities of the time."[160] In the context of the PTD's public use obligations, these "felt necessities" are within the discretion of state courts.[161]

Recognition of public rights in wildlife and beaches requires no further evolution of the PTD.[162] These public rights are both clear examples of the application of the sovereign usufructuary PTD.[163] Distinguishing them as the *wildlife trust* or as *customary rights* is simply a mechanism for eliminating

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156. Complaint at 5, Oregon v. Monsanto Co., No. 18CV00540 (Or. Cir Ct. Jan. 4, 2018) (emphasis added).

157. *See supra* notes 146–56 and accompanying text (describing the City of Lake Oswego and the State of Oregon's position in the litigation).

158. Chernaik v. Kitzhaber, 328 P.3d 799, 800 (Or. Ct. App. 2014) ("Plaintiffs are children who . . . sued the State of Oregon . . . for declaratory and equitable relief . . . . [P]laintiffs seek . . . a declaration that defendants have violated their duties to uphold the public trust and protect the State's atmosphere [and resources] from the impacts of climate change." (internal quotations omitted)).

159. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972).

160. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881).

161. *Id.*; *see supra* Parts III & III.A (explaining that the sovereign usufructuary PTD is a matter of state law).

162. *See supra* notes 83 and 104 (discussing cases recognizing public trust rights to beach access and wildlife).

163. *See, e.g.*, Nies v. Town of Emerald Isle, 780 S.E.2d 187, 194 (N.C. Ct. App. 2015) ("Public trust rights are associated with public trust lands, but are not inextricably tied to ownership of these lands."); s*ee also* Geer v. Connecticut, 161 U.S. 519, 529 (1896) ("The wild game within a State belongs to the people in their collective sovereign capacity." (quoting *Ex Parte* Maier, 37 P. 402, 404 (Cal. 1894))).

public enforcement rights.[164] The loser would be the public: the beneficiary of the PTD.

The frontier of the sovereign usufructuary PTD may well lie in public access rights to trust resources. The public's right to use the trust *res* is of little value if the public can be excluded through closed off public access to adjacent lands, as has happened in the Oswego Lake case. The principle behind the beach access decisions was that access over the privately owned dry sand was ancillary to the public's use of tidelands and the ocean.[165] In those cases the *jus privatum* was not a mechanism of exclusion of the *jus publicum*.[166] Public access advocates will likely seek a similar ancillary right to reach trust resources in the future.[167]

Judicial recognition of the PTD's dichotomous *jus privatum* and *jus publicum* estates—the kind of split estate familiar to private trust lawyers—has produced a sovereign usufructuary PTD that burdens resources that are not state-owned. Recently, the Washington Supreme Court presciently examined the nature of this dichotomy in a decision involving the status of a nearly 60-year old fill in Lake Chelan.[168] The court contrasted the *jus publicum* with the *jus privatum*, explaining that "[t]he fact that the State never acquired title ownership [to the fill property] does not mean the public trust doctrine has no constitutional force as to this property."[169] The court also clarified that the *jus privatum* "remains subservient" to the *jus*

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164. *See supra* notes 83, 104 and accompanying text (discussing *Geer* and *Thornton*).

165. *See supra* notes 83, 104 and accompanying text (discussing several cases where courts upheld public access across privately owned beaches); *see also supra* Part III.B (explaining that after *Lamprey* "states began to adopt broad definitions of waterways to which the public had access rights irrespective of public riverbed or lakebed ownership").

166. *See* Shively v. Bowlby, 152 U.S. 1, 48 (1894) (discussing the distinction between *jus privatum* and *jus publicum*); *see also infra* notes 168–70 and accompanying text (analyzing the *jus privatum* and *jus publicum* distinction in a recent Washington Supreme Court case).

167. In *Weise v. Smith*, the Oregon Supreme Court long ago recognized that a member of the public using a navigable water for log floats could fasten supports on surrounding private uplands to facilitate the operation. Weise v. Smith, 3 Or. 445, 450–51 (1869). Similarly, states recognizing portage rights sanction trust users' temporary use of private uplands. *See, e.g.*, Galt v. State *ex rel.* Dep't of Fish, Wildlife & Parks, 731 P.2d 912, 916 (Mont. 1987) ("Landowners, through whose property a water courts flows . . . , have their fee impressed with a dominant estate in favor of the public.").

168. *See* Chelan Basin Conservancy v. GBI Holding Co., 413 P.3d 549, 557, 561–62 (Wash. 2018) (deciding that the Washington legislature had authorized the fill in a 1971 statute, which a trenchant four-member concurrence insisted should have been subjected to the *Illinois Central*-like PTD exemptions); *see also* Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) ("The test of whether or not an exercise of legislative power with respect to tidelands and shorelands violates the 'public trust doctrine' is found in [*Illinois Central*].").

169. *Chelan Basin Conservancy*, 413 P.3d at 555, 558 (explaining that private property "remains continuously subject to the [PTD] servitude"). The PTD is constitutionally entrenched in Washington. WASH. CONST. art. XVII; *see Chelan Basin Conservancy*, 413 P.3d at 558 ("[T]he public trust doctrine is 'partially encapsulated' in article 17 of [the] state constitution." (quoting Rettkowski v. Dep't of Ecology, 858 P.2d 232, 239 (Wash. 1993))).

publicum, which operates "much like 'a covenant running with the land.'"[170]

Over 125 years ago, the Minnesota Supreme Court anticipated the Lake Chelan Court's decision by uncoupling the sovereign PTD from land ownership in its *Lamprey* decision.[171] Judicial recognition of the sovereign usufructuary PTD could have significant effects on ongoing cases. For example, if courts understand that the scope of the PTD is not confined to state lands, there might be no principled way of distinguishing state trust ownership of surface water from groundwater.[172] Something similar might be said concerning wildlife, a widely recognized trust resource,[173] and the atmosphere.[174] Groundwater sustainability and atmospheric stability both clearly fit within *Illinois Central*'s issues "of public concern."[175] If *Lamprey*'s legacy extends to the state's duty to protect these resources in a climate-challenged world, the decision may be remembered as just as much of a lodestar as the *Illinois Central* decision that Professor Sax made famous a half-century ago.[176]

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170. *Chelan Basin Conservancy*, 413 P.3d at 555 (quoting Orion Corp. v. State, 747 P.2d 1062, 1072–73 (Wash. 1987)); Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986).

171. *Lamprey*, decided in 1893, was a year after the Supreme Court's *Illinois Central* decision and three years before *Geer v. Connecticut*. *See supra* notes 11, 104 (providing decision dates of *Illinois Central* and *Geer*, respectively). All three cases reflect the strong anti-monopolization sentiment widespread in the populist movement of the 1890s, a counterweight to privatization and exclusion of the dominant thinking of the Gilded Age of post-Civil War America. *See* Dunning, *supra* note 108, § 32.03 (explaining the expansion of the *Lamprey* rule to include non-commercial public rights). Populists distrusted hierarchy and the centralization of wealth, as evident in other initiatives like the Interstate Commerce Commission Act and the Sherman Anti-Trust Act. *See* George J. Stigler, *The Origin of the Sherman Act*, 14 J. L. STUD. 1, 1 (1985) (discussing the populist sentiments that led to the passing of the Sherman Anti-Trust Act). By extending the PTD—beyond a means to ensure public use of waterbodies that were important arteries of commerce—to protect the public's recreational use of waterways, the *Lamprey* decision reflected the sentiments of the age. *Id.* at 5.

172. *See, e.g.*, Envtl. Law Found. v. State Water Res. Control Bd., No. 34-2010-80000583, 2014 WL 8843074, at *2, *6 (Cal. Super. Ct. July 15, 2014) ("[T]he court concludes the public trust doctrine protects navigable waterways from harm caused by groundwater extraction . . . ."); Lake Beulah Mgmt. Dist. v. Wis. Dep't of Nat. Res., 799 N.W.2d 73, 76 (Wis. 2011) ("The [Department of Natural Resources] has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state." (footnotes omitted)).

173. *See supra* note 104 (discussing the state ownership of wildlife).

174. *See supra* notes 4, 19 (discussing *Juliana* and the atmospheric trust).

175. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892) ("The ownership of the navigable waters of the harbor and of the lands under them is a subject of *public concern to the whole people* of the State." (emphasis added)).

176. Sax, *Effective Judicial Intervention*, *supra* note 10, at 489.

BLACK SWAN RECONFIGURATION: LEGAL SEPARATION OF AMERICAN POWERS

Steven Ferrey[*†]

ABSTRACT

In a legal Black Swan *event, the Supreme Court, in an unprecedented action, stayed and blocked implementation of the Obama Administration's core domestic and international agenda—years before a legal challenge to the regulation would ever reach the highest Court. This decision underscores major changes in the legal separation of U.S. governmental powers, and alters long-standing* Chevron *deference to the executive branch.*

The Clean Power Plan served as the foundation of the Obama Administration's goal to reduce climate-warming gas emissions from power plants. It provided the legal mortar cementing the U.S. commitment to the 2015 International Paris Agreement on climate change. This plan was a controversial exercise of executive action in the second Obama term that wove together domestic and international legal policy. With a 5–4 split, the Supreme Court decision peremptorily stayed the Plan—years before the lower court could rule on a contested challenge or advance to it—and the court of appeals froze. Raising the stakes, the Trump Administration is now recalculating the costs and benefits of the Plan in order to change American law.

These are pending disputes of legal first impression, fundamentally reshaping constitutional law. Rules of law have changed due to a combination of the unprecedented Supreme Court stay of executive action—years before any challenge would reach it on appeal—and the Trump Administration's efforts to recalibrate the costs and benefits of the regulations. This article analyzes in detail the legal position of each side

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* Steven Ferrey is Professor of Law at Suffolk University Law School and was a Visiting Professor of Law at Harvard Law School. Since 1993, Professor Ferrey has been a primary legal consultant to the World Bank, the European Union, and the United Nations on their renewable energy and climate change reduction policies for developing countries, where he has worked extensively in Asia, Africa, and Latin America. He holds a B.A. in Economics from Pomona College, a Juris Doctor degree and a master's degree in Regional Energy Planning both from the University of Californian Berkeley, and was a post-doctoral Fulbright Fellow at the University of London between his graduate degrees. He is the author of 100 articles and seven books, the most recent of which are UNLOCKING THE GLOBAL WARMING TOOLBOX (2010); ENVIRONMENTAL LAW (7th ed. 2016) & (8th ed. 2019); and LAW OF INDEPENDENT POWER (45th ed. 2018).

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and the impacts of this long-pending, and significant constitutional confrontation, transfiguring domestic and international law.

I. RECEDING DEFERENCE IN ADMINISTRATIVE LAW

The Supreme Court initiated a major change reverberating in the separation of powers and administrative law.[1] The Supreme Court took the unprecedented, and still ongoing, action three years ago to stay and block enforcement of core Obama Administration domestic and international regulatory programs.[2] This action occurred years before the contested case ever reached a decision on the merits by the lower court or reached the Supreme Court on appeal.[3] This stay was an unprecedented preemptive reach of the Court.[4] Thereafter, the D.C. Circuit Court of Appeals avoided any decision upon hearing oral argument in 2015 for this critical matter of fundamental executive branch power.[5]

After the 2016 Presidential election, this pending judicial conflict on the separation of powers became even less clear to areas of constitutional and administrative law, creating unresolved issues of whether:

(1) A federal regulation's administrative benefits must always exceed costs;[6]

(2) So-called *co-benefits* can be counted as actual benefits when a regulation does not regulate such affected *co-benefits*;[7]

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1. *See* Jonathan H. Adler, Opinion, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST: VOLOKH CONSPIRACY (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.076d469e7e5a [hereinafter *Brakes on CPP*] (referencing the Supreme Court's stay of the EPA's Clean Power Plan).

2. *See generally id.* (recounting the specifics of the Supreme Court's action).

3. *Id.*; *see also* Richard Wolf, *Supreme Court Blocks Obama's Climate Change Plan*, USA TODAY, https://www.usatoday.com/story/news/politics/2016/02/09/supreme-court-halts-obamas-emissions-rule/80085182/ (last updated Feb. 9, 2016) (outlining the history of the Clean Power Plan).

4. *See Brakes on CPP*, *supra* note 1 (commenting on the unusual nature of the action taken by the Supreme Court).

5. Janice Chon, Note, *Clean Power Plan*, 7 BARRY U. ENVTL. & EARTH L.J. 105, 107 (2017).

6. *See generally* Mario Loyola, *Federal Coercion and the EPA's Clean Power Plan*, ATLANTIC (May 17, 2015), https://www.theatlantic.com/politics/archive/2015/05/federal-coercion-and-the-epas-clean-power-plan/393389/ (calling into question the benefits of compliance with the Clean Power Plan).

7. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,928 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Clean Power Plan] (discussing *co-benefits* and their economic calculation).

(3) There is a new judicial rule when an agency confronts differing versions of statutory language incorporated in a statute;[8] and
(4) The *stare decisis* of prior U.S. Supreme Court opinions control the outcome.[9]

Administrative agencies in the 21st century have tried to avoid a court challenge reaching the merits of agency energy regulation.[10] Agencies have defended their administrative regulations by asking courts to avoid the legality of the merits or trying to disqualify the challenger on procedural grounds.[11] Such challenges include lack of plaintiff standing, failure to exhaust administrative remedies, and inability of courts to issue writs to executive agencies commanding compliance with the law.[12] Success on any of these defenses avoids a substantive decision on the merits of a legal controversy.[13]

This challenge to the Clean Power Plan (CPP) calls into question traditional rules of legal deference to agency actions.[14] The ongoing legal opposition to the Obama Administration's signature CPP is still not through the appellate process and the Supreme Court has not heard the case approximately three years after its challenge.[15] After the D.C. Circuit denied a request for a stay until a decision on the merits,[16] the Supreme Court, on February 9, 2016, took the unprecedented step of asserting its jurisdiction.[17] The Supreme Court ordered the EPA, prior to any opinion on

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8. *See, e.g.*, *In re* Murray Energy Corp., 788 F.3d 330, 336 (D.C. Cir. 2015) (litigating the applicability of §§ 111(d) & 112 as amended and discussing judicial review of a proposed rule based on the EPA's interpretation of the statutory language).

9. *See* Lawrence Hurley & Valerie Volcovici, *U.S. Supreme Court Blocks Obama's Clean Power Plan*, SCI. AM., (Feb. 9, 2016), https://www.scientificamerican.com/article/u-s-supreme-court-blocks-obama-s-clean-power-plan/ (explaining that the Supreme Court has never blocked an EPA rule and that doing so would be unusual).

10. *See infra* Part IV.B.2 (explaining the remedies administrative agencies use to avoid unfavorable court decisions).

11. *See generally infra* Part IV (noting the different procedural methods used by agencies to halt litigation).

12. *See infra* Part IV.B.2.a (discussing the procedural grounds administrative agencies have used to dismiss cases from court).

13. *See infra* Part IV.B.2 (discussing the EPA's approach to avoiding a decision on the merits).

14. *See* Chevron U.S.A. v. NRDC, 467 U.S. 837, 866 (1984) (establishing the precedent of deference to agency action when Congress has not spoken to the issue and agency action is not arbitrary and capricious).

15. Wolf, *supra* note 3.

16. *See Brakes on CPP*, *supra* note 1 ("[A]s it is unusual for the high court to block federal regulations, particularly where (as here) the D.C. Circuit had denied a similar request.").

17. *See* Wolf, *supra* note 3 (describing how the Supreme Court stunned the environmental community by staying the CPP despite the need for the case to run its natural course first).

the merits or an appeal, to halt enforcement of the CPP until the D.C. Circuit issues an order on the lawsuit.[18]

This *Black Swan* legal event is unprecedented: the Supreme Court stepped in and preempted the circuit court on a stay when the merits were not yet decided by the D.C. Circuit.[19] This 5–4 split decision to issue a stay by the Court marks the first time the Supreme Court ever stayed a regulation before a judgment by the Court of Appeals.[20] Some commentators posit that this was not a surprising outcome, given the ruling in the 2015 Supreme Court decision in *Michigan v. EPA*.[21] Ultimately, the question is not about the CPP alone. There is a shift in administrative deference—both eroding the principles and ongoing practices emanating from the landmark *Chevron* decision.[22] There is a legal shift in the administrative state.[23]

This article navigates this shift that engulfs the pressing environmental and energy controversy of the 21st century—the control of our climate. Part II examines the contours of what the Obama Administration's CPP is, tracking both its proposed and modified final forms. We track its impacts at its cost of billions of dollars.[24]

Part III analyzes each aspect of the Petioners' substantive legal challenges to the CPP as arbitrary and capricious agency action not supported by the record. We dissect precedent ensnarling the substantive

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18. *Brakes on CPP*, *supra* note 1; *see* Wolf, *supra* note 3 (explaining the suspension of CPP enforcement due to pending litigation).

19. *See* Jonathan H. Adler, Opinion, *Placing the Clean Power Plan in Context,* WASH. POST: VOLOKH CONSPIRACY (Feb. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context/?utm_term=.c0e004e8cb0d [hereinafter *CPP in Context*] (describing the unprecedented manner of the actions taken by both the Court and the CPP).

20. Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html.

21. *Brakes on CPP*, *supra* note 1. As a side note, there was no stay granted to the plaintiffs in the Supreme Court *Michigan* decision resulting in power plants paying for later-stricken upgrades to comply with the EPA's rulemaking during the litigation only to have it later overturned by the Supreme Court for the lack of cost-of-compliance analysis done by the EPA for the § 112 regulations. *See* Michigan v. EPA, 135 S. Ct. 2699, 2711–12 (2015) (holding that the EPA interpreted the statute unreasonably by not considering cost to be a relevant factor in their decision). By the time the order was invalidated, the costs were expended and plants were at or near compliance with the invalidated rulemaking, as suggested in Petitioners application for stay. *Id.*

22. *See* Chevron U.S.A. v. NRDC, 467 U.S. 837, 866 (1984) (detailing the Supreme Court's decision regarding deference to agencies).

23. *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1393 (2017) (discussing the emergence and decline of the *Chevron* ruling).

24. *See infra* Parts II.A, III.C (providing an overview of the CPP).

legal issues and attempts at rebuttal by the Obama Administration EPA and Justice Department before the Supreme Court and federal courts.[25] At issue are the remaining contours of *Chevron* deference, a long-respected foundation of American administrative and constitutional law.[26]

In administrative law, there is substance and there is procedure. Part IV transitions to the procedural defenses raised by the agency to attempt to avoid a decision on the merits. These defenses raise issues of lack of citizen standing, failure to exhaust admnistrative remedies, and whether the executive branch agency can legally be subject to a judicial writ to compel its actions.[27] Every case has consequences. Part V charts lasting impacts for U.S. administrative law and the change to executive branch power.

II. DISSECTING THE CLEAN POWER PLAN

A. The Obama Administration's CPP Rule

1. Continuation or Significant Legal Departure?

The Obama Administration's CPP was the foundational U.S. environmental regulation with international implications, promulgated to meet Kyoto Protocol and 2015 Paris Agreement pledges to reduce carbon emissions.[28] The CPP did so by exclusively targeting carbon emissions from electricity produced by fossil fuels.[29] This was seen by many, including 15 states that sued the EPA on promulgation of this rule,[30] as a significant departure from previously allowed EPA regulations under the Clean Air Act.[31] The CPP requires state-differentiated plans with varying

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25. *See infra* Parts III.A.1–A.2 (looking at CPP litigation parties' arguments).

26. *See* Steven Ferrey, *Mind the Gap: Supreme Court Contraction of Legal Discretion for the Executive Branch*, 13 TEX. J. OIL, GAS, & ENERGY L. 119, 121 (2018) [hereinafter *Mind the Gap*] ("*Chevron* and its progeny are the foundation of modern administrative law . . . .").

27. *See infra* Part IV (discussing various defenses the EPA has raised against challenges to agency decisions).

28. *See generally* Robinson Meyer, *The Problem with Abandoning the Paris Agreement*, ATLANTIC (Nov. 18, 2017), https://www.theatlantic.com/science/archive/2016/11/the-problem-with-abandoning-the-paris-agreement/508085/ (describing how Obama intended the CPP to bring the U.S. into compliance with the Kyoto Protocol and the Paris Agreement).

29. *See* Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014, 80 Fed. Reg. 64,996, 64,996 (proposed Oct. 23, 2015) ("In this action, the [EPA] is proposing a federal plan to implement the greenhouse gas (GHG) emission guidelines (EGs) for existing fossil fuel-fired electric generating units (EGUs) under the Clean Air Act (CAA).").

30. *See In re* Murray Energy Corp., 788 F.3d 330, 331–33 (D.C. Cir. 2015) (noting that 27 states were parties to the suit, albeit for various reasons).

31. *See, e.g.*, Loyola, *supra* note 6 (explaining the traditional operations of the EPA and the subsequent departure from those traditions in the face of missing statutory authority).

requirements,[32] and exclusively targets the electric power sector.[33] As detailed below, the regulation of carbon from stationary power plants (as opposed to mobile vehicle sources)[34] was a step beyond prior regulation.[35]

However, targeting the electric power sector to reduce Clean Air Act emissions is not a divergence from past practices.[36] Previous EPA regulatory practices also targeted the electric sector to reduce emissions.[37] The EPA prepares Control Technique Guidelines (CTGs)[38] and Alternative Control Techniques (ACTs)[39] to strongly influence how states implement required reductions in Clean Air Act criteria pollutant emissions.[40] The EPA created CTGs to target sources of volatile organic compound (VOC) emissions.[41] For Reasonably Achievable Control Technology (RACT) techniques—implemented by states—to control VOC emissions,[42] ACTs target power plant nitrogen oxide (NO_x) emissions.[43] As part of achieving State Implementation Plan (SIP)

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32. *See infra* Part II.A.4 (summarizing CPP state requirements).

33. JAMES E. MCCARTHY ET AL., CONG. RESEARCH SERV., R44341, EPA'S CLEAN POWER PLAN FOR EXISTING POWER PLANTS: FREQUENTLY ASKED QUESTIONS 1 (2017).

34. *See, e.g.*, STEVEN FERREY, ENVIRONMENTAL LAW 219 (Wolters Kluwer 7th ed. 2016) [hereinafter ENVIRONMENTAL LAW] (explaining carbon regulation for mobile sources).

35. *See infra* Parts III.B.1, III.B.3 (highlighting the regulatory purview of the CPP and how the regulation differs from past regulations).

36. *See* 1 STEVEN FERREY, LAW OF INDEPENDENT POWER § 6:92, at 6–388, § 6:96, at 6–402 (Thomson Reuters 46th ed. 2018) [hereinafter LAW OF INDEPENDENT POWER] (providing past examples of the EPA targeting the electric power sector).

37. *See id.* § 6:96, at 6–402 (describing how, in 2000, the EPA issued a Clean Air Act § 126 rule that required roughly 400 power plants to reduce NO_x emissions).

38. *Id.* § 6:92, at 6–383.

39. *See id.* ("In an effort to give the states more direction in creating the appropriate NO_x RACT standard, the EPA created Alternative Control Techniques (ACT) documents.").

40. *Id.*

41. *Id.* These CTGs describe what SIP elements for particular sources the EPA will generally approve. The industry categories that the EPA identifies range from large pharmaceutical production to the coating of metal products. *Id.* Once the EPA develops a CTG for a category, the EPA expects the states to use it in creating a SIP for industries within the category. *Id.* CTGs, however, do not address major sources of NO_x, and the Act does not require CTG guidelines to do so. *Id.* This became a problem because states did not have any EPA direction in creating standards of control for sources that emit NO_x. *Id.*

42. *See* Approval and Promulgation of Implementation Plans; Revised Deadline for Submission of Volatile Organic Compound (VOC) RACT Regulations for Set II CTG Sources, 45 Fed. Reg. 78,121, 78,121 (Nov. 25, 1980) (to be codified at 40 C.F.R. pt. 52) [hereinafter RACT Regulations for Set II CTG Sources] (including RACT requirements in state ozone emission control measures for those states not yet having achieved attainment).

43. *See* Clean Air Act § 183, 42 U.S.C. § 7511a(f)(1) (2012) (providing requirements for RACT and ACTs to reduce NO_x pollution); RACT Regulations for Set II CTG Sources, 45 Fed. Reg. at 78,121 (explaining that these guidelines target source categories which describe SIP control elements that the EPA generally will approve). Section 183(c) of the Act requires that the Agency issue ACTs that identify alternative controls for all categories of stationary sources that emitted more than 25 tons per year of VOCs and NO_x. *See* 42 U.S.C. § 7511b(c) (2012) (detailing requirements for compliance

compliance, the EPA issues and supplies ACTs for all sources with NO_x emissions larger than 25 tons per year (tpy), as a guide for states to achieve RACT levels restricting existing stationary sources.[44]

While the EPA claimed that the ACTs were only intended to help guide the states in choosing among the RACT standards for their individual SIPs,[45] these CTG and ACT guidelines have the practical effect of compelling states to accept the EPA's definition of what level of control for power plant emissions is acceptable to satisfy RACT requirements of the Clean Air Act.[46] Courts have noted that EPA guidance on ACTs and CTGs for RACT are only "informal suggestions."[47] Although not required to follow the CTGs or ACTs, these federal EPA documents often do a significant portion of the design work for the states.[48] ACTs describe what techniques the EPA will generally approve promptly as part of a SIP submission.[49]

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with the Clean Air Act). Similar to the CTGs issued for VOC source categories, the RACTs contain extensive background information on control techniques, costs, availability, feasibility, etc., that may be used by states in making RACT choices and determinations. *See* State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas-Supplement, 44 Fed. Reg. 53,761, 53,762 (proposed Sept. 17, 1979) (to be codified at 40 C.F.R. pt. 52) (detailing generally EPA's expectation of states for RACT compliance). However, unlike the CTGs, the ACTs do not create a presumptive RACT. *See* 42 U.S.C. § 7511a(b)(2)(A) (2012) (explaining RACT requirements).

44. OFFICE OF AIR QUALITY PLANNING & STANDARDS, EPA, ALTERNATIVE CONTROL TECHNIQUES DOCUMENT—NO_x EMISSIONS FROM STATIONARY GAS TURBINES 1-1 (1993); *see* State Implementation Plans for National Primary and Secondary Ambient Air Quality Standards, 42 U.S.C. § 7410 (2012) (listing EPA requirements for responding to state-submitted implementation plans).

45. *See* State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13,498, 13,513 (Apr. 16, 1992) (to be codified at 40 C.F.R. pt. 52) [hereinafter Implementation of CAA Amendments of 1990] (outlining EPA requirement to suggest ACTs not meant to be presumed RACTs).

46. *See Demonstrating Compliance with New Source Performance Standards and State Implementation Plans*, EPA, https://www.epa.gov/compliance/demonstrating-compliance-new-source-performance-standards-and-state-implementation-plans (last visited Nov. 25, 2018) (explaining the SIP program and requirements); Paul DeCotis, *What the Clean Power Plan Means for You & How to Tackle Building a Compliance Strategy*, ENERGY CENT. (Nov. 7, 2014), https://www.energycentral.com/c/um/what-clean-power-plan-means-you-how-tackle-building-compliance-strategy (explaining EPA authority in regard to SIPs).

47. *See* Citizens for a Better Env't v. Costle, 515 F. Supp. 264, 278 (N.D. Ill. 1981) (arguing that CTGs, while informal guidelines, are preemptory attempts by the EPA to force states to follow EPA targeting of power plants; the court deferred deciding this issue); *see also* Nat'l Steel Corp. v. Gorsuch, 700 F.2d 314, 322 (6th Cir. 1983) (explaining the revision and implementation process for state plans under the EPA regulation).

48. *See* Implementation of CAA Amendments of 1990, 57 Fed. Reg. at 13,513 (detailing EPA recommendations and their foundation).

49. *See id.* (explaining the EPA requirement to provide ACTs for certain categories of pollutant sources that could produce 25 tons of such category pollutants).

While states have discretion to follow the EPA suggestions or deploy their own techniques to control NO_x and VOC criteria emissions, these preapproved options place significant pressure on the states to adopt EPA recommendations in order to expedite their SIP approval.[50] If the EPA denies a state plan, it can eventually impose a Federal Implementation Plan (FIP) and/or the state can lose federal highway funds.[51] When the EPA promulgates a FIP for a state, it can choose to adopt the controls originally specified in the ACTs.[52] There is more EPA influence and control over eventual state regulatory choices under the Clean Air Act than there appears in the plain language of the statute's constitutional federalism delegating decisions to the state.[53]

2. Proposed CPP Rule, Modified Rule, and CPP Final Promulgation

The Obama Administration's October 2015 CPP, a 460-page rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," would dramatically limit CO_2 emissions from large power-generating facilities.[54] The Obama Administration's CPP, implemented through executive branch regulation without congressional approval, would impose a required 32% reduction of annual CO_2 emissions from new and existing power plants by 2030.[55] The

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50. *See* State Implementation Plans for National Primary and Secondary Ambient Air Quality Standards, 42 U.S.C. § 7410 (2012) (explaining the requirement of the EPA Administrator to provide minimum standards); *See also* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:92, at 6–383 to 6–384 (highlighting the risk of federal sanctions to states that do not follow the EPA's ACTs and CTGs).

51. *See* 42 U.S.C. § 7509(b)–(d) (2012) (indicating that the Administrator can prescribe additional attainment measures and can withhold federal highway funds); NRDC v. Browner, 57 F.3d 1122, 1124 (D.C. Cir. 1995) (describing when and how the EPA imposes a FIP and sanctions on state funds).

52. *See* DANIEL P. SELMI, SABIN CTR. FOR CLIMATE CHANGE, FEDERAL IMPLEMENTATION PLANS FOR CONTROLLING CARBON EMISSIONS FROM EXISTING POWER PLANTS: A PRIMER EXPLORING THE ISSUES 9 (2015) (explaining that the EPA can employ measures to obtain the goal of reducing emissions and in some circumstances has much discretion to create the measures of a FIP).

53. *See* Approval and Promulgation of Implementation Plans; California-South Coast Air Basin; Ozone and Carbon Monoxide Plans, 53 Fed. Reg. 49,494, 49,495 (Dec. 7, 1988) (to be codified at 40 C.F.R. pt. 52) (detailing the potential for the EPA to need to assume legislative functions to create a FIP).

54. *See* Clean Power Plan, 80 Fed. Reg. 64,661, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (noting that the purpose of the CPP was to reduce pollution emissions from emitting facilities).

55. *See id.* at 64,665 ("Nationwide, by 2030, [the] final CAA section 111(d) existing source rule will achieve CO_2 emission reductions from the utility power sector of approximately 32 percent from CO_2 emission levels in 2005."). Between the rule's promulgation in 2014 and final rule issuance in 2015, the EPA delayed implementation. *Id.* at 64,662, 64,790. This included more time for state compliance with a two-year delay for states filing required plans from 2016 to 2018, and a two-year delay in the first year of required CO_2 reductions, from 2020 to 2022. *Id.* at 64,669. The EPA's final

CPP uses the 2005 carbon emission levels as the baseline, against which future reductions are measured and with the first reduction pledge to be implemented by 2022.[56] In certain states, this would require a significant cut—up to 50%—in the carbon intensity of existing electric power generation.[57]

Starting from the beginning: In 2013, President Obama announced his "Climate Action Plan," and directed the EPA to work expeditiously to promulgate CO_2 emission standards for fossil-fuel-fired power plants.[58] The EPA proposed performance standards for "new, modified, and reconstructed power plants" under § 111(b) of the Clean Air Act.[59] Section 111(d) of the Act details the process for states to submit plans to address CO_2 emissions from existing power plants.[60] The original proposed rule contained two main elements: (1) state-specific, emission-rate-based CO_2 goals for all regulated coal- and natural gas-fired sources; and (2) guidelines for states to develop, submit, and implement state plans.[61] While the rule contained individualized CO_2 goals for each state, it did not prescribe how a state should meet its federally imposed carbon emission goal.[62] Rather, each state would have the flexibility to design its own means of limiting carbon emissions from large power plants or to use other techniques "outside the fence" of the regulated power plants.[63] The EPA received more than two million comments on its 2014 CPP proposed rule.[64]

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regulation indicates that the goal of this rule is to substitute gas for coal in the generation of electricity. *Id.* at 64,665. The EPA increased how much CO_2 emissions will have to be brought down from the 2005 baseline in the next 15 years from the 30% proposed to 32% in the final rule. *See id.* (explaining that the new rule sets the baseline at 32%); *see also id.* at 64,736 n.384 (proposing the prior 30% baseline).

56. Clean Power Plan, 80 Fed. Reg. at 64,666, 64,736 n.384; *see also* Juliet Eilperin & Steven Mufson, *EPA Proposes Cutting Carbon Dioxide Emissions From Coal Plants 30% by 2030*, WASH. POST (June 2, 2014), https://www.washingtonpost.com/national/health-science/epa-to-propose-cutting-carbon-dioxide-emissions-from-coal-plants-30percent-by-2030/2014/06/01/f5055d94-e9a8-11e3-9f5c-9075d5508f0a_story.html?utm_term=.d0ac10c6d397 (explaining the general facts and objectives of the EPA's proposed regulation).

57. DeCotis, *supra* note 46.

58. *Fact sheet: President Obama's Climate Action Plan*, OFF. OF THE PRESS SEC'Y (June 25, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan.

59. Clean Power Plan, 80 Fed. Reg. at 64,665.

60. *See also id.* (detailing the application of §§ 111(b) & (d) to power plants).

61. *See* DeCotis, *supra* note 46 (discussing the SIP under § 111(d) of the Clean Air Act).

62. *See* Eilperin & Mufson, *supra* note 56 (noting states have autonomy in choosing which methods they want implemented to meet CO_2 goals).

63. *See id.* (discussing how some states would have to cut emissions up to 50% under the CPP).

64. *See EPA Fact Sheet: Clean Power Plan and Carbon Pollution Standards*, EPA (Jan. 7, 2014), https://archive.epa.gov/epa/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf (stating the timeline for implementing the CPP).

Between the rule's promulgation in 2014 and the final rule issuance a year later in October 2015, the EPA increased the degree of CO_2 emissions reductions and tried to immunize the rule from both legal attack and policy pushback through specific changes.[65] Environmental justice advocates told the EPA that the proposed CO_2 limits for power plants did not emphasize environmental equity and offered too much flexibility to states.[66] In response, the 2015 final EPA rule allowed state consideration of environmental equity and low-income community involvement in the development of their plans.[67]

The changes made for the final rule were significant. When compared to the 2005 baseline, the EPA increased the 2030 CO_2 emission requirements from 30% in the proposed rule to 32% in the final rule, providing the states with a 15-year compliance period.[68] Commensurately, this final rule included more time for state compliance with a 2-year delay for the required filing of state plans from 2016 to 2018, and delayed the first year of required CO_2 reductions from 2020 to 2022.[69] The EPA's final regulation indicated that the rule's goal is to substitute less CO_2-intensive natural gas for coal in the generation of electricity.[70]

Significant changes in the final rule included the elimination of energy conservation options to help reduce carbon emissions, although they are in the proposed rule.[71] The EPA eliminated the option to count energy efficiency and demand-response resource measures as carbon reduction components in state plans, although included in the original list of four state compliance options in the proposed CPP rule.[72] When the EPA eliminated energy efficiency as one of four compliance building blocks to reduce total CO_2 emissions, it left states with these remaining options in the final rule: improving coal-fired power facility operating heat rates; substituting natural

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65. *See* Clean Power Plan, 80 Fed. Reg. at 64,662 (publishing the final CPP, which consisted of 93% preamble and 7% rule for regulating future CO_2 emissions from existing fossil-fuel-fired power plants).

66. Rachel Leven, *Power Plant Carbon Rule Lacks Equity, Environmental Justice Advocates Tell EPA*, BLOOMBERG BNA ENERGY & CLIMATE REPORT, Oct. 1, 2014.

67. *See* Clean Power Plan, 80 Fed. Reg. at 64,662–63 (providing a table of contents for the plan that shows sections on federal low-income requirements and state environmental equity considerations).

68. *Id.* at 64,736 n.384.

69. *Id.* at 64,673.

70. *See id.* at 64,678 (explaining the significant reduction of pollution through reliance on natural gas and the average age of coal-fired generating fleets, which is expected to urge industry to invest in the next generation of fuel rather than repair old infrastructure).

71. *See, e.g.*, *id.* at 64,673 (detailing key changes between the proposal and the final rule, including the exclusion of energy efficiency options as an allowable alternative to carbon emissions reduction).

72. *Id.*

gas for existing coal-fired electric facility operations; or constructing more renewable energy.[73] States can comply with the final rule by:

(1) Improving coal plant operational heat rates by 2–4.3%;
(2) Dispatching lower-carbon natural gas facilities in lieu of coal facilities; or
(3) Relying more heavily on renewable power generation technologies.[74]

The EPA, in the final rule, shifted to calculating state compliance by using a plant-by-plant CO_2 emission level/Mwh of emissions per usable unit of power generated.[75] In 2015, when the CPP regulation requiring states to submit plans was first proposed, Senator Mitch McConnell sent a letter to the National Governors Association urging states not to submit required plans complying with those regulations (once they were promulgated), in order to resist restructuring their electric systems in line with the EPA's wishes.[76] If a state refused to submit a CPP plan (which several governors stated that they would refuse to submit), or where the EPA rejected a state plan, the EPA would restrict fossil-fuel-facility CO_2 emissions of each and every power-generating plant in that state.[77] If states did not comply, the EPA could impose FIPs as mandatory elements for the states.[78]

The EPA's rule states that the "book life" of a coal plant is 40 years, and that states, in their required compliance filings, should consider barring older coal plants under this rule.[79] Utilizing historic data demonstrating that natural gas facilities can operate at 91% capacity, the EPA made the

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73. *Id.*

74. JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R43652, STATE CO_2 EMISSION RATE GOALS IN EPA'S PROPOSED RULE FOR EXISTING POWER PLANTS 6–7, 9 (2014).

75. *See id.* at 1 (describing the method for measuring outputs to monitor state compliance). Coal-fired steam-cycle plants must meet a 1,305 lbs CO_2/MWh limit, while natural gas combustion turbines must meet 771 lbs CO_2/MWh limit by 2030 operations. EPA: OFF. OF AIR & RADIATION, CO_2 EMISSION PERFORMANCE RATE AND GOAL COMPUTATION TECHNICAL SUPPORT DOCUMENT FOR CPP FINAL RULE 18 (2015).

76. *See* Letter from Mitch McConnell, Senate Majority Leader, to National Governors Association (Mar. 19, 2015), https://www.ieca-us.com/wp-content/uploads/Senator-McConnell-Letter-to-NGA_03.19.15.pdf ("[P]roposed 'Clean Power Plan' . . . would require states to dramatically restructure their electricity systems based on the EPA's view of how electricity should be produced and used in each state.").

77. *See id.* (indicating that, if states are "unwilling or unable to submit a plan to the EPA's satisfaction, the only recourse for the EPA is to develop and impose its own federal plan for that state").

78. JEREMY M. TARR, NICHOLAS INST. FOR ENVTL. POLICY SOLUTIONS., THE CLEAN AIR ACT AND POWER SECTOR CARBON STANDARDS: BASICS OF SECTION 111(D) 3 (2013), https://nicholasinstitute.duke.edu/sites/default/files/publications/ni_pb_13-03.pdf.

79. Clean Power Plan, 80 Fed. Reg. 64,661, 64,872 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

assumption that states and regional independent system operators (ISOs) could take natural gas combustion turbines that were running at a national average of only 40–50% of their capacity factor, and increase them to a 75% operating capacity factor in order to displace coal-fired power.[80] The EPA included bankable CO_2 credits for a renewable energy project that starts construction after the state plan is submitted by 2018 and prior to compliance requirements under the rule in 2022.[81]

3. CPP Legal Tethering to the Clean Air Act—Plant-by-Plant

The EPA's CPP employs § 111(d) of the Clean Air Act to regulate existing CO_2 emission sources that are not regulated under other sections of the Act.[82] Section 111(d) differs from § 111(b) of the Act because it requires states to create EPA guided "performance standards for existing sources."[83] As a legal prerequisite, § 111(d) cannot regulate existing sources unless § 111(b) has already established New Source Performance Standards (NSPS) for new or modified sources.[84] This encompasses existing power plants.[85]

For new power plants emitting CO_2, the EPA also proposed new executive branch regulations under § 111(b) of the Clean Air Act, to which Best System of Emission Reduction (BSER) applies.[86] The EPA established a BSER so strict that it effectively made conventional coal-burning power

80. *Id.* at 64,799.

81. *Id.* at 64,890.

82. *See generally* EPA, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED CARBON POLLUTION GUIDELINES FOR EXISTING POWER PLANTS AND EMISSION STANDARDS FOR MODIFIED AND RECONSTRUCTED POWER PLANTS *passim* (2014), https://archive.epa.gov/epa/sites/production/files/2014-06/documents/20140602ria-clean-power-plan.pdf (providing general information on the CPP including, factsheets and press releases). Section 111(d) has been used only five times, because most other categories of sources are addressed in other sections of the Clean Air Act. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 79 Fed. Reg. 34,830, 34,844 (proposed Jun. 18, 2014) (to be codified at 40 C.F.R. pt. 60).

83. JAMES E. MCCARTHY, CONG. RESEARCH SERV., R43127, EPA STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM POWER PLANTS: MANY QUESTIONS, SOME ANSWERS (2013). *Compare* Clean Power Plan, 80 Fed. Reg at 64,665 (noting that § 111(b) authorizes new source performance standards for CO_2 from "new, modified, and reconstructed power plants"), *with id.* at 64,666 (noting that under § 111(d), the EPA develops "emission guidelines" that the states must develop plans to meet).

84. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 79 Fed. Reg. at 34,852. The EPA stresses that § 111(d) provides a broad grant of power to flexibly address air pollutants that are not identified as criteria pollutants. *Id.* at 34,899. States determine the "combination of measures" that will meet the guidelines. *Id.*

85. *Id.* at 34,830.

86. *Id.* at 34,852.

technology impossible for use in new plants.[87] The Clean Air Act's NSPS must implement BSER and are supposed to take into account costs, environmental impact, and energy requirements.[88] NSPS apply to new and majorly-modified stationary sources, but only to those sources in certain high-emission industries.[89] NSPS applies only to approximately 50 major industry groups, including: electric utility steam-generating units, fossil-fuel-fired steam generators of more than 250 million British thermal units (MMBtu) heat input, glass manufacturing plants, and incinerators with more than a 50-tons-per-day charging rate.[90]

For the CPP, the EPA determined that carbon capture and storage (CCS)[91] is an "adequately demonstrated" technology that qualifies as BSER and is only applicable to all new coal-fired electric power plants.[92] The

87. Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources, 79 Fed. Reg. 1430, 1434–35 (proposed Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); *see* Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources, 77 Fed. Reg. 22,392, 22,398 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60) (adding emission standards for new power plants in 2012, which was withdrawn after comment period); Withdrawal of Proposed Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources, 79 Fed. Reg. 1352, 1352–54 (withdrawn Jan. 8, 2014) (to be codified at 40 C.F.R. pt. 60).

88. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 79 Fed. Reg. 34,830, 34,844 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

89. The Clean Air Act defines "modification" to mean any change to "a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any [new] air pollutant . . . ." Clean Air Act, 42 U.S.C. § 7411(a)(2)–(4) (2012).

90. New Source Performance Standards Review, 76 Fed. Reg. 65,653, 65,656 (advanced notice of proposed rulemaking Oct. 24, 2011) (to be codified at 40 C.F.R. pt. 60). NSPS also cover iron and steel plants, municipal solid waste landfills, petroleum refineries, copper smelters, lead smelters, rubber tire manufacturing plants, and sewage treatment plants. New Source Performance Standards for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units, 72 Fed. Reg. 32,710, 32,710 (June 13, 2007) (to be codified at 40 C.F.R. pt. 60).

91. There are at least three approaches to carbon capture: (1) pre-combustion (conversion of carbon in the fuel to CO_2, with removal prior to combustion); (2) post-combustion (separating dilute CO_2 from flue gas after combustion); and (3) oxycombustion (using nearly pure oxygen—rather than air—as the oxidant to produce a flue gas consisting mainly of CO_2 and water vapor). Based on comparison to a reference case of natural gas combined cycle plants without CCS, the cost of an avoided metric ton of CO_2 emissions ranged from $65.32–$142.27. *Carbon Capture Approaches for Natural Gas Combined Cycle Systems*, NAT'L ENERGY TECH. LAB. 1, 14 (Dec. 20, 2010), http://www.netl.doe.gov/File%20Library/Research/Energy%20Analysis/Coal/C_Capture_NGCC_20101220.pdf.

92. EPA, FACT SHEET: CARBON POLLUTION STANDARDS 2–3 [hereinafter EPA FACT SHEET], https://archive.epa.gov/epa/sites/production/files/2015-11/documents/fs-cps-overview.pdf (last updated Sept. 14, 2015). Facilities deploying CCS technology can filter and capture CO_2 from the emission waste stream and pump it into geologic formations or use it to extract coal-bed methane or oil in depleted or diminished oil reservoirs. *See* EPA, CARBON DIOXIDE CAPTURE & SEQUESTRATION FEDERAL RESEARCH & REGULATION, https://archive.epa.gov/epa/climatechange/carbon-dioxide-capture-and-sequestration-federal-research-and-regulations.html#EPA (last visited Nov. 25, 2018) (describing the capabilities of CCS technologies). The EPA cites four projects currently under

proposed "New Source Rule" issued by the EPA establishes the following separate performance standards for new coal- and gas-fired power plants:

(1) 1,400 lbs CO_2/MWh of electricity produced, as allowed emissions, for new coal plants (on a 12-operating-month rolling basis);[93]
(2) 1,000 lbs CO_2/MWh of electricity produced, as allowed emissions, for new gas-fired facilities with a heat input exceeding 850 MMBtu/h (250 MW);[94] and
(3) 1,100 lbs CO_2/MWh of electricity produced, as allowed emissions, for new gas-fired facilities with a heat input between 250 MMBtu/h (73 MW) and 850 MMBtu/h (250 MW).[95]

Thus, the EPA's CPP final rule establishes separate and differentiated performance standards for new coal- and gas-fired power plants:[96] For coal-fired steam cycle plants 1,100 lbs CO_2/MWh[97] and for natural gas turbines 1,000 lbs CO_2/MWh.[98] For coal, this established a regulatory threshold 40% lower than current *best-in-class* new coal-turbine technologies available on the market at the time the EPA promulgated the regulation.[99] This threshold is a level that then-current technology for coal facilities could not meet, having actual emissions of approximately 1,770 lbs CO_2/MWh.[100] Thereby, the CPP—and indirectly the BSER levels set by executive branch regulation without congressional input—substitutes operation of natural gas and renewable energy generation in lieu of existing coal-fired power plants.[101]

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development that will deploy some type of CCS. *See id.* (listing EPA CCS projects that were ongoing at the time).

93. EPA FACT SHEET, *supra* note 92, at 1–3 (noting the different carbon emission standards for different types of power plants).

94. *Id.* at 2.

95. EPA, COMBINED HEAT & POWER P'SHIP, OUTPUT-BASED REGULATIONS: A HANDBOOK FOR AIR REGULATORS B–24 (2014), https://www.epa.gov/sites/production/files/2015-07/documents/output-based_regulations_a_handbook_for_air_regulators.pdf.

96. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. 64,510, 64,512 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98) (indicating that a "new source" does not include existing sources undertaking modifications or reconstructions, and certain projects currently under development).

97. *Id.* at 64,513.

98. *Id.* at 64,515.

99. *See id.* at 64,513 (detailing the technologies necessary to achieve the new standards).

100. *See* Clean Power Plan, 80 Fed. Reg. 64,661, 64,709 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (discussing "best" system emission reduction that is at a reasonable cost); *see also* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:7.40, at 6–81 n.9 (highlighting that, at the time, "conventional coal-fired electric generation [could only generate] about 1770 lbs. [CO_2/MWh]").

101. Clean Power Plan, 80 Fed. Reg. at 64,726 (stating that the plan will substitute lower emitting units and renewable energy units for the higher emitting units). The EPA utilizes a planning assumption that states and independent system operators should take natural gas combustion turbines, whose history demonstrates that they can operate at 91% availability, but which nationally are running

There are technological distinctions: "Coal technologies typically employ steam turbines, while gas-fired plants can employ simple cycle turbines."[102] In the CPP regulations, there is an express exemption for simple cycle turbines.[103] The proposed rule effectively exempted new gas-fired power plants, which emit approximately 700 lbs CO_2/MWh of electricity generated.[104] The proposed rule exempted: peaking power generation plants,[105] oil-fired plants, combined heat and power/cogeneration facilities, and smaller generating facilities of less than 25 MW of generation capacity (although they all can emit more CO_2 per unit of power produced than gas-fired plants).[106]

The EPA's CPP final regulation reinforces that the goal of this rule is substituting the burning of natural gas in lieu of coal to generate electricity.[107] What do these standards translate to in terms of use of coal-fired new electric power generation? This CPP standard established a regulatory threshold significantly more stringent than current "best-in-class" new coal-turbine technologies available on the market.[108] In sum, no basic coal-fired power plant could meet the required CPP standard—conventional coal-fired electric generation could not meet the CPP emission standard of 1,100 lbs of CO_2/MWh, when best-in-class coal technologies

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only at a 40–50% capacity factor, and increase those to a 75% capacity factor to displace coal-fired power. *Id.* at 64,799–800.

102. For more on steam cycle turbines and simple cycle turbines, *see* Steven Ferrey, *Presidential Executive Action: Unilaterally Changing the World's Critical Technology and Infrastructure,* 64 DRAKE L. REV. 43, 64 (2016).

103. Clean Power Plan, 80 Fed. Reg. at 64,716. The rule would require combustion turbine units (defined as including both simple cycle and combined cycle units) with a heat input rating greater than 250 MMBtu/hr to meet an emissions standard for CO_2 of 1,000 lbs/MWh, whereas combustion turbine units with a heat input rating at or below that threshold would have to meet an emissions standard of 1,100 lbs CO_2/MWh. *Id.*

104. *See id.* at 64,881 n.731 (stating that the only gas-fired units affected under the criteria are units supplying more than 25 MW).

105. *See id.* at 64,716–17 (explaining that peeking units must be exempted to avoid jeopardizing the reliability of the grid). Operating with less than 33% capacity factors, a stationary combustion turbine is not subject to the emissions standard unless it was constructed for the purpose of supplying, and supplies, one-third or more of its potential electric output and more than 219,000 MWh net-electrical output to a utility distribution system on a three-year rolling average basis. *See id.* at 64,953 (describing units that are excluded).

106. LAW OF INDEPENDENT POWER, *supra* note 36, § 6:7.20, at 6–70.5.

107. Clean Power Plan, 80 Fed. Reg. at 64,726.

108. *See* U.S. EPA Issues Proposed New Source Performance Standard to Limit Carbon Dioxide Emissions from New Fossil Fuel Electricity Generating Power Plants, SULLIVAN & WORCESTER (Feb. 2014), https://www.sandw.com/assets/htmldocuments/CLIENT-ADV-U-S-EPA-Issues-Proposed-New-Source-Performance-Standard-to-Limit-B1817903.pdf (explaining that compliance will require a 40% reduction in emissions for the best coal-powered plants currently made).

emit approximately 1,770 lbs CO_2/MWh.[109] It is simple math; the numeric spread is not close. These new regulations would require the addition of partial or full CCS technologies for new coal-fired generating facilities.[110] The EPA determined that CCS[111] is an "adequately demonstrated" technology for BSER.[112] Despite that, many considered it not demonstrated in practice in the United States, and therefore not legally a BSER.[113]

4. Differentiated Legal Treatment of Each State

How does the individualized CPP CO_2 emission standard for each state operate? The CPP establishes dramatically inconsistent "best system" CO_2 emission standards for each of the 50 states, depending on their existing means of producing electric power.[114] The EPA determined BSER for each state based on its mix of individual existing generating sources, expressed as a statewide lbs/MWh emission rate.[115]

In response to each state's different CPP reduction goal, states were free to determine how to reduce CO_2 emissions.[116] In certain states under the CPP regulations, this would require up to a 50% cut in carbon intensity of existing power generation in the state.[117] Figure 1 shows the relative degree of greenhouse gas (GHG) emissions by state, with the darker gray colors illustrating the greater GHG emissions.

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109. *See* Seth Hilton, *The Impact of California's Global Warming Legislation on the Electric Utility Industry*, 19 ELECTRICITY J. 10, 14 (2006) (detailing emission specifications of coal-fired plants); *see also* NRDC, *California Takes on Power Plant Emissions: SB 1368 Sets Groundbreaking Greenhouse Gas Performance Standard*, CLIMATE FACTS (Aug. 2007), https://www.nrdc.org/sites/default/files/sb1368.pdf (indicating that the "1,100 lbs. CO_2/MWh" level for GHG emission standards in California will preclude coal-fired power plants as a source of future energy in the state).

110. The EPA calculated that a new coal plant without CCS would emit approximately 1,700 pounds of CO_2/MWh. *See* SULLIVAN & WORCESTER, *supra* note 108 (noting the national average is 2,200 pounds CO_2/MWh).

111. *See* EPA FACT SHEET, *supra* note 92, at 3 (noting that CCS technology has been demonstrated to be feasible in various industries).

112. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. 64,510, 64,511 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98) (verifying the EPA's evaluation of emission standards).

113. *See* Kevin Bullis, The Cost of Limiting Climate Change Could Double without Carbon Capture Technology, MIT TECH. REV. (April 18, 2014), https://www.technologyreview.com/s/526646/the-cost-of-limiting-climate-changecould-double-without-carbon-capture-technology (discussing the availability of carbon capture and sequestering technology).

114. Steven Ferrey, *Subnational Discretion Mediating New Climate Regulatory Challenges*, 7 SAN DIEGO J. OF CLIMATE & ENERGY L. 31, 34 (2016) [hereinafter *Subnational Discretion*].

115. *Id.* at 45–46.

116. *Id.* at 34–36, 44–45, 49.

117. *See also* DeCotis, *supra* note 46 (discussing the effects of the CPP on states).

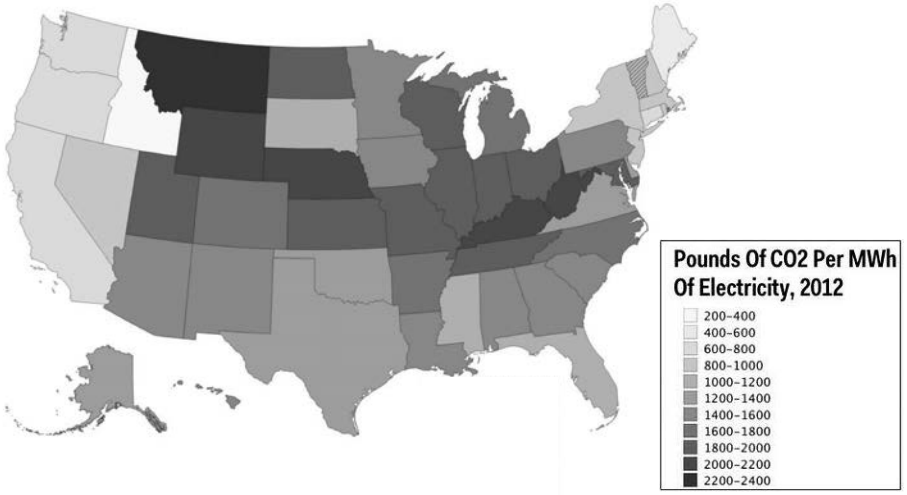

Figure 1. GHG Emissions by State[118]

Under the CPP, states have freedom to use a mass-based or rate-based calculation of carbon emissions and their power plants could join a multi-state plan.[119] Different state choices could produce inconsistent plans from the 50 states (plus the District of Columbia, 11 U.S. territories under federal jurisdiction, and 2 U.S. commonwealths).[120]

The CPP rule would also allow state plans that use CO_2 controls "beyond the fence line" of the affected power generation project's site deeded metes and bounds.[121] Of note, there was a fundamental change in allowing such off-site, "outside the fence line," compliance mechanisms with the most recent change of administrations.[122] In fall 2017, the Trump

118. Andy Kiersz & Brett LoGiurato, *Here's How Obama's New Carbon Rules Affect Each State*, BUS. INSIDER, fig.1 (June 2, 2014), https://www.businessinsider.com/epa-state-carbon-goals-2014-6. Vermont is shown with diagonal lines because it has no fuel-fired plants affected by the EPA's newly promulgated rule. *Id.*

119. *See Subnational Discretion*, *supra* note 114, at 46 n.60 ("Rate-based limits for emissions limit the pounds of a pollutant emitted per million British thermal units of energy produced by a power generation facility. Mass-based limits do not deal with emissions from individual sources, but instead limit the mass of regional emissions. California A.B. 32, RGGI, and the EU-ETS utilize mass-based limits for GHGs. With mass-based limits, they can be achieved by using lower-emission forms of generation such as renewable generation, or by reducing the need for power through end use efficiency, but does not affect the rate of emissions per unit of energy produced by conventional generators even when they operate for fewer hours.").

120. *See id.* at 46 (noting a few of the compliance options available to states that could result in disparities).

121. *Id.*

122. *See infra* Part V.B (discussing the Trump Administration's changes to the CPP and the "outside the fence line" policy).

Administration declared that the CPP was not permissible because the Clean Air Act—the legal authority underlying the CPP—requires individual power plant source regulation, rather than regulation "outside the fence line" or off-site and away from the emitting pollution source.[123] In other words, under the Trump Administration's EPA interpretation, individual source controls must be applied to reduce the actual individual power plant carbon emissions, rather than employing a generic command for states to find any way to reduce carbon emissions anywhere beyond the fence line of the regulated power plants.[124] Senate Majority Leader McConnell advanced this position to the National Governors Association in 2015.[125] In November 2017, the Trump Administration announced that it intended to repeal the CPP.[126] In the last few days of 2017, the EPA issued an Advance Notice of a Proposed Rulemaking to Replace the Clean Power Plan.[127]

B. Reduction of Coal Compared to Renewable Power and Natural Gas

1. The Nadir of Coal

If this final CPP regulation were upheld after the ongoing litigation,[128] it could dramatically affect—and explicitly is designed to affect—the frequency of dispatch orders for operation of the existing large fleet of coal-fired power generation plants, which would determine whether or not they are operated in 2022 and thereafter.[129] Given that the CPP regulations set different mandatory levels of CO_2 emissions for each state based on existing carbon intensity of state power sector emissions in 2012, there

123. *See infra* note 484 and accompanying text.

124. *Id.*

125. *See* Letter from Mitch McConnell, *supra* note 76 ("[A] federal plan likely would be limited to regulating a power plant itself, such as the efficiency measures under the EPA' s building block 1.").

126. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources, 82 Fed. Reg. 51,787, 51,787 (proposed Nov. 8, 2017) (to be codified at 40 C.F.R. pt. 60).

127. EPA, ADVANCE NOTICE OF PROPOSED RULEMAKING ON STATE GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING POWER PLANTS 1–2 (2017), https://www.epa.gov/sites/production/files/2017-12/documents/fs-anprm-state-guidelines-ghg-emissions-egus.pdf; *EPA Takes Another Step To Advance President Trump's America First Strategy, Proposes Repeal Of "Clean Power Plan,"* EPA [hereinafter *EPA Takes Another Step*], https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal (last visited Nov. 25, 2018) (recommending the utilization of the BSER *at or to an existing power plant*, *at the source-specific level*, based on a physical or operational change to a building, structure, facility, or installation at that source).

128. *See CPP in Context, supra* note 19 (noting how the EPA could be given legal authority after a stay).

129. *See, e.g.*, *Analysis of the Impacts of the Clean Power Plan*, U.S. ENERGY INFO. ADMIN. (May 22, 2015), https://www.eia.gov/analysis/requests/powerplants/cleanplan/ (analyzing how the CPP would affect coal plants).

would be differential impacts and requirements in each state across the country.[130] The EPA utilized a planning assumption that states and regional ISOs should take natural gas combustion turbines, which had been running at a national average 40–50% capacity factor, and increase those to a 75% capacity factor, when their history demonstrates that they can operate at 91% availability.[131] This increase in operation of gas-combined cycle turbines would then displace operation of simple-cycle coal-fired steam turbines.[132]

With or without court deference to the Obama Administration initiatives culminating in the CPP, the zenith of coal use in the U.S. is ebbing under current economic conditions.[133] Coal for power generation has been rapidly decreasing in the most recent decade, to where it now supplies just over 30% of the U.S.'s electric power, with its share continuing to decrease substantially.[134] There has been a dramatic exodus of coal. In 2012, there were 1,308 coal-fired generating units in the U.S. totaling 310 gigawatts (GW) of capacity, of which 10.2 GW of coal-fired capacity retired in 2012, and more each year since.[135] The Energy Information Administration estimates that "60 gigawatts of coal-fired capacity will be shuttered by 2020."[136] U.S. coal-fired generating capacity is projected to decrease to 262 GW of installed capacity in 2040, which would constitute another 15% decrease, according to the U.S. Energy Information Agency.[137] Coal capability is expected to decrease 35% by 2040, with retirement of more than 90 GW of coal capacity.[138] Natural gas power generation and renewable electric energy have quickly supplanted coal generation over the

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130. *See also* DeCotis, *supra* note 46 (noting the range in emission cuts for different states under the CPP).

131. Clean Power Plan, 80 Fed. Reg. 64,661, 64,799–800 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

132. *See id.* at 64,716–17 (discussing simple cycle turbines).

133. Wendy Koch, *EPA Seeks 30% Cut in Power Plant Carbon Emissions by 2030*, USA TODAY (June 3, 2014), https://www.usatoday.com/story/money/business/2014/06/02/epa-proposes-sharp-cuts-power-plant-emissions/9859913/.

134. *See id.* (noting the coal industry supplied about 37% of the U.S.'s electric power in 2014 and has been steadily decreasing since).

135. *AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 than Have Been Scheduled*, U.S. ENERGY INFO. ADMIN. (Feb. 14, 2014) [hereinafter *AEO2014 Projections*], http://www.eia.gov/todayinenergy/detail.cfm?id=15031.

136. Michael Bastasch, *Report: EPA Regulations to Accelerate Coal Plant Shutdowns*, DAILY CALLER (Feb. 14, 2014), https://dailycaller.com/2014/02/14/report-epa-regulations-to-accelerate-coal-plant-shutdowns/.

137. *See id.* ("U.S. coal-fired generating capacity will fall from 310 gigawatts in 2012 to 262 gigawatts in 2040 . . . .").

138. *Analysis of the Impacts of the Clean Power Plan*, *supra* note 129; *Industry Data*, EDISON ELEC. INST., http://www.eei.org/resourcesandmedia/industrydataanalysis/industrydata/Pages/default.aspx (last visited Nov. 25, 2018).

last five years, even without the CPP being implemented while it is stalled in court.[139]

2. Legal Emission Issues and *Chevron* Deference Before the D.C. Circuit Under the Clean Air Act

More than emissions of CO_2 are at issue here. Among other emissions, coal-fired plants emit mercury to the ambient air.[140] Mercury is a toxic pollutant generated by coal burning and is regulated by the Clean Air Act.[141] Also, mercury emissions pose a serious risk when emitted by coal-burning power plants and other stationary emission sources in the U.S.[142] In 2000, the EPA established regulations stating that mercury emitted by electric generation units was a Hazardous Air Pollutant (HAP), and began regulating power plant emissions of mercury under § 112 of the Clean Air Act.[143] This rule was later challenged.[144]

Four years later, the EPA elected to regulate power plant emissions utilizing a cap-and-trade system under § 111 of the Clean Air Act (primarily governing criteria pollutants).[145] At the same time, § 111 removed power plant sources from the list of facilities whose HAPs were regulated under § 112 (governing hazardous pollutants).[146] Section 112 of the Act allows the EPA to de-list a HAP only if the agency determines that "emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source."[147]

The EPA argued that this language allowed it to bypass the § 112(c)(9) de-listing requirements if the agency determined that another section of the

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139. *See Natural Gas, Renewables Projected to Provide Larger Shares of Electricity Generation*, U.S. ENERGY INFO. ADMIN. (May 4, 2015), http://www.eia.gov/todayinenergy/detail.cfm?id=21072 (highlighting how natural gas power and renewable electric energy usages are growing much more rapidly than coal generation).

140. *See* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:22, at 6–152 ("Coal-fired plant emissions are the leading source for mercury . . . .").

141. Standards of Performance for New and Existing Stationary Sources, 70 Fed. Reg. 28,606, 28,606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75).

142. New Source Performance Standards for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units, 72 Fed. Reg. 32,710, 32,728 (June 13, 2007) (to be codified at 40 C.F.R. pt. 60).

143. New Jersey v. EPA, 517 F.3d 574, 578 (D.C. Cir. 2008).

144. *Id.* at 577–78.

145. Standards of Performance for New and Existing Stationary Sources, 70 Fed. Reg. at 28,606.

146. *New Jersey*, 517 F.3d at 579–80.

147. 42 U.S.C. § 7412(c)(9)(ii) (2012).

Clean Air Act should regulate power plants.[148] The court disagreed with the EPA, finding that § 112(n)(1)(A) is not applicable after the EPA has listed a pollutant as a HAP, on which there was no ambiguity.[149] As such, the first step of the *Chevron* deference standard applied, and the EPA was bound to satisfy the de-listing requirements set forth in § 112(c)(9) of the Act.[150]

The EPA also argued that it has the inherent authority to reverse any earlier administrative determination or ruling if it has a principled basis for doing so.[151] According to the court, the agency could have reversed its decision to regulate electric generation units under § 112 prior to listing them; but after listing them, the agency may not reverse its decision because Congress expressly limited the EPA's ability to de-list HAPs.[152] Finally, the EPA argued that because it had previously removed HAPs from the list without satisfying the requirements of § 112, it should not be estopped from doing so in this instance.[153] The D.C. Circuit quickly rejected this argument by stating: "[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation."[154]

The D.C. Circuit Court in 2008 held that the EPA acted outside its authority by unilaterally removing, without congressional approval, power plant HAP emissions from § 112.[155] The Supreme Court majority opinion characterized the allocation choices EPA made as "equitable," "efficient," and "mak[ing] good sense,"[156] citing its landmark decision in *Chevron*

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148. The EPA argued that the second step of the *Chevron* test applied in this case because § 112(c)(9)—which contains the instructions for removing a HAP from § 112—is made ambiguous by § 112(n)(1). *New Jersey*, 517 F.3d at 582–83. "[I]f EPA makes a determination under section 112(n)(1)(A) that power plants should not be regulated at all under section 112 . . . [then] this determination *ipso facto* must result in removal of power plants from the section 112(c) list." *Id.* at 582 (second and third alterations in original).

149. *See id.* at 583 (holding that the EPA must follow the plain text of § 112 in regard to the delisting process).

150. *See id.* at 582–83 (explaining that the text of § 112(c)(9) is not ambiguous and thus the EPA must follow the plain meaning of the text under *Chevron*).

151. *Id.* at 582.

152. *Id.* at 583.

153. *Id.*

154. *Id.* (quoting F.J. Vollmer Co. v. Magaw, 102 F.3d 591, 598 (D.C. Cir. 1996)).

155. *Id.* at 582.

156. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1589–90, 1593–94, 1607 (2014) ("[C]urtailing interstate air pollution poses a complex challenge for environmental regulators. . . . The overlapping and interwoven linkages between upwind and downwind States with which EPA had to contend number in the thousands . . . . Rather, as the gases emitted by upwind polluters are carried downwind, they are transformed, through various chemical processes, into altogether different pollutants. The offending gases at issue in these cases—nitrogen oxide (NO_X) and sulfur dioxide (SO_2)—often develop into ozone and fine particulate matter ($PM_{2.5}$) by the time they reach the atmospheres of downwind States.").

U.S.A. v. NRDC.[157] The Supreme Court's dissenting opinion, agreeing with the D.C. Circuit Court majority, underscored limits necessary for unilateral executive action.[158] This dissent echoes strands of the non-delegation doctrine.[159] This did not end the contest though. The Utility Air Regulatory Group (UARG) then challenged the EPA's technical revisions to the cross-state air pollution rule, including revised emissions budgets for 13 states.[160]

In *Chevron*, the Court rejected each of the EPA's three arguments for its de-listing action.[161] In this earlier challenge to EPA regulation under the Clean Air Act, the EPA argued that its action was appropriately within its administrative discretion, as established by the *Chevron* doctrine of agency deference, when "Congress has not directly addressed the precise question at issue."[162] Under the first step of *Chevron*, if Congress did directly speak to the substantive issue, the EPA lacks interpretive discretion and the agency must respect the congressional statement.[163] On the other hand, if Congress did not speak directly to the substantive issue, under the second *Chevron* step, the Court asks "whether the agency's answer is based on a permissible construction of the statute," and if so, defers to the agency interpretation when otherwise supported.[164] At the second step, there is significant agency discretion in interpreting EPA authority.[165]

In this 2008 Clean Air Act challenge, the EPA argued that the second *Chevron* step, granting the agency deference, was applicable because Clean Air Act § 112(c)(9), which embodies the instructions for de-listing a HAP from § 112, is rendered ambiguous by the Act's § 112(n)(1),[166] which provides "if [the] EPA makes a determination under section 112(n)(1)(A)

157. *Id.* at 1607–21. Under *Chevron*, Congress's silence effectively delegates authority to the EPA to select from among reasonable options. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (explaining that courts should give authority to an agency interpretation when Congress did not give direction within the statute). EPA's chosen allocation method was held to be a "permissible construction of the statute." Chevron U.S.A. v. NRDC, 467 U.S. 837, 843 (1984) (explaining that when a statute has not spoken directly to an issue it must be determined if the agency has acted reasonably).

158. *EME Homer City Generation*, 134 S. Ct. at 1610 (Scalia, J., dissenting) ("Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress . . . . Today, the majority approves [an] undemocratic revision of the Clean Air Act.").

159. *See* ENVIRONMENTAL LAW, *supra* note 34, at 42–43 (discussing the non-delegation doctrine in depth).

160. Unopposed Motion to Govern Further Proceedings, Util. Air Regulatory Grp. v. EPA, 1, 2 (D.C. Cir. 2014) (No. 12–1346).

161. *See* NRDC v. Gorsuch, 685 F.2d 718, 727 (D.C. Cir. 1982) (reviewing the arguments presented by the EPA in lower court proceedings).

162. *Chevron*, 467 U.S. at 843.

163. *Id.* at 842–43.

164. *Id.* at 843.

165. *Id.* at 844.

166. New Jersey v. EPA, 517 F.3d 574, 582 (D.C. Cir. 2008).

that power plants should not be regulated at all under section 112 . . . [then] this determination *ipso facto* must result in removal of power plants from the section 112(c) list."[167] The EPA then asserted that this language allowed it to bypass the § 112(c)(9) de-listing requirements simply by determining that power plants should be regulated by some other section of the Clean Air Act.[168] The court disagreed with the EPA, concluding that § 112(n)(1)(A) was no longer applicable once the EPA listed a pollutant as a toxic HAP.[169] Thereafter, there was no conflict or ambiguity.[170] Under such a posture, rather than the second step, the first step of the *Chevron* standard applied.[171] The Clean Air Act bound the EPA to satisfy the de-listing requirements set forth in § 112(c)(9).[172]

III. SUBSTANTIVE LEGAL CHALLENGE TO THE CLEAN POWER PLAN

The EPA received 2.5 million comments in the period between initial proposal and final promulgation of the CPP regulation, under which each state is required to develop standards of performance to limit CO_2 emissions from existing fossil-fuel-fired generating facilities.[173] Seventeen concerned state attorneys general filed comments highlighting "numerous legal defects" and system reliability issues in the EPA's proposal to regulate power plant emissions under § 111(d) of the Clean Air Act.[174] Once the EPA proceeded, more than half the states thereafter sued the EPA regarding its authority to issue these regulations.[175] Less than two weeks after the EPA announced the final CPP rule, 27 states petitioned the U.S.

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167. *Id.* (second and third alterations in original).

168. *See id.* at 582–83 (discussing an EPA brief in which the EPA expressed its position on the bypass process in § 112(c)(9)).

169. *See id.* at 583–84 (explaining the court's interpretation of § 112(c)(9)).

170. *See id.* (noting how Congress explicitly took steps to limit the EPA's discretion in removing sources once listed).

171. *Id.*

172. *Id.*

173. *Subnational Discretion*, *supra* note 114, at 46; *see* EPA, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED STANDARDS OF PERFORMANCE FOR GREENHOUSE GAS EMISSION FOR NEW STATIONARY SOURCES 1–1 (2013), https://www.epa.gov/sites/production/files/2013-09/documents/20130920proposalria.pdf (stating that the EPA considered the "public comments received—totaling approximately 2.5 million").

174. Att'ys Gen. of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming, Comment Letter on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources (Nov. 14, 2014), https://ago.wv.gov/publicresources/epa/Documents/Comment%20from%2017%20State%20Attorneys%20General%20on%20Proposed%20EPA%20Carbon%20Pollution%20Rule%20111d%20-%2011-24-2014.pdf.

175. *Subnational Discretion*, *supra* note 114, at 45.

Court of Appeals for the District of Columbia Circuit for an emergency stay of the regulation.[176]

A. Plain-Meaning Interpretation of the Clean Air Act

1. Legal Structure of the Clean Air Act

The Clean Air Act provides a comprehensive scheme for air pollution control, addressing three general categories of pollutants emitted from stationary sources: criteria pollutants, hazardous pollutants, and pollutants that are (or may be) harmful to public health or welfare but are not hazardous or criteria pollutants or cannot be controlled under those programs.[177] First, six relatively ubiquitous criteria pollutants are regulated under 42 U.S.C. §§ 7408–7410.[178] Once the EPA issues air quality criteria for such pollutants, the EPA Administrator must propose primary National Ambient Air Quality Standards (NAAQS) for the pollutants at levels requisite to protect the public health with an adequate margin of safety.[179]

Second, other than criteria pollutants, HAPs are regulated under § 112 of the Act and codified at 42 U.S.C. § 7412.[180] "[The] EPA must publish and revise a list of 'major' and 'area' source categories of hazardous pollutants, and [thereafter] has a nondiscretionary obligation to establish achievable emission standards for all listed hazardous air pollutants emitted by sources within a listed category."[181] The National Emission Standards for Hazardous Air Pollutants are additional federal emission limitations established for less widely emitted, but still dangerous, hazardous, or toxic air pollutants that are not covered by the NAAQS.[182] These hazardous

176. *See In re* Murray Energy Corp., 788 F.3d 330, 331–34 (D.C. Cir. 2015) (explaining that opponents to the proposed rule had originally attempted to bring suit before the agency finalized the rule).

177. Final Brief for Respondent at 3, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14-1112 & 12-1151) [hereinafter Final Brief for Respondent].

178. *Clean Air Act Title I – Air Pollution Prevention and Control, Parts A Through D*, EPA, https://www.epa.gov/clean-air-act-overview/clean-air-act-title-i-air-pollution-prevention-and-control-parts-through-d (last updated Jan. 16, 2018). Note that 42 U.S.C. § 7412 corresponds to § 112 of the Clean Air Act. *Compare* Clean Air Act of 1970, Pub. L. No. 91–604, § 112, 84 Stat. 1676, 1685 (1970) (highlighting an amendment to the Clean Air Act, which does not include any discussion of six criteria pollutants), *with* 42 U.S.C. § 7412 (2012) (explaining the six criteria pollutants that this law regulates). Both terms are used interchangeably and similar transposed terms are also applied to other sections of the Act. *See, e.g.*, 42 U.S.C. §§ 7401, 7408–7410 (2012) (using similar terms to § 7412).

179. Final Brief for Respondent, *supra* note 177, at 3.

180. *Id.*

181. *Id.* at 4.

182. ENVIRONMENTAL LAW, *supra* note 34, at 197–98.

substances include carcinogens and mutagens.[183] The categorical emission limitations are intended, by an "ample margin of safety," to regulate pollutants that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."[184]

Third, the final major category of pollutants that the Clean Air Act covers are harmful pollutants not regulated under the NAAQS or hazardous pollutant programs.[185] Section 111, codified at 42 U.S.C. § 7411, regulates this category of pollutants and has two main components.[186] First, § 111(b) mandates "EPA to promulgate federal 'standards of performance' addressing *new* stationary sources that cause or contribute significantly to 'air pollution which may reasonably be anticipated to endanger public health or welfare.'"[187] When the EPA sets new source standards that address particular pollutant emissions, § 111(d) "authorizes EPA to promulgate regulations requiring states to establish standards of performance for *existing* stationary sources of the same pollutant."[188] If a state fails to submit a satisfactory plan, the EPA can prescribe and enforce plans for the state.[189] Together, the NAAQS, hazardous pollutant, and performance standard programs create a comprehensive scheme designed to achieve "Congress' goal of 'protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare.'"[190]

In the Clean Air Act, there is a specified division of state and federal authority where states have the "first-implementer role,"[191] while the EPA "is relegated . . . to a secondary role."[192] However, within this Clean Air Act envelope, there is no federal case law, nor any EPA rules, which has or could resolve direct conflicts regarding how one counts environmental *benefits* against the cost imposed on the operation of power generation units to reduce their regulated polluting operation.[193] The closest precedent is provocative Supreme Court *dicta* from forty years ago in *Union Electric*,

183. *Id.*

184. Clean Air Act of 1970, Pub. L. No. 91–604, § 112, 84 Stat. 1676, 1685 (1970). This statutory language emphasizes that these standards are intended to protect the public health and welfare. NRDC v. EPA, 824 F.2d 1146, 1152, 1156 (D.C. Cir. 1987).

185. Final Brief for Respondents, *supra* note 177, at 5.

186. *Id.*

187. *Id.* (quoting 42 U.S.C. § 7411(b)(1)(A) (2012)).

188. *Id.*

189. *Id.*

190. *Id.* (quoting 42 U.S.C. § 7401(b) (2012)).

191. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 28 (D.C. Cir. 2012) *rev'd*, 134 S. Ct. 1584 (2014) (explaining the first-implementer role that the states have, even though the EPA has the authority to draft and enforce standards).

192. Train v. NRDC, 421 U.S. 60, 79 (1975).

193. Steven Ferrey, *Broken at Both Ends: The Need to Reconnect Energy and Environment*, 65 SYRACUSE L. REV. 53, 97 (2014).

that stated an owner of a fossil-fuel-fired power generation facility can *always* "shut down its plant and curtail electric service" to meet any imposed environmental requirements.[194]

In its 2009 *Riverkeeper* decision, the Supreme Court held that Congress, in enacting Clean Water Act § 316(b), did not categorically forbid the EPA from comparing costs to benefits when determining the best technology available for minimizing adverse environmental impacts of power plant cooling water intake structures.[195] Instead, the EPA was left the authority to decide to engage or not to engage in such analysis.[196] Next, this article examines how the various stakeholder parties are approaching the legality of the CPP, in the context of this substantive Clean Air Act precedent. These positions frame the long, and still unresolved, legal battle over the ability of the EPA to implement additional regulation.[197]

2. Challengers' Legal Position on Plain Meaning of the Clean Air Act

Plaintiff challengers were the first movers in the legal battle. Lead challenger, Murray Energy Corporation, argued that the EPA had ignored the plain text of § 111(d) of the Clean Air Act when the agency erroneously claimed that conflicting and competing versions of key statutory provisions that gave the agency broad discretion to interpret the Act as it saw fit.[198] Murray disputed that any conflict enabled EPA to choose how to interpret the statute's conflicting language.[199] Murray argued instead that the EPA had ignored the text of the Clean Air Act, and that the U.S. Code did not contain an ambiguity,[200] which accurately directed a different result.[201]

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194. Steven Ferrey, *International Power on "Power,"* 45 ENVTL. L. 1063, 1089 (2015); *accord* Union Elec. v. EPA, 427 U.S. 246, 265 n.14 (1976) ("In a literal sense, of course, no plan is infeasible since offending sources always have the option of shutting down if they cannot otherwise comply with the standard of the law.").

195. *See* Entergy Corp. v. Riverkeeper, 556 U.S. 208, 224–25 (2009) (requiring the EPA to provide a reasoned explanation if it should choose to regulate in a way that would do more harm than good, or provide a reasoned explanation why the agency is indifferent to that outcome, yet *did not require* the EPA to employ cost-benefit analysis).

196. *Id.* at 226.

197. AVI ZEVIN, INST. FOR POL'Y INTEGRITY, DUELING AMENDMENTS: THE APPLICABILITY OF SECTION 111(D) OF THE CLEAN AIR ACT TO GREENHOUSE GASES 3–4 (2013), https://policyintegrity.org/files/publications/2014-5_Zevin.pdf (describing the conflicting amendments and the options available for EPA interpretation and implementation of regulations).

198. Final Opening Brief of Petitioner at 29, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14-1112 & 12-1151).

199. *See id.* (noting that the legislature, not the EPA, is the first to determine the meaning of the text).

200. *Id.* at 10.

201. *Id.* at 32.

Murray argued that when the Clean Air Act was last amended in 1990, there was a conforming amendment that prohibited § 111(d) provisions from regulating any toxic mercury sources already regulated under the separate and distinct § 112 of the Act.[202] It is not unusual in the U.S. process for legislation containing an amendment to an existing statutory provision to fail to be in force due to an earlier provisional amendment contained in the same bill.[203] However, where there are conflicting amendments contained within the same bill, Congress and the Office of Law Revision Counsel have uniform rules to resolve any such conflicts.[204] A statutory amendment is not effective if a prior amendment in the same bill removes or alters the text that the subsequent amendment purports to amend.[205] Pursuant to these longstanding rules, Murray argued that the U.S. Code thus resolved any conflict and accurately reflected the text of § 111(d) in force after the amendment.[206]

In a battle over the extent of executive branch authority, it becomes critical to remove the executive branch agency from deciding which conflicting legislative branch version of language it will elect to enforce.[207] Murray backstopped its position with this foundation, by arguing that the EPA had no delegated power to choose among legislative conflicts, even if there was one.[208] Murray argued that if the court determined that there was any conflict in provisions of 1990 Clean Air Act amendments,[209] such a conflict in legislation did not empower the EPA, an executive branch agency, to decide which version of the conflicting text of the law was the one in force. Murray stated that any dispute as to what the definitive text of

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202. *See id.* at 30–31 (explaining the differences between the amendments).

203. *Id.* at 31.

204. *See* U.S. SENATE, OFF. OF THE LEGIS. COUNS., LEGISLATIVE DRAFTING MANUAL 33 (1997) ("If, after a first amendment to a provision is made . . . the provision is again amended, the assumption is that the earlier (preceding) amendments have been executed."); U.S. HOUSE OF REPRESENTATIVES, OFF. OF THE LEGIS. COUNS., HLC 104–1, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 42 (1995) (explaining that the House also relies on the assumption that the earlier amendments have been executed).

205. *See* Final Opening Brief of Petitioner, *supra* note 198, at 33 (stating that the conforming amendment enacted by Congress had no effect on the Act); *see also id.* at 47, 49–50 (explaining that the U.S. Code accurately reflected the text of § 111(d) after incorporating provisions of the 1990 amendments to the Act).

206. *See id.* at 30–31, 33 ("[T]he conforming amendment . . . would do nothing other than update a reference by deleting the text '(1)(A).'").

207. *See id.* at 34–55 (discussing the balance of power between executive agencies, Congress, and the judiciary).

208. *See id.* at 34 (explaining that the EPA is not entitled to deference).

209. In its brief, Murray stated that there was no ambiguity and that the EPA was not entitled to deference in determining the current text of the Clean Air Act. *See id.* (arguing that the decision belongs to the courts, not the EPA).

the Act was after the 1990 amendments could not be decided by the Executive Branch.[210] According to Murray, disputes could only be resolved by the Office of Law Revision Counsel, a legislative agency, or by the judicial branch during litigation.[211] Unilaterally allowing the EPA to make this legal determination would allow the executive branch to usurp a legislative function and process.[212] Thus, Murray stated that it would be necessary to defer to the legislature's Office of Law Revision Counsel, rather than to the EPA, to respect the express legal roles and powers of these co-equal and independent branches of government.[213]

To the contrary, the EPA argued for continued deference under the *Chevron* doctrine.[214] In response, the intervenor brief submitted by Peabody Energy, represented by law professor Laurence Tribe,[215] countered that *Chevron* deference should never be afforded when the issue before the court is conflicting legislative amendments to an act of Congress.[216] Peabody Energy argued that executive "agencies exercise discretion only in the interstices created by statutory silence or ambiguity," not when there is a basic choice of what statutory language prevails when there are two versions.[217] Professor Tribe, for Peabody Energy, argued that in this instance, there were no interstitial gaps in the Clean Air Act statutory scheme or ambiguities in the conflicting House amendment and the Senate amendment; the agency had no power to choose which version of the amendments the agency wished to make legally operative.[218]

Peabody Energy asserted that the EPA was extending beyond its authority, attempting to exercise legislative law-making power, and not respecting the clear separation of powers, without any support for such extensions of its power in *Chevron.*[219] Petitioner Murray asserted that *Chevron* only addresses the degree of deference an agency receives when

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210. *Id.*

211. *Id.* at 36.

212. *Id.* at 34.

213. *Id.* at 35.

214. *See id.* at 34, 51–52 (specifying that *Chevron* dictates that a court must accept an agency's interpretation if it is reasonable).

215. Final Brief for Intervenor Peabody Corp. at 17, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151). [hereinafter Final Brief for Intervenor Peabody]; *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues*, *Hearing Before the H. Subcomm. on Energy and Power Comm. on Energy and Commerce*, 114th Cong. 14 (2015) (testimony of Laurence H. Tribe).

216. *See* Final Brief for Intervenor Peabody, *supra* note 215, at 10–11 (asserting that *Chevron* deference is improperly used when the EPA is choosing between different versions of an amendment that Congress created).

217. *Id.* at 11 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014)).

218. *Id.*

219. *Id.*

resolving an ambiguity in statutes that the agency is charged with enforcing; *Chevron* does not empower an executive agency to elect, for itself, which version of a law Congress enacted it wishes to follow.[220] Peabody Energy and Murray argued that there was no statutory ambiguity in either version of congressional language at issue; and even if such ambiguity was found by a court to exist, the EPA failed in its *Chevron* prerequisite burden to show that Congress sought to delegate to the EPA the authority to resolve such an issue.[221]

3. *Chevron* as a Decision Rule for Broad Court Deference to EPA

What is the legal precedent? *Chevron v. NRDC* remains the key opinion on interpreting the EPA's administrative discretion in law-making.[222] *Chevron* is the most cited administratiave law precedent by the Supreme Court year after year,[223] and is one of the 20 most-cited Supreme Court cases in the history of the Court.[224] The Court opinion established a deferential judicial approach to EPA agency interpretations of law embodied in legislative rules, where Congress was wholly silent in the statute on such interpretation.[225] The Court overruled the D.C. Circuit's substitution of its legal interpretation for that of the EPA when the statute was ambiguous.[226] In *Chevron*, the circuit court had rejected each of the EPA's three arguments in support of its administrative action implementing the Clean Air Act.[227]

When attempting to apply the precedent to the CPP, the EPA first argued that its CPP rule was appropriately within its administrative

220. *See id.* at 10–11 (explaining further that *Chevron* deference is reserved for instances of statutory silence and ambiguity, and cannot be used to decide between conflicting amendments).

221. *See id*. (clarifying that, absent a statutory ambiguity, the EPA lacks the congressionally delegated authority to select between two different laws).

222. *See* Chevron U.S.A. v. NRDC, 467 U.S. 837, 837 (1984) (examining Supreme Court precedent regarding deference to agencies).

223. Chris Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG. & ABA SEC. ADMIN. L. & REG. PRAC.: NOTICE AND COMMENT (Oct. 9, 2014), http://yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

224. Shane Marmion, *Most-Cited U.S. Supreme Court Cases in HeinOnline–PartII*, HEINONLINE: HEINONLINE BLOG (Feb. 16, 2009), http://heinonline.blogspot.com/2009/01/most-cited-us-supreme-court-cases-in.html.

225. *Chevron*, 467 U.S. at 837.

226. *See id.* at 842 (explaining that the lower court erred in assigning a definition where deference should have been given to the agency).

227. *See* NRDC v. Gorsuch, 685 F.2d 718, 727 (D.C. Cir. 1982) (discussing the arguments raised by the EPA before the lower court).

discretion under the *Chevron* standard,[228] because "Congress has not directly addressed . . . the issue."[229] If, and only if, Congress did not directly speak to the issue, does the EPA have statutory interpretive discretion under *Chevron*.[230] Where Congress did not speak directly to the issue, then the court moves to the second *Chevron* step, which determines "whether the agency's answer is based on a permissible construction of the statute."[231] The second step allows for significant agency discretion in interpreting ambiguity.[232]

However, the factual predicate for *Chevron* does not apply regarding many statutes and agency actions.[233] Where the *Chevron* precedent does not apply to afford deference, courts apply the "arbitrary [and] capricious" standard of review of agency action.[234] Under the "arbitrary [and] capricious" standard, the agency must offer a sufficient explanation for the actions taken, including a "rational connection between the facts found and the choice made."[235]

Where *Chevron* does not apply to a particular agency action, then under the *Skidmore* precedent*,* while not controlling upon the courts, the body of agency experience and informed judgment can guide the court.[236] Moreover, the way an agency exercises its power is legally significant. The

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228. Final Brief for Respondent, *supra* note 177, at 51; *see also Chevron*, 467 U.S. at 837 (establishing a test to determine when deference shall be given to agency decisions).

229. *Chevron*, 467 U.S. at 843. It does this by explaining that the EPA was within administrative discretion by "employing traditional tools of statutory construction." *Id.* at 843 n.9. If the court deems the statutory language "clear," it simply "give[s] effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* If the agency construction is permissible, the court defers to that construction, and "does not simply impose its own construction of the statute." *Id*. The *Chevron* test can also be deemed not to apply. *See* United States v. Mead Corp., 533 U.S. 218, 218 (2001) (finding that when an agency asserts authority not promulgated through formal rulemaking the authority does not receive *Chevron* deference).

230. *Chevron*, 467 U.S. at 842–43.

231. *Id.* at 843.

232. *See id.* at 844 (clarifying that statutory interpretation has traditionally been guided by relevant agency interpretations).

233. *See* VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., R44954, *CHEVRON* DEFERENCE: A PRIMER 5–6 (2017) (providing that *Chevron* deference is appropriately applied to formal rulemaking procedures).

234. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 413–14 (1971) (holding that agency action may be subject to review if the action was arbitrary, capricious, an abuse of discretion, or not in accordance with the law).

235. *Id.* at 414; Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

236. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority; do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

court gives no deference to an agency's position where its determination does not embody a formal regulation pursuant to the Administrative Procedure Act.[237] Deference is only afforded to an agency interpretation "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[238]

There is judicial deference to the substance of administrative rules where disputes turn on issues of technical fact or policy,[239] or if the statute does not precisely answer the question the rule addresses, as in *Chevron*.[240] Interpretive rules that are not issued pursuant to formal rulemaking procedures do not enjoy the strong deference accorded legislative rules,[241] but still enjoy an initial presumption of *Skidmore*-level deference.[242]

Correct administrative procedure matters when determining what kind of judicial deference an agency might enjoy. In some cases, courts will strike interpretive rules made by an agency when the rules were actually legislative rules that require a full notice and comment under formal or informal rulemaking processes.[243] However, there is little agreement among the courts on what distinguishes legislative (to which legal formalities attach) and interpretive rules (to which legal formalities do not attach).[244] Circuit Judge Posner stated, "[d]istinguishing between a 'legislative' rule, to which the notice and comment provisions of the Act apply, and an interpretive rule, to which these provisions do not apply, is often very difficult—and often very important to regulated firms, the public, and the

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237. *See* United States v. Mead Corp., 533 U.S. 218, 240 (2001) (Scalia, J., dissenting) (summarizing the dissent's understanding that the decision made by the majority applies *Chevron* deference only to rules promulgated through official procedures).

238. *Id.* at 226–27 (majority opinion).

239. *See id.* at 220 (explaining that *Chevron* did not preclude the use of *Skidmore* analysis in situations involving highly specialized information).

240. Chevron U.S.A. v. NRDC, 467 U.S. 837, 837 (1984).

241. *See also Mead Corp.*, 533 U.S. at 220 (acknowledging that some degree of deference is generally given to agency interpretations regardless of form as held in *Skidmore*).

242. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (indicating that an administrator's interpretations and actions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *see also* Christensen v. Harris, 522 U.S. 576, 587 (2000) (determining that interpretation of agency action that did not develop through formal rulemaking is not given the level of deference asserted under *Chevron*); Auer v. Robbins, 519 U.S. 452, 461 (1997) (extending *Chevron* deference from the interpretation of an agency's enabling statute to the interpretation of the agency's own rules and regulations); Christopher v. SmithKline Beechman Corp., 567 U.S. 142, 155–56 (2012) (limiting *Auer* deference when the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question and may cause unfair surprise).

243. *Cf.*, Morgan D. Mitchell, *Wolf or Sheep?: Is an Agency Pronouncement a Legislative Rule, Interpretive Rule, or Policy Statement?*, 62 ALA. L. REV. 839, 840–41 (2011) (highlighting the difficulty of determining whether an agency rule is interpretive or legislative).

244. *Id.* at 842–52.

agency."[245] Where mathematical or technical standards are imposed by an agency, or a new duty is imposed on a party, formal requisites of the Administrative Procedure Act notice and comment process are typically required.[246]

There is a web of prior precedent at least indirectly relevant to resolving the CPP dispute. First, Justice Antonin Scalia noted in *Whitman v. American Trucking Ass'n* that any statutory language is "absolute" and cannot be altered.[247] Second, the Supreme Court in *United States v. Mead Corp.* acknowledged that *Chevron* recognizes that Congress can implicitly delegate discretionary authority to an administrative agency.[248] Third, in *City of Arlington v. FCC*, the Supreme Court held that *Chevron* deference applies to an agency's interpretation of the scope of its own statutory jurisdiction: "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[249] The Court explained that it makes no distinction in terms of deference afforded the agency between an agency's "jurisdictional and non-jurisdictional interpretations."[250] The Court further reasoned that "[i]f 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter."[251] This overruled the lower court's determination

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245. Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996).

246. *E.g.*, Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 922–24 (D.C. Cir. 1998) (clarifying that the EPA rulemaking under § 3004 of RCRA was arbitrary and capricious where the agency relied on an analytical model that it knew was flawed and not an accurate predictor).

247. *See, e.g.*, Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 465, 472–73 (2001) (providing that agencies cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute"). Justice Scalia wrote that the statute "unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA." *Id.* at 471.

248. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

249. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013). The Court noted that, under *Chevron*, the Court must first ask whether Congress directly spoke to the precise question at issue; if so, the Court must give effect to Congress's unambiguously expressed intent, and "if the statute is silent or ambiguous," the court must defer to the administering agency's construction of the statute so long as it is permissible. *Id.* (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842–43 (1984)).

250. *Id.* No "exception exists to the normal [deferential] standard of review" for "jurisdictional or legal question[s] concerning the coverage of [an] Act." NLRB v. City Disposal Sys., 465 U.S. 822, 830 n.7 (1984). There is no principled basis for carving out an arbitrary subset of jurisdictional questions from the *Chevron* framework. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 333, 339 (2002) (citing *Chevron*, 467 U.S. at 843–44) (explaining that agencies can interpret statutory language when it is found to be ambiguous).

251. *City of Arlington*, 133 S. Ct. at 1874–75 (quoting *Chevron*, 467 U.S. at 842); *see* United States v. Eurodif S.A., 555 U.S. 305, 315–19 (2009) (holding that an agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous"). *See generally* Commodity Futures Trading Co. v. Schor, 478 U.S. 833, 844–57 (1986) (highlighting how the Supreme Court has given deference to agencies' construction of the scope of their own jurisdiction).

that federal rules did not defer sufficiently to state implementation.[252] These precedents provide context as to how the courts will construe the 1990 amendments, the CPP regulations, and any resultant deference in liberties taken in regulation.

B. Prohibited Agency Double Regulation of Sources

1. Assessing Agency Discretion and Canons of Construction

The key legal issue is in the pending litigation: What discretion does an agency have when there are two versions of statutory amendment language enacted that it is charged with enforcing? Under the Senate version of amendments to § 111(d) of the Clean Air Act, if a pollutant source category is regulated under the Act's HAP provision embodied in § 112, other pollutants emitted by that *source* category are wholly excluded from any other regulation under the distinct § 111(d) of the statute.[253] In stark contrast, under the House of Representatives' version of amendments to § 111(d) of the Act, it is only the specific *pollutants* regulated under § 112 that are exempt from regulation under the separate § 111(d).[254] Given that both versions were included in the final statute amendments,[255] even if by error, only one can dominate, and it matters who makes this determination. This presents a critical case of first impression when the new regulation is challenged, as it now has been.[256]

Both the *what* and the *how* are important elements of the controversy around the CPP. How did two different congressionally enacted versions of the same statute emerge in the same amendment at the same time? In the original Clean Air Act amendments in 1970, § 111(d) authorized the EPA to establish a program for state regulation of existing sources within a source category when the EPA sets a NSPS technology-based BSER standard for new and modified stationary sources in that category.[257] Two decades later, the subsequent 1990 Clean Air Act amendments contained

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252. While employing a different mechanism than the Clean Air Interstate Rule to address cross-state pollution, the D.C. Circuit found that it required some states to reduce emissions by more than what they contributed to downwind state pollution. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 25 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584 (2014). Fifteen states sought review of Cross State Air Pollution Rule, while nine states intervened to support the rule. *Id.* at 9–10.

253. *See* ZEVIN, *supra* note 197, at 4 (detailing Clean Air Act amendment differences).

254. *Id.*

255. *Id.*

256. *In re* Murray Energy Corp., 788 F.3d 330, 333 (D.C. Cir. 2015).

257. Clean Air Amendments of 1970, Pub. L. 91–604, 81 Stat. 486 (codified as amended at 42 U.S.C. § 7411(d) (1970)).

different Senate and House versions of amendments to § 111(d).[258] The Congressional Conference Committee combined the amendments, melding a final version of the amendments without clear reconciliation in the final enacted version.[259] Congress required the EPA to establish standards for each source category of hazardous pollutant emissions.[260]

At a deeper level of detail as to what happened, in the course of overhauling the regulation of HAPs under § 112 of the Act, Congress also edited § 111(d), which cross-referenced a provision of prior § 112 that was to be eliminated.[261] The pre-1990 version of § 111(d) obligated the EPA to require standards of performance "for any existing source for any air pollutant" (i) for which air quality criteria have not been issued or (ii) "which is not included on a list published under section [7408(a)] or [7412(b)(1)(A)]."[262] To address the then newly obsolete cross-reference to § 7412(b)(1)(A), which is § 112(b)(1)(A) of the Act, the two Houses of Congress passed two different language amendments that were never reconciled by the Conference Committee.[263]

The difference was only a few words—but of great legal significance. The House amendment replaced the cross-reference with the phrase "emitted from a source category which is regulated under section [7412]";[264] the Senate amendment replaced the same text with a cross-reference to § 7412 of the Code.[265] The Senate amendment was a technical amendment regarding NSPS criteria pollutant regulation without substantive change.[266] The House amendment made the same technical change, but added that § 111(d) of the Act regarding criteria pollutants could not be applied to regulate a category of sources already regulated

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258. *See, e.g.*, ZEVIN, *supra* note 197, at 4 (noting that both versions were passed without addressing the differences).

259. *See, e.g.*, *id.* (explaining how the 1990 amendments were different when passed by the House and Senate, leaving the Conference Committee to resolve these issues).

260. 42 U.S.C. § 7411(b)(1)(A)–(B) (2012).

261. *See* ZEVIN, *supra* note 197, at 4 (detailing the conflict between §§ 111(d) & 112 as amended).

262. *Id.* at 12.

263. *Id.* at 24–25.

264. Clean Air Act Amendments of 1990, H.R. 3030, 101st Cong. (1989).

265. Clean Air Act Amendments of 1990, S. 1630, 101st Cong. (1989).

266. *See generally* ZEVIN, *supra* note 197, at 30–40 (detailing the Senate amendment as a whole).

under § 112, which regulates HAPs unrelated to the criteria pollutants.[267] The House version restricted what the EPA sought to do with the CPP.[268]

Both versions are included in the final amendments to the Act as wrought by the final Conference Committee, then passed by both Houses of Congress, and signed by the President.[269] Neither version is inconsistent with the other, as far as their basic subject.[270] Both amendments were included in the final version enacted into law in the Statutes at Large, which, under law, supersedes the U.S. Code if there is a conflict between the two.[271] In 2000, the EPA determined under 42 U.S.C. § 7412(n)(1)(A) "that regulation of hazardous pollutant emissions from coal- and oil-fired [power plants] under section 112 of the [Act] is appropriate and necessary," and added those coal and oil power plants to the § 7412(c) list of mercury emission source categories of facilities to be regulated under the Act.[272] This was referred to as the Mercury and Air Toxics Standard (MATS) rule, and unlike the CPP it does not regulate CO_2, which is not a listed HAP, but instead regulates mercury and several other air toxic pollutants.[273]

When a final bill includes two conflicting provisions, canons of statutory construction exist to give full intended interpretation to all words included in a final legislative version.[274] The plaintiffs in the Murray litigation submitted that a rulemaking to regulate the same pollutant sources under both §§ 111(d) and 112 of the Clean Air Act is *ultra vires*, because the amended Act prohibits statewide regulation under the former section and prohibits direct source regulation under the latter section of the Act.[275]

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267. *See id.* at 27 (explaining how the actions of both the White House and the House of Representatives showed that both bodies intended substantive revisions to what is regulated by § 111(d)).

268. *See id.* at 29 (discussing concerns that the House version would leave the EPA the option of inaction).

269. *See id.* at 4 (recognizing that, despite a lack of reconciliation, the amendments were signed into law).

270. *See id.* (explaining that both amendments addressed the same material with minute but material differences).

271. *See id.* at 13–14 (describing the Supreme Court's interpretation that the Statutes at Large controls over the U.S. Code in the event of conflicting statutory language).

272. Final Brief for Respondent, *supra* note 177, at 7 (alteration in original) (quoting Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,826–30 (December 20, 2000)); *see Basic Information About Mercury and Air Toxics Standards*, EPA (June 8, 2017), https://www.epa.gov/mats/basic-information-about-mercury-and-air-toxics-standards (stating that it was "appropriate and necessary" to regulate mercury emissions).

273. *See Basic Information About Mercury and Air Toxics Standards, supra* note 272 (listing the toxic pollutants).

274. *See* ZEVIN, *supra* note 197, at 13–14 (outlining the rules of construction that guide conflicts between the U.S. Code and Statutes at Large).

275. *See* Final Opening Brief of Petitioner, *supra* note 198, at 39, 54 (arguing that the agency action is *ultra vires* and that the same pollutant sources are regulated under both sections).

Trying to hold a higher ground, the EPA admits that this is one possible interpretation of the statutory amendments.[276] It argues, though, that this interpretation could not be the intent of Congress, because if it were, then § 111(d) would be almost completely negated in its application and ineffective, as over 100 source categories, covering the full range of American industry, have been regulated under § 7412 in regard to some hazardous pollutant.[277] Therefore, one section would negate the application of the other. However, part of this interpretation is a function of how the EPA has chosen to regulate under each section.[278]

Supreme Court precedent on the Clean Air Act can constrain how the CPP is adjudicated. Justice Ruth Bader Ginsburg, in a footnote of the 8–0 majority opinion in *American Electric Power Co. v. Connecticut*, embodied that precedent and construed the EPA's authority under the Clean Air Act in a case that also involved CO_2.[279] She wrote: "[the] EPA may not employ § 7411(d) [§ 111(d)] if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the 'hazardous air pollutants' program, § 7412 [§ 112]."[280]

Regulating a plant for hazardous mercury air pollutants under § 7412 of the Code (§ 112 of the Act), which the EPA uses to regulate hazardous-coal-plant emissions, could bar the agency from issuing non-hazardous CO_2 standards under § 111(d).[281] Because power plants—a category of facilities—and specifically coal-fired power plants, are regulated under § 112, it becomes an interesting fit as to which interpretation controls and whether the EPA has authority to issue these regulations.[282] The Court held

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276. *See* Final Brief for Respondent, *supra* note 177, at 35 (demonstrating why Murray's interpretation is not the only one available and why that interpretation is rather impossible).

277. *See, e.g.*, 42 U.S.C. § 7412(a)(11)(b) (2012) (listing the hazardous pollutants); *id.* § 7412(c) (listing the source categories).

278. *See* ZEVIN, *supra* note 197, at 13 (identifying different interpretations given to each section by the EPA).

279. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 n.7 (2011) (stating the exception to the precedent that the agency must establish standards for performance within a category).

280. *Id.*

281. *Cf.* ZEVIN, *supra* note 197, at 35–37 (explaining that application of § 112 to municipal solid waste landfills precluded the agency from applying § 111(d) standards, similar to the situation with power facilities).

282. *See* Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000) ("[R]egulation of [mercury] emissions from coal- and oil-fired electric utility steam generating units under section 112 of the CAA is appropriate and necessary."). The EPA asserted in the preamble of the CPP rule and in the legal memorandum supporting the proposed CPP rule that this conflict in amendment language creates an ambiguity that the agency may resolve, and thus it is entitled to deference under the *Chevron* precedent. *See* ZEVIN, *supra* note 197, at 38 (discussing mercury emissions from electric generating plants and the

that the initial litigation under § 111(d) was premature when the regulation was not yet final.[283]

2. Challengers' Construction of Law on CPP Double Regulation

The lead challenger to the CPP regulation, Murray Energy Corp., is effectively the "largest privately-owned coal company in the United States."[284] It is also "the fifth largest coal producer in the country, employing approximately 7,500 workers in the mining, processing, transportation, distribution, and sale of coal."[285] Murray asked the court to rule that the EPA's legal conclusion supporting the proposed rule was illegal and to enjoin the proposed CPP.[286] Murray submitted that the EPA could not double-back to use § 111(d) of the Clean Air Act to mandate state-by-state standards for the same sources already regulated under § 112 of the Act, which is expressly prohibited by multiple section of the Act, as it constitutes double regulation.[287] Essentially, the EPA may not issue standards under § 111 of the Act for emissions that are from a source category already regulated under § 112 of the Act.[288]

Murray stated that the EPA had only one bite at the regulatory apple, arguing that Congress specifically directed the EPA to require states to implement national emission standards only if "appropriate and necessary."[289] This gave the EPA the choice of whether to issue a national standard or, in the alternative, to allow power plants to be regulated through state-by-state standards, but it could not do both.[290] Murray maintained that the EPA "repeatedly acknowledged that the text of Section 111(d), [as it stood] after the 1990 [Clean Air Act] Amendments, unambiguously

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Clinton Administration's interpretation that the EPA did not have the legal authority to regulate under § 112); Clean Power Plan, 80 Fed. Reg. 64,661, 64,713–15 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (stating that the EPA has the power to resolve the ambiguities created by the House and Senate amendments).

283. *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894 (1990) (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164–66 (1967)) (acknowledging that any litigation must await final agency action); *see also In re* Murray Energy Corp., 788 F.3d 330, 336 (D.C. Cir. 2015) (holding that the proposed rule was not a final agency action subject to judicial review).

284. Final Opening Brief of Petitioner, *supra* note 198, at v.

285. *Id.*

286. *Id.* at 7.

287. *See id.* at 10 (describing how the 2012 and 2013 regulations attempted to regulate the same sources).

288. *See id.* (asserting that § 112 of the Act authorizes the EPA to issue national emission standards, meaning that the EPA may not thereafter mandate state-by-state emission standards for that same source category without impermissible double regulation of the source).

289. *Id.* at 16.

290. *Id.*

prohibit[ed] [the EPA from] doubly regulating existing source categories"[291] in this case, sweeping into a second impermissible requirement for coal-fired power plants under the CPP.[292]

Other intervenor parties in the litigation also opposed double regulatory provisions under multiple sections of the Clean Air Act.[293] Both the National Federation of Independent Business (NFIB) and the UARG filing as joint-intervenors argued that the plain language of § 111(d) of the Clean Air Act regarding source NSPS precluded double regulation of NSPS already regulated under § 112 of the Act for HAPs.[294] They argued that once the EPA adopted the MATS rule for existing electric generation units under § 112, it was clear that the EPA may not simultaneously regulate emissions from power plants under § 111(d).[295] Once the EPA imposed regulations on existing coal-fired power generators under § 112 for hazardous mercury emissions, the generators could not also be subject to simultaneous, duplicative regulation under § 111(d) for CO_2.[296] The reply brief of NFIB and UARG stated that the EPA counsel's new contrary legal interpretation contradicts and conflicts with EPA's prior interpretation of the same text and ignores applicable canons of construction.[297] NFIB and UARG maintained that § 111(d)'s plain meaning should be interpreted as a straightforward provision of law declaring that source categories regulated under § 112 are exempt from further duplicative regulation under § 111(d).[298]

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291. *Id.*

292. *Id.*

293. *See, e.g.*, Brief for Intervenor–Petitioners Nat'l Fed'n of Indep. Bus. & Util. Air Regulatory Grp. at 9, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151) [hereinafter Brief for Intervenor–Petitioners NFIB and UARG]; Final Brief of the States of West Virginia et al., at 4, *In re* Murray Energy Corp., 788 F.3d 330, (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151) [hereinafter Final Brief of the States of West Virginia et al.] (both demonstrating intervening parties with arguments against double regulation under §§ 111(d) & 112).

294. Brief for Intervenor–Petitioners NFIB and UARG, *supra* note 293, at 6.

295. *Id.* at 9.

296. *Id.*

297. *See id.* at 6 (arguing a clarification of EPA's prior interpretation that sources cannot be regulated under both statutes).

298. *See id.* at 7 (asserting that § 111(d) does not apply to sources that are already regulated under § 112); *see also* Final Brief of the States of West Virginia et al., *supra* note 293, at 8 (explaining that the amendment can be read literally to declare source categories as exempt from double regulation under §§ 111(d) & 112).

3. EPA Defense of No Double Regulation by the Agency

The EPA's response essentially was that "past is [p]rologue."[299] EPA defended and countered that it was the decision-maker with discretion—pursuant to the *Chevron* doctrine—to choose the version of statutory language it prefers and to simultaneously ignore any other versions.[300] The EPA reached back to past practices to explain that prior to the 1990 Clean Air Act amendments, the EPA had established precedent to regulate existing sources using § 111(d).[301] The EPA submitted that the 1990 Act amendments did not limit the ways through which the EPA could double regulate emission *sources* under the statute, but only prohibited the double-regulation of *pollutants* using § 111(d).[302]

Mercury and CO_2 qualify in different basic categories of pollutants—the former a toxic pollutant, the latter non-toxic.[303] The EPA used both sections of the Act simultaneously with the CPP to regulate the same existing power plant sources which emitted both the toxic and non-toxic pollutants.[304] The environmental protection community, supporting the EPA in the CPP litigation, previously argued that the House amendments should govern the statutory interpretation, which here would support the Petitioners' arguments.[305]

The EPA asserted that it had plenary authority and could use such authority as it saw fit.[306] On brief, the EPA argued that "Congress designed [§ 111(d) of the Act] to work in tandem with the NAAQS" regulating criteria pollutants and with § 112 programs regulating HAPs.[307] Together, these various elements of the Clean Air Act cover every emission from

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299. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1 (Thomas Y. Crowell & Co. 1903) (1623); *see* Final Brief for Respondent, *supra* note 177, at 50 (asserting that the legislative history of past versions of a statute is not relevant).

300. *See* Final Brief for Respondent, *supra* note 177, at 51–52 (arguing that the EPA has the authority under *Chevron* to choose whichever statutory interpretation it believes is best).

301. Brief for Intervenor–Petitioners NFIB and UARG, *supra* note 293, at 10.

302. *See* Final Brief for Respondent, *supra* note 177, at 44 (emphasizing that Congress explicitly allowed simultaneous regulation of sources under multiple regulatory programs); *see also* Final Brief of the States of West Virginia et al., *supra* note 293, at 7–8 (asserting that the amendment changed the restriction in § 111(d) to limit double-regulation of pollutants rather than sources regulated under § 112).

303. *See* LAW OF INDEPENDENT POWER, *supra* note 36, § 6:7, at 6–19, § 6:22, at 6–152 (highlighting that "CO_2 is not directly hazardous" and that "mercury [is] a bioaccumulative toxin with a long-term impact").

304. *Cf.* Final Opening Brief of Petitioner, *supra* note 198, at 3 (explaining that all three sections were applied at once).

305. Final Brief for Respondent, *supra* note 177, at 50.

306. *Id.* at 52.

307. *Id.* at 41.

stationary sources.[308] The EPA countered that under challenger Murray's single-authority reading of the Clean Air Act amendments, there would be a gap in coverage, leaving certain pollutants beyond the Act's scope.[309] At the macro level, the EPA submitted that the legislative history of the Act and its amendments conflicted with Murray's interpretation because the 101st "Congress [generally] sought to expand EPA's regulatory authority" under the Act.[310]

EPA argued not that the legislature had authority to determine which version of the Act amendment language officially prevailed, but that the EPA could adopt any well-supported interpretation, so long as it was not arbitrary and capricious.[311] In the EPA's view, for Murray to prevail on the merits of its challenge, Murray would have to show that its interpretation highlighting the House language regarding § 111(d) of the Act was indisputably the only possible interpretation of the controversial provision.[312] Thus, the EPA argued that a court would construe any statutory ambiguity against the complainant and in favor of an alternative interpretation proffered by the EPA.[313] The EPA asserted that there were several different interpretations and the agency deserved the court's absolute deference as to which version to apply.[314]

There was an undisputed lack of clarity between the House and Senate versions of the 1990 Act amendments, with the Senate version providing more discretion to the EPA.[315] The agency asserted that the assumed

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308. *Id.* The 1970 Clean Air Act amendments instructed the EPA to promulgate NAAQS for six "criteria air pollutants" for which the EPA had issued scientific air quality criteria prior to 1970: (1) particulate matter, (2) sulfur dioxide, (3) ozone, (4) nitrogen oxides, (5) carbon monoxide, and (6) hydrocarbons. *NAAQS Table*, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-table (last updated Dec. 20, 2016). The EPA must review the adequacy of NAAQS at least once every five years. *1999 National-Scale Air Toxics Assessment: Fact Sheet*, EPA, https://archive.epa.gov/airtoxics/nata1999/web/html/naaqs.html (last updated Feb. 21, 2016). NAAQS are established, without regard to cost, to protect sensitive subpopulations. Am. Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998). NAAQS protect normal populations with an adequate margin of safety. *Primary National Ambient Air Quality Standard (NAAQS) for Sulfur Dioxide*, EPA, https://www.epa.gov/so2-pollution/primary-national-ambient-air-quality-standard-naaqs-sulfur-dioxide#additional-resources (last updated June 20, 2018).

309. *See* Final Brief for Respondent, *supra* note 177, at 42 (arguing that the court should provide the EPA an opportunity to interpret that particular provision to promote the purpose of the Clean Air Act, protecting health and welfare).

310. *Id.*

311. *See id.* at 52 (asserting that the EPA has the authority to find a reasonable interpretation when there is a conflict between amendments from the House and the Senate).

312. *Id.* at 34.

313. *See id.* at 35 (asserting that the court will evaluate the agency's interpretation in light of its reasonability, not necessarily considering whether the complainant's interpretation is superior).

314. *See id.* (emphasizing that the EPA has the authority to interpret the statute at its discretion).

315. *Id.* at 35–36.

unfavorable "literal text of the House-amended version of section [111(d) of the Act] . . . can be read as authorizing [the] EPA to address power plant emissions under that provision so long as the pollutant in question (here, [CO_2]) is not a criteria pollutant."[316] CO_2 is not a criteria pollutant.[317] Thus, the EPA Administrator may exercise *Chevron* discretion to require states to establish standards for an air pollutant so long as states have not established air quality criteria for that pollutant yet, or states have met one of the remaining criteria.[318] Following this logic, states have not issued air quality criteria for CO_2.[319] Thus, according to the EPA, it is irrelevant whether § 112 regulates power plants.[320] The EPA also countered that § 111(d) could also be read literally as requiring regulation of power plant CO_2 emissions.[321]

Other intervenors supported the EPA's defense. New York and other state intervenors argued that, under petitioner Murray's interpretation of § 111(d), the EPA would have had to choose to act as a regulator.[322] The EPA could have done this under "*either* section 112 to address dangers associated with hazardous air pollutants like mercury *or* section 111(d) to address . . . carbon dioxide emissions from power plants, as well as . . . sulfuric acid mist and fluoride compounds."[323] New York noted that Murray's reading would exclude the most prolific sources of CO_2 from regulation under § 111(d).[324] The EPA employed § 111(d) as its statutory foundation for the CPP, because those sources—including "power plants, petroleum refineries, and cement plants—[were] already regulated under section 112 due to their emission of hazardous air pollutants."[325] These intervenors concluded that "[n]othing in the legislative history of the 1990 [Clean Air Act] amendments suggest[ed] that Congress intended" to create such a large hole in agency authority.[326]

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316. *Id.* at 36.

317. *Id.* at 37.

318. *Id.* at 36–37.

319. *Id.* at 37.

320. *Id.*

321. *Id.* (clarifying that § 111(d) could be read to require the EPA to regulate source emissions of a pollutant from a source category if that category is regulated under § 112).

322. Final Brief of the States of New York et al., at 9, *In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. Mar. 9, 2015) (Nos. 14–1112 & 14–1151) [hereinafter Final Brief of the States of New York et al.].

323. *Id.*

324. *Id*. at 9–10.

325. *Id*.

326. *Id.* at 10.

And this is where things remain as the legal challenge has been enjoined by the Supreme Court and stalled for three years.[327]

C. The Controversy Around the New Math: "Co-Benefits"

1. Doing the Basic Math

Costs and benefits quantify the impact of a regulation.[328] A significant contention in the pending CPP litigation is the Obama Administration's EPA counting so-called *co-benefits* to justify that the CPP benefits outweigh costs.[329] *Co-benefits* are not impacts from pollutants that are regulated by the CPP, but occur because reducing the pollutant regulated by the CPP has the impact of simultaneously reducing co-pollutants.[330] Under the CPP, the administration regulates a pollutant at such a strict level that certain current technology is unable to meet these standards, and by default eliminating all pollutants otherwise emitted when the plants employing that technology shut down.[331] In the case of the CPP, the Obama Administration regulated CO_2 emissions from large power plants as a stated mechanism to reduce the operation of coal-fired power plants.[332] The CPP counts many *co-benefits* that stem from reducing pollutants other than the CPP-targeted CO_2 (which is neither a criteria nor toxic pollutant in the Clean Air Act).[333] Many international climate benefits were also added to and used to supplement relatively limited domestic climate benefits related to limiting or shutting down domestic electricity generation plants.[334]

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327. *See* Amanda Reilly, *Environmental Groups Ask Supreme Court to Revisit Clean Power Plan Stay*, SCI. AM. (July 31, 2018), https://www.scientificamerican.com/article/environmental-groups-ask-supreme-court-to-revisit-clean-power-plan-stay/ (giving background on the history of the Supreme Court's CPP stay from 2015 to present).

328. *Quantifying the Benefits and Costs of Federal Regulations*, DEP'T OF TRANSP., VOLPE CTR. https://www.volpe.dot.gov/policy-planning-and-environment/economic-analysis/quantifying-benefits-and-costs-federal-regulations (last updated Mar. 7, 2018).

329. Amanda Reilly, *Air Pollution: Battle over EPA 'Co-benefits' Rages After Mercury Ruling*, E&E NEWS: GREENWIRE (July 1, 2015), https://www.eenews.net/stories/1060021172.

330. *Mind the Gap*, *supra* note 26, at 147.

331. *Id.*

332. *See* JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RESEARCH SERV., R41561, EPA REGULATIONS: TOO MUCH, TOO LITTLE, OR ON TRACK? 13 (2016) [hereinafter TOO MUCH, TOO LITTLE, OR ON TRACK?], https://fas.org/sgp/crs/misc/R41561.pdf (discussing how the CPP planned to improve the efficiency of fossil-fueled power plants).

333. *See infra* tbl.1.

334. *Id.*

We start from the ground *up*. Various provisions of the Clean Air Act require the EPA to weigh both costs and benefits of regulations.[335] For example, § 111 directs the agency to establish performance standards for sources of air pollution that reflect the "best system" of pollution reduction, "taking into account the cost" of achieving the standard.[336] The EPA's calculations for indirect and direct costs and benefits related to Clean Air Act climate regulations are displayed in Table 1.

Statute	Type	Year	EPA Regulation	Annual Costs	Benefits
CAA	Report	2009	Green House Gas Reporting Rule	$867 per facility	
CAA 111	NSPS	2015	Clean Power Plan	$5.1–8.4 billion	$32–54 billion
CAA 111	NSPS	2016	Methane Emission for Oil & Gas Industries	$530 million	$690 million
CAA 112	MACT		Powerplant MATS Mercury & Air Toxics	$9.6 billion	Hg alone is $4–6 million w/ co-benefits $37–90 billion
CAA 111	NSPS	2012	Fracking Wells & Gas Distribution		$11–19 million
CAA 112	HAPs	2012			

Table 1. Costs and Benefits of Clean Air Act Climate-Related EPA Regulations[337]

The Obama Administration's EPA justified the economics of the CPP by highlighting the economic benefits of immediate respiratory health improvements from the *co-benefits* of reduction of lung irritants.[338] To alter the otherwise lopsided domestic cost-benefit outcome of the CPP—costs far exceeded direct benefits of the CO_2 pollutant expressly reduced from regulation—the Obama Administration's EPA added estimated indirect, incidental *co-benefits* related to reduction of pollutants, which were not regulated by the CPP rule.[339] According to the Congressional Research Service:

335. U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-252, CLEAN AIR ACT: OBSERVATIONS ON EPA'S COST-BENEFIT ANALYSIS OF ITS MERCURY CONTROL OPTIONS 1 (2005), https://www.gao.gov/assets/250/245489.pdf.

336. 42 U.S.C. § 7411(a)(1) (2012).

337. *See* TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 8, 13, 14, 19 (discussing background on EPA regulatory authority and providing information that author used to construct table).

338. *See* Clean Power Plan, 80 Fed. Reg. 64,661, 64,928 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (estimating the economic benefit to be $54 billion by 2030).

339. *Id.* at 64,679.

> There are recurring questions regarding the methodologies used to estimate both costs and benefits, including what to choose as the baseline against which to measure changes resulting from a regulation; how to monetize improvements in public health, such as the avoidance of premature death; whether to count both direct benefits and cobenefits (i.e., benefits achieved that were not the purpose of the regulation); how to account for benefits for which there is no accepted measurement or valuation methodology; whether to include reductions in the "social cost of carbon" as a benefit and, if so, how to measure those benefits; and whether certain benefits or costs are double-counted when simultaneous proposals address the same pollutant.[340]

There was also movement in the legislative branch regarding cost calculations. Evan Jenkins, a Republican Representative from West Virginia, introduced legislation to prohibit the EPA and the Department of Energy from including the social cost of controlling carbon and methane—GHGs—or ancillary *co-benefits* of particulate matter reduction.[341] Some states disagreed with the EPA's ability or discretion to count *co-benefits*.[342] The Director of the Ohio EPA, in comments to the U.S. EPA, stated:

> When U.S. EPA promulgates a revised [NAAQS] it uses the amount of air quality improvement as a measure to determine benefits. If a facility installs controls to meet the NAAQS and also complies with the Utility MATS, plus Cross State Air Pollution Rule (CSAPR), U.S. EPA should not double or even triple count those reductions as part of each rulemaking. The health benefit that U.S. EPA states is occurring can only occur once, not be recounted multiple times under separate U.S. EPA rulemakings.[343]

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340. *See* TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 4 n.16 (discussing the questions surrounding cost and benefit methodologies).

341. H.R. 5668, 114th Cong. (2016).

342. *See Mind the Gap*, *supra* note 26, at 147 ("Legal challenges to the Clean Power Plan were filed by more than 100 parties following its promulgation in October 2015.").

343. Comment Letter from Scott J. Nally, Dir., Ohio EPA, to EPA Docket Ctr. (Jan. 15, 2016), https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2009-0234-20560&attachmentNumber=1&disposition=attachment&contentType=pdf; *see also* Util. Air Regulatory Grp., Comment in Response to the Environmental Protection Agency's Supplemental Finding That it is Appropriate and Necessary to Regulate Hazardous Air Pollutants 20 (Jan. 15, 2016) https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2009-0234-20557&attachmentNumber=1&disposition=attachment&contentType=pdf ("In order for there to be *co-benefits* from $PM_{2.5}$ to attribute to the Proposed Rule, the Proposed Rule must require more reductions of primary $PM_{2.5}$ and $PM_{2.5}$ precursors (*e.g.*, SO_2 and NO_x) than would otherwise occur under other

2. Court Decision Rules

Is there court precedent for counting *co-benefits* or elements not covered by a regulation? My search for court decisions regarding the counting of indirect *co-benefits* or alleged *double-counting* of benefits produced no precedent.[344] So, on these critical issues, the country is left with a case of first impression.

In 2011, a few years before the CPP, EPA proposed and promulgated maximum achievable control technology MATS for power plant mercury emissions.[345] "The final rule sets standards for all hazardous air pollutants (HAPs) emitted by coal- and oil-fired electric generating units (EGUs) with a capacity of 25 megawatts or greater."[346] These MATS promulgated by the EPA were estimated to avert up to "11,000 premature deaths, 4,700 heart attacks and 130,000 asthma attacks every year."[347] However, virtually none of the benefits were related to the emissions directly regulated by the rule.[348] Almost all of the projected value of avoided deaths and monetized benefits came from the rule's effect on emissions of particulates, which are non-toxic pollutants.[349] Rather, these benefits did not stem from an

existing regulations, including the current National Ambient Air Quality Standards (NAAQS) for $PM_{2.5}$. To include any co-benefits from reductions that will occur anyway as a result of the current $PM_{2.5}$ NAAQS in this rule would be to *double*-count those benefits—first as the direct benefits that were counted to justify the $PM_{2.5}$ NAAQS in that rule's 2006 RIA (EPA, 2006), and then again as co-benefits to justify this Proposed Rule.").

344. An independent search of court decisions concerning indirect *co-benefits* and double counting of benefits similarly returned no results.

345. Regulatory Actions - Final Mercury and Air Toxics Standards (MATS) for Power Plants, EPA, https://www.epa.gov/mats/regulatory-actions-final-mercury-and-air-toxics-standards-mats-power-plants (last visited Nov. 25, 2018). The EPA stated that the standards for existing units could be met by 56% of coal- and oil-fired electric generating units using pollution control equipment already installed; the other 44% would be required to install technology that would reduce uncontrolled mercury and acid gas emissions by about 90%, at an annual cost of $9.6 billion. TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 22.

346. *Basic Information About Mercury and Air Toxics Standards*, *supra* note 272 (emphasis removed). This affects larger coal plants, if coal is greater than 10% of fuel input, and the unit is greater than 25 MW capacity, produces electricity for sale, and supplies more than one-third of its potential output to any utility power distribution system, unless its annual capacity factor is less than 8% of rating (i.e., only used for peaking purposes). National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304, 9309, 9384 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63).

347. *Mercury and Air Toxic Standards: Healthier Americans*, EPA, https://www.epa.gov/mats/healthier-americans (last updated Dec. 7, 2016) [hereinafter *Healthier Americans*].

348. *See id.* (asserting that the incidental effects this rule has on particulate matter are the more direct cause of the predicted benefits of the rule).

349. *See id.* (reasoning that fine particulate reduction leads to a reduction in various severe health problems).

identified reduction of mercury or other air toxic chemical exposure regulated expressly by the MATS.[350]

What made the rule controversial is that the *co-benefits* associated with incidental reduction of fine particulate matter ($PM_{2.5}$) reductions comprised the overwhelming majority of all benefits attributed to the MATS regulations by the EPA.[351] $PM_{2.5}$ is already otherwise regulated by the EPA under other sections of the Clean Air Act NAAQS regulations.[352] This allowed the EPA to achieve, indirectly through executive action, $PM_{2.5}$ emissions reductions beyond those allowed or achieved under provisions of the Act authorizing direct regulation of $PM_{2.5}$.[353] Across the country, this rule had both strong supporters and detractors.[354]

Existing coal-fired power plants had until April 2015 (with a possible one-year extension) to meet the standards.[355] "The final rule set standards for all hazardous air pollutants emitted by coal- and oil-fired electric generating units with a generation capacity of 25 megawatts or greater."[356] Any existing source would have about four years to comply with the new MATS, and then under the Clean Air Act, a state could grant an additional year.[357]

Numerous parties petitioned the courts for review of the rule.[358] They contend that the EPA failed to conduct a cost-benefit analysis or cost consideration in its initial determination that control of air toxics from electric power plants was "appropriate and necessary."[359] Moreover, Petitioners alleged that the agency's later cost-benefit analysis demonstrated that the rule's direct benefits failed this test.[360] This issue proceeded on appeal to the Supreme Court in a challenge by a coalition of

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350. *Cf. id.* (pronouncing that the value of the incidental impact on particulate matter accounts for the vast majority of the public health benefits).

351. Maxine Joselow, *Clean Air Advocates Worried by EPA's Move to Rethink Cost-benefit Calculations*, SCI. MAG. (June 25, 2018), http://www.sciencemag.org/news/2018/06/clean-air-advocates-worried-epa-s-move-rethink-cost-benefit-calculations.

352. *Id.*

353. *See id.* (indicating that the counting of *co-benefits* increased $PM_{2.5}$ emissions reduction calculations).

354. *See id.* (containing the names of both supporters and detractors of the CPP).

355. *AEO2014 Projections*, *supra* note 135.

356. *Basic Information About Mercury and Air Toxics Standards*, *supra* note 272.

357. *Healthier Americans*, *supra* note 347.

358. *See* Joselow, *supra* note 351 (mentioning the parties who sought judicial review of the EPA's rule).

359. TOO MUCH, TOO LITTLE, OR ON TRACK?, *supra* note 332, at 19.

360. *See id.* (stating the EPA's "appropriate and necessary" finding).

more than 20 states.[361] The agency could only quantify $4 million–$6 million in direct benefits related to reductions of HAPs regulated by MATS, a fraction of one percent of the total direct and indirect *benefits* claimed by the agency.[362] The EPA claimed primarily long-term *co-benefits* of $37 billion–$90 billion annually, without providing any statistical basis or medical proof.[363] On appeal, the Supreme Court overturned MATS because: "The [EPA] must consider cost—including . . . cost of compliance—before deciding whether regulation is appropriate and necessary."[364] "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[365]

Both EPA regulations at issue in the MATS challenge and the CPP challenge are common in that each created a *de minimis* amount of *direct* public health benefits, scaled against much more significant costs for private industry to implement the reductions (mercury in the MATS rule and CO_2 in the CPP rule, respectively).[366] In both cases, to alter the outcome of costs far exceeding direct benefits of the pollutant specifically regulated, the EPA added estimated indirect, incidental *co-benefits* related to reduction of pollutants, which were not regulated by the rule.[367]

IV. THE AGENCY SWIVEL TO PROCEDURAL AGENCY DEFENSES

Both federal and state environmental agencies have attempted to stop the challengers' suits on procedural grounds to prevent a court from considering the merits of what the agency is regulating.[368] When can one

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361. *See* Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (agreeing to grant *certiorari* and consolidate three separate positions filed by the UARG, the National Mining Association, and 21 states, whereby 15 states supported the EPA's MATS regulation before the Court).

362. *Id.*

363. *Id.*

364. *Id.* at 2711.

365. *Id.* at 2707.

366. *See id.* at 2705, 2706–08, 2715 (explaining that the cost of regulating mercury outweighed the direct health benefits); *see also* Final Opening Brief of Petitioner, *supra* note 198, at 4, 6, 20, 22 (arguing that the cost of regulating carbon under the CPP also outweighed the direct health benefits).

367. *See* Jason Perkins, Essay, 2015–16 Olaus and Adolph Murie Award-winning Paper, *The Case for Co-Benefits: Regulatory Impact Analyses, Michigan v. EPA, and the Environmental Protection Agency's Mercury and Air Toxics Standards*, STAN. L. SCH., 13–14, 21 (Sept. 6, 2016) (discussing the history of, support for, and criticism of *co-benefits*).

368. *See* Steven Ferrey, *Can the Ninth Circuit Overrule the Supreme Court on the Constitution?*, 93 NEB. L. REV. 807, 817, 822, 849, 854 (2015) [hereinafter *Overrule Supreme Court*] (providing evidence of procedural challenges raised during trial); Steven Ferrey, *Wrinkles in the Administrative Fabric: Regulatory Initiatives and California Economic Development*, 20 NEXUS CHAPMAN'S J. L. & POL'Y 17, 22 (2015) [hereinafter *Wrinkles in the Administrative Fabric*] (noting one of seven significant state law challenges to California's sustainable energy policy succeeded on

sue on the merits? The Administrative Procedure Act § 706(2)(A) provides that courts must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[369] Procedure, timing, and exhaustion of remedies have become major defenses of government agencies at both the federal and state levels in litigation to attempt to truncate courts reaching the merits of challenges.[370] These challenges typically raise: (1) standing of the challengers, arguing that the challenger does not have a specific injury as was raised in the CPP case;[371] (2) that challengers have not exhausted their administrative actions or remedies prior to seeking review;[372] (3) that the current version of the regulation is not yet final and thus judicial action is not yet ripe;[373] or (4) no writ is available to halt agency initiatives.[374] Here, each of these procedural defenses constituted substantial aspects of the EPA's defense to try to prevent the government from needing to defend the legal merits of its substantive decision and CPP regulation.[375]

A. Exhaustion of Administrative Remedies

Opposed to the CPP, Murray Energy Corp. attempted to stop the rulemaking by filing suit as soon as the EPA placed the proposed rule in the Federal Register.[376] Procedural objections to any litigation were raised by the Obama Department of Justice as premature before final agency

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procedural grounds, while the state raised procedural challenges to all six to try to avoid the merits of the claims).

369. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

370. *Cf.* Joseph F. DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409, 412–45 (1977) (discussing how some private parties are precluded by procedure and requirements such as exhausting available remedies); *see also* Melissa M. Devine, *When the Courts Save Parties from Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade*, 21 TUL. J. INT'L & COMP. L. 329, 334 (2013) (discussing the importance of judicial procedure).

371. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1991) (explaining that plaintiff must have a specific injury to have standing in a case).

372. *See* William Funk, *Exhaustion of Administrative Remedies – New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 1–2 (2000) (discussing how government agencies use exhaustion of remedies as a defense in court).

373. *See infra* Part IV.A (discussing the issue of ripeness as an agency defense in court).

374. *See* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461–62, 464–65, 472 (2008) (overviewing court holdings in the face of agency inaction).

375. *See infra* Part IV.B.2 (examining the EPA's legal approach to upholding the CPP).

376. *In re* Murray Energy Corp., 788 F.3d 330, 334 (D.C. Cir. 2015). Murray argued that its business would be negatively affected by the plan, and it had incurred costs in anticipation of the final rulemaking. *Id.* at 335.

action.[377] The legal doctrine of exhaustion of administrative remedies provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[378] To satisfy exhaustion, plaintiffs must demonstrate that they have exhausted all possible administrative remedies available at the promulgating administrative agency prior to securing judicial review.[379]

Exhaustion of administrative remedies serves four main purposes.[380] Those purposes are: (1) respecting the legislative purpose in granting implementation authority to an agency; (2) protecting agency autonomy and separation by allowing the agency the opportunity correct errors; (3) streamlining judicial review by developing the facts of the case at the agency level; and (4) promoting judicial economy.[381] In environmental cases, courts typically apply the *McKart* exhaustion factors to determine ripeness of judicial reviewability.[382] Courts frequently reject the exhaustion defense where judicial review of a decision is granted.[383]

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377. *See id.* at 335, 339 (highlighting procedural issues raised by respondents).

378. *See* McKart v. United States, 395 U.S. 185, 193 (1969) (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938)) (summarizing the doctrine of exhaustion, which uses four factors to determine whether judicial review is appropriate for an agency action that is not the final agency determination on that matter). *McKart* described four factors that must be considered to determine whether judicial review is ripe: (1) the degree of plaintiff's injury; (2) the need to protect the integrity of agency functions; (3) the likelihood that judicial review would be enhanced by application of agency experience or the accumulation of a record; and (4) the improvement of judicial efficiency by avoiding intervention and first giving the agency a chance to correct the matter. *See* ENVIRONMENTAL LAW, *supra* note 34, at 63 (examining the court's opinion in the *McKart* case).

379. *McKart*, 395 U.S. at 193 (quoting *Myers*, 303 U.S. at 50–51). There are internal appeal processes within the EPA. *Environmental Appeals Board*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf (last updated Oct. 5, 2018). The EPA has a centralized Environmental Appeals Board (EAB) to hear appeals and petitions in three types of cases: civil penalties for violations of environmental statutes and regulations; issuance, modification, or revocation of permits regulating pollutants and activities; and costs associated with cleaning up hazardous waste sites. *Id.* However, none of these include general rulemaking as was at issue with the CPP. *See, e.g.*, Elec. Privacy Info. Ctr., *The Administrative Procedure Act (APA)*, https://www.epic.org/open_gov/Administrative-Procedure-Act.html (last visited Nov. 25, 2018) (noting that final rule makings are subject to APA adjudication).

380. Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

381. *Id.* at 1484.

382. *See McKart*, 395 U.S. at 193 (stating exhaustion factors that help other cases determine ripeness of review).

383. *See* State v. U.S. Steel Corp., 240 N.W.2d 316, 319 (Minn. 1976) (holding the exhaustion doctrine inapplicable because no administrative action occurred); State v. Dairyland Power Coop., 187 N.W.2d 878, 882–83 (Wis. 1971) (holding the exhaustion doctrine inapplicable because there was "no administrative action of any kind whatsoever").

1. Final Agency Action

In the challenge to the CPP, petitioners assertively argued that an agency's interpretation of the law is presumptively final once it is signed by the head of the agency.[384] Thus, Murray argued that the initial CPP proposal was a final agency action because the preamble that announced the EPA's legal conclusion was part of the regulation signed by the EPA Administrator, which plaintiff Murray argued was a final action by the agency.[385] Murray further argued that once the legal determination was made by the agency, it was irrelevant that the EPA would subsequently accept public comments on the proposed CPP rule.[386] Petitioners stated that although the EPA was free to later modify its legal positions, it did not render those positions any less final at the time they were made.[387] Therefore, judicial review could proceed as to whether the agency was correct.[388] Murray argued that the EPA's legal conclusion was a final agency action when the EPA concluded it had authority for this rule under its basic authority pursuant to § 111(d) of the Clean Air Act.[389]

2. The D.C. Circuit Decision on Timing of Litigation Challenges

The D.C. Circuit held that only final agency action, not proposed action, is subject to judicial review:[390]

> Proposed rules meet neither of the two requirements for final agency action: (i) They are not the 'consummation of the agency's decisionmaking process,' and (ii) they do not determine 'rights or obligations,' or impose 'legal consequences'. . . . [A] proposed regulation is still in flux, so review is premature . . . . Agency action is final when it imposes an obligation, denies

384. Final Opening Brief of Petitioner, *supra* note 198, at 48; *see also* NRDC v. Tenn. Valley Auth., 367 F. Supp. 128, 133 (E.D. Tenn. 1973) (claiming failure to comment on draft impact statements is a complete bar to an attack on NEPA statement adequacy).

385. Final Opening Brief of Petitioner, *supra* note 198, at 48–49.

386. *Id.* at 50.

387. *Id.*

388. *Id.*

389. *Id.* at 54.

390. *See In re* Murray Energy Corp., 788 F.3d 330, 334 (D.C. Cir. 2015) (denying petition for review on this basis). Murray's position was that their business would be negatively affected by the CPP, and their injury consisted of costs incurred in anticipation of the final rulemaking. *Id.*

> a right, or fixes some legal relationship, and an agency's proposed rulemaking generates no such consequences.[391]

Thereafter, the initial complaint in *In re Murray Energy Corp.* was dismissed by the D.C. Circuit in June 2015 because the challenged CPP rule was not yet in final form.[392] In principle, administrative remedies had not yet been exhausted, and thus the court lacked the authority to rule on its legality.[393] Then, even before there was a merited CPP challenge at the circuit level or petition for *certiorari* before the Supreme Court, the Supreme Court overruled the D.C. Circuit and granted an indefinite stay to the entire CPP on February 9, 2016.[394] This is now much more than two years before the D.C. Circuit would deliver any initial decision on the merits of the case.[395] It is a rare event for the Supreme Court proactively to override a circuit court's decision to not grant a stay when the case is not yet before the circuit court on the merits.[396] Some commenters posit that this was not a surprising outcome given the Supreme Court's ruling in *Michigan v. EPA*.[397] The agency went into defensive posture.[398]

B. Authority of a Court to Issue a Writ to Compel Agency

1. Challengers' Legal Position

Murray and several intervenors structured their requested relief asking for a writ from the court to enjoin alleged EPA double regulation of CO_2

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391. *Id.* at 334–35 (internal citations omitted).

392. *Id.* at 334 ("[A] proposed rule is just a proposal. In justiciable cases, this Court has authority to review the legality of final agency rules.").

393. *Id.* ("We do not have authority to review proposed agency rules.").

394. *See Brakes on CPP*, *supra* note 1 (verifying the D.C. Circuit's denial of the request).

395. *See id.* (listing the action's procedural history).

396. *Cf. id.* (discussing how unusual it is for the Supreme Court to block federal regulations and override the decision of the circuit court).

397. *See id.* (providing a brief description of the *Michigan* Court's reasoning). There was no stay granted to the plaintiffs in *Michigan* resulting in them paying for upgrades to comply with the EPA's rulemaking during the litigation only to have the regulatory requirement overturned by the Supreme Court for the lack of cost-of-compliance analysis done by the EPA for the § 112 Clean Air Act regulations. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (holding that the court was not going to grant plaintiffs a stay because by the time the order was invalidated, the costs were expended and the plants were at, or near compliance with the invalidated rulemaking). By the time the order was invalidated, the costs were expended and plants were at, or near compliance with the invalidated rulemaking, as suggested in Petitioners application for stay. *Id.*

398. *See Brakes on CPP*, *supra* note 1 (referencing the position of the EPA following the stay of action).

emissions under the Clean Air Act.[399] The challengers maintained that courts can issue extraordinary writs when appropriate, including the arrest of unlawful agency conduct.[400] There is direct judicial review of rules promulgated by the EPA if they are final agency actions.[401] Under the All Writs Act, federal courts may issue all writs necessary or appropriate.[402] An extraordinary writ would be available when an administrative agency exceeded its authority.[403] Challengers asserted this should apply even if not in the form of a final regulation, as it already constitutes an *ultra vires* agency action.[404]

The non-delegation doctrine restricting agency action is derived from Article I of the Constitution, whereunder all "legislative power herein granted shall be vested in a congress."[405] The Supreme Court held that "Congress cannot delegate legislative power to the President."[406] Even a permissible congressional delegation requires Congress to specify an *intelligible principle* to guide the agency's discretion.[407] For example, the same agency challenged in the CPP litigation, the EPA, was able to sustain its regulation when the agency's NO_x and $PM_{2.5}$ standards ultimately were upheld against challenge under the long-moribund "nondelegation doctrine."[408]

In the CPP litigation, Murray argued that it and others would suffer irreparable injury if the court did not provide immediate relief via writ.[409] Murray submitted that while it was a retail coal supplier, the deck was stacked against coal.[410] This was because utility companies it supplied with

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399. *See* Final Opening Brief of Petitioner, *supra* note 198, at 39. *See generally* Nicole Einbinder, *Scott Pruitt Says That EPA Will Repeal the Clean Power Plan*, PBS (Oct. 10, 2017), https://www.pbs.org/wgbh/frontline/article/scott-pruitt-says-that-epa-will-repeal-the-clean-power-plan/ (explaining Obama's EPA CPP and its effects).

400. Final Opening Brief of Petitioner, *supra* note 198, at 38.

401. *Id.*

402. *Id.* at 39.

403. *Id*. at 40.

404. *Id*. at 41 ("EPA cannot resolve its lack of authority by revising the proposed rule, since EPA has no other legal basis for the rule . . . .").

405. *See* ENVIRONMENTAL LAW, *supra* note 34, at 42–43 (quoting U.S. CONST. art. I, § 1).

406. Field v. Clark, 143 U.S. 649, 692 (1899).

407. *See* Yakus v. United States, 321 U.S. 414, 424–25 (1944) (holding that the Emergency Price Control Act was not an unauthorized delegation of legislative power because the Act's prescribed standards sufficiently guided the Administrator towards achieving the legislative will).

408. *See* Am. Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g*, 195 F.3d 4, 7 (D.C. Cir. 1999) (holding that the intelligible principle applied by the EPA fulfills the purpose of the nondelegation doctrine); *see also* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 475–76 (2001) (reversing the lower court's decision that the Clean Air Act unconstitutionally delegated to the EPA authority to set specific air-quality standards).

409. Final Opening Brief of Petitioner, *supra* note 198, at 41.

410. *Id.* at 41–42.

coal were already forced to make costly decisions about the future economic and environmental viability of existing coal-fired power plants under already impending compliance deadlines established before the 2012 EPA § 112 Clean Air Act toxics rules.[411] The newly proposed additional rules of the CPP—also expressly targeting coal-fired power generation facilities—added additional unauthorized rules with large costs to comply with the distinct CPP carbon standard for coal-fired power plants.[412]

Moreover, regarding the required state agency public response, the new § 111(d) CPP mandate required all 50 states to begin development of 50 different unique state plans to satisfy the rule.[413] Even though states had one year from the date of the final rule in 2015 to submit their final state-specific plans,[414] the balancing process for intrastate power supply and demand, as well as power reliability concerns and concerns about economic growth and employment, had to commence immediately.[415] Murray argued such immediate impacts and related injuries justified immediate injunctive relief by a writ prohibiting the EPA from issuing the final rule.[416]

Intervenors NFIB and UARG further noted that the EPA employed § 111(d) to regulate only five emission source categories in the prior 40 years since the Clean Air Act was enacted.[417] Thus, the EPA's resuscitation of this provision in 2015 to address carbon was a unique and questionable use of § 111(d).[418] Intervenors argued that the EPA's mistake arose from agency interpretive errors of constitutional dimension.[419]

2. EPA Position on Agency Immunity to Court Writs

The EPA, as expected, countered that a writ was not warranted under the circumstances.[420] Halting an ongoing rulemaking before the EPA had issued the rule in final form would be extraordinary and without legal basis.[421] The EPA, as it had done before, attacked the petitioners

411. *Id.*

412. *Id.*

413. *Id.* at 42.

414. *Clean Power Plan Timeline*, CTR. FOR CLIMATE & ENERGY SOLUTION: SOLUTIONS FORUM, https://www.c2es.org/site/assets/uploads/2015/09/cpp-implementation-timeline.pdf (last updated Feb. 22, 2016).

415. Final Opening Brief of Petitioner, *supra* note 198, at 42.

416. *Id.* at 43.

417. Brief for Intervenor-Petitioners NFIB and UARG, *supra* note 293, at 36.

418. *Id.*

419. *Id.* at 37.

420. *See* Final Brief for Respondent, *supra* note 177, at 27–34 (arguing that the courts lack jurisdiction to issue a writ to stop an ongoing rulemaking).

421. *Id.* at 33–34.

procedurally[422] in an attempt to block the court from reaching the merits of the CPP rule.[423] It argued in multiple dimensions that Murray lacked Article III standing, the court lacked jurisdiction over Murray's direct challenge to the proposed rule, the court lacked jurisdiction to issue a writ of prohibition to the agency, and the court should not stop the rulemaking based on a challenger's interpretation of an ambiguous provision.[424]

a. Lack of any Intervenor's Standing to Challenge Agency Action

The EPA argued that Murray lacked necessary Article III standing because Murray was unable to show an individualized injury resulting from the proposed rule.[425] To establish Article III standing, an injury must be concrete, particularized, actual or imminent, fairly traceable to the challenged agency action, and redressable by a favorable ruling.[426] The EPA sought to establish that standing based on the expectation of future injury, as with the still unpromulgated CPP rule, must surmount a significantly more rigorous burden to establish standing.[427] Based on case precedent, the EPA stated that when the petitioner is not itself the object of the government action or inaction it challenges, standing ordinarily becomes substantially more difficult to establish.[428] The EPA maintained that an administrative agency's initiation of a rulemaking through a notice and comment process did not yet impair the rights of interested parties.[429] Thus, such rulemaking does not give rise to Article III standing, even if an eventually promulgated final rule would eventually regulate such parties.[430]

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422. *See Overrule Supreme Court*, *supra* note 368, at 817, 822, 849, 854 (noting procedural defenses raised by the California environmental regulator to try to avoid challenges on the merits of claims against its carbon regulation); *Wrinkles in the Administrative Fabric*, *supra* note 368, at 17, 22 ("Of seven significant legal challenges to California sustainable energy policy raised pursuant to *state* law, California settled in favor of challengers in more than half of these which have proceeded to a decision, while one was sidetracked on procedural grounds without reaching the merits of the claim[.] Of six significant suits pursuant to the Supremacy Clause of the U.S. Constitution regarding regulation of its electric power generation facilities and liquid fuels, California settled in favor of challengers or lost four of these six, with the fifth matter pending and sixth matter dismissed on procedural grounds without reaching the merits of the claim, leaving plaintiffs with discretion to re-file the complaint[.]").

423. *See In re* Murray Energy Corp., 788 F.3d 330, 335, 339 (D.C. Cir. 2015) (referencing the motivation for the EPA's actions).

424. *See* Final Brief for Respondent, *supra* note 177, at 9–10 (discussing the court's ability to issue a writ to stop an ongoing rulemaking).

425. *Id.* at 9, 12.

426. *Id.* at 9.

427. *Id.* at 10–11.

428. *Id.* at 11.

429. *Id.*

430. *Id.*

The EPA also argued that any future Murray injury was speculative in a proposed rule, and insufficient to confer standing.[431] The EPA argued that the Article III standing cases that Murray relied on to establish its standing involved final rules promulgated after notice and comment, not proposed rules published for the purpose of soliciting public comments.[432]

The State of New York, supporting all EPA defenses, stated that the court lacked jurisdiction to issue the requested writ absent a uniquely compelling unusual justification.[433] New York argued that Murray needed to wait to participate in the ongoing rulemaking and that only judicial review of the final rule would be available to assess alleged injury.[434]

The EPA's standing argument sought to isolate Murray's injury as too attenuated because Murray is a coal producer, not a regulated entity burning the coal under the CPP.[435] The EPA argued that on this basis of not being directly regulated, Murray bore a greater burden to link the downstream economic effects it alleged were future potential injuries to Murray's business and were genuinely traceable to the EPA's rule, not to the independent choices of third-party coal consumers, and that the injury would be redressable if relief were granted.[436] The EPA asserted that Murray would fail even if its claim was not premature before the EPA had completed its rulemaking process, because its claim was totally speculative and conjectural.[437]

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431. *Id.* at 12. The EPA stated that when it was still evaluating the millions of comments it received, any predictions about what state-specific guidelines the EPA might include in a final rule, as well as what requirements each state, in turn, independently may later impose on power plants pursuant to such guidelines, were not yet final or known. *Id.* at 13. However, of note, the EPA's eventual final rule, while different than the proposed rule, was not different in ways that materially impacted Murray's allegation in its suit. *See* Jehmal Terrence Hudson, *EPA's Clean Power Plan Final Rule: What's Next?*, 55 INFRASTRUCTURE 1, 5–7 (2016) (explaining the differences in the final rule compared to the proposed rule, along with significant aspects of the final rule).

432. Final Brief for Respondent, *supra* note 177, at 13.

433. Final Brief of the States of New York et al., *supra* note 322, at 2.

434. *See id.* at 2–3 (arguing that the court does not have jurisdiction until after notice and comment, rulemaking, and the EPA has made a decision based on the notice and comment rulemaking process).

435. Final Brief for Respondent, *supra* note 177, at 14.

436. *Id.* The EPA asserted that Murray was required to demonstrate a substantial probability that the economic effects would not have occurred but for the EPA action, as well as demonstrating that if it gained the requested relief, the plaintiff's alleged injury would be redressed. *Id.* EPA complained that Murray simply stated in a conclusory fashion that certain of Murray's customers' power plants would have to shut down or were slated for closure, without going into detail regarding reasons for these decisions. *Id.* at 15.

437. *See id.* at 12 (asserting that Murray does not have standing because its claim is based on speculative impacts of a ruling, not on an actual injury-in-fact, as is required for standing).

b. Lack of Final Agency Action

The EPA also noted that there was no final agency action.[438] The Clean Air Act § 307(b)(1) provides judicial review as an exclusive remedy.[439] The EPA stated that the Act makes clear that only a final promulgated rule consummates the rulemaking process after a proposed rule is made available for public comment in the Federal Register for a specific period.[440] Having never advanced to the threshold of a promulgated rule, judicial review was not allowed nor was Murray's entitlement to a writ.[441]

c. Court Jurisdiction to Issue Writs Compelling Agency Results

The third argument asserted as part of the EPA's procedural defense was lack of jurisdiction to issue a writ of prohibition to stop an ongoing non-final rulemaking under the All Writs Act.[442] The EPA stated that the All Writs Act does not itself confer court jurisdiction where it is otherwise absent, nor does it enlarge court jurisdiction.[443] The EPA asserted that the court cannot entertain a challenge to the ongoing § 111(d) rulemaking without impermissibly enlarging the court's jurisdiction.[444] The EPA asked the court to find that a writ is an extraordinary remedy not available when review by any other means is possible.[445] The EPA additionally maintained that Murray's petition did not fit into any of the three narrow categories in which an extraordinary writ may be issued under a court's jurisdiction.[446]

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438. *See id.* at 17 (highlighting that this is not a final action, and precedent establishes that there must be a final action for the court to have jurisdiction over the case).

439. *Id.*

440. *Id.* at 18.

441. *See id.* at 17, 27 (explaining that a writ will not confer jurisdiction where it is lacking and, therefore, Murray is not entitled to one for that purpose).

442. *Id.* at 27.

443. *Id.*

444. *Id.* According to the EPA brief, allowing Murray to challenge the rule while in only its proposed form, would allow any party to bypass congressional limitations on litigation, while simultaneously enlarging the court's jurisdiction. *Id.* at 27–28. EPA stated that a plaintiff must wait until the rule is final to seek a remedy under the Clean Air Act. *See id.* at 28 (emphasizing that Murray's challenge must wait until the rule is final and must challenge under the Clean Air Act's review process).

445. *Id.* at 29.

446. *Id.* at 29–31. The EPA's brief noted three categories for which such a writ may be issued: (1) to issue a writ of mandamus to compel agency action where an agency has unreasonably delayed taking action required of it by law; (2) to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority; or (3) to resolve an important, undecided issue that will forestall future error in trial courts. *Id.*

Of note, the Supreme Court recently circumscribed some of the issues of court deference to administrative decisions.[447] In *King v. Burwell*, the Court held that the IRS would not be granted *Chevron* deference because the IRS does not have expertise in crafting health insurance policies.[448] Congress would have to grant express authority to the agency for it to have deference.[449] The potential analogy for the CPP litigation is that the EPA is not the agency with expertise on energy policy.[450] Thus, the EPA is not entitled to deference from courts when it enacts regulations to reorganize how power is generated and sold in America.[451] No court has yet decided claims on this matter.[452]

V. CLEAN POWER PLAN'S CHANGING IMPACT ON ADMINISTRATIVE LAW

The Supreme Court will eventually see this case again on a petition for *certiorari* if the D.C. Circuit renders a decision on the merits.[453] Prior to the change in Presidential Administrations, the defendant agency remained in a defensive posture by attempting to convince the D.C. Circuit not to reach the merits and instead dismiss the complaint on the following procedural grounds:

(1) The agency had not completed its actions thus, the complaint was premature;[454]
(2) Prerequisite administrative remedies had not been exhausted to allow court review;[455]

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447. *See also* King v. Burwell, 135 S. Ct. 2480, 2487–89 (2015) (holding that there would be no deference to the IRS because Congress could not have intended such a delegation).

448. *Id.*

449. The *Chevron* framework for analyzing an agency's interpretation of a statute "'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.' [But] '[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.'" *Id.* at 2488–89 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *see also id.* (highlighting how the *Chevron* two-step framework is based on the theory that when a statute is ambiguous, it is an implicit delegation from Congress to the agency; however, there are circumstances where Congress might not intend this effect).

450. *Cf. id.* at 2489 (discussing how the IRS does not have the health insurance expertise required to craft health insurance regulations).

451. *Cf. id.* (analogizing IRS and EPA deference).

452. *Cf.* Bruce Huber, *FERC and EPA: Better Together?*, YALE J. ON REG. & ABA SEC. ADMIN. L. & REG. PRAC.: NOTICE AND COMMENT (Dec. 24, 2014), http://yalejreg.com/nc/ferc-and-epa-better-together-by-bruce-huber/ (noting there are few, if any, historical interactions between the regulated fields of energy and the environment).

453. *See* Response Opposing Requests for Further Abeyance Combined with Motion to Decide the Merits of Case at 1, West Virginia v. EPA (D.C. Cir. 2018) (No. 15–1363) (discussing how the petitioners should not get more time and that the case should proceed).

454. Final Brief for Respondent, *supra* note 177, at 9.

(3) Complainants could show no injury and therefore had no standing to bring a claim;[456] and

(4) Lack of access to a judicial mechanism or writ to arrest agency actions.[457]

If not successful in procedurally derailing litigation, the agency's substantive defense is that:

(1) *Chevron* Step Two applies and precedent provides the agency free discretion and deference;[458]

(2) The CPP agency regulatory program stands unless it is arbitrary or capricious;[459]

(3) The Supreme Court's *King* precedent removing agency deference should not apply because the CPP is akin to environmental regulation on which the EPA has expertise—notwithstanding that CPP applies only to energy-plant operations—which is not within the EPA's expertise;[460] and

(4) The restrictions to *Chevron* deference established in various recent Supreme Court decisions involving the EPA and the Clean Air Act should not apply to the CPP.[461]

Timing matters with the CPP because only final rulemakings, not proposed rules, can be challenged.[462] "Proposed rules meet neither of the two requirements for final agency action: (i) They are not the 'consummation of the agency's decisionmaking process,' and (ii) they do not determine 'rights or obligations,' or impose 'legal consequences.'"[463] Notwithstanding arguments of the parties, the recent fabric of Supreme Court precedent provides context for where the Court might proceed on this matter. In 2014, the Supreme Court blocked the EPA's attempt to finesse

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455. *Id.* at 29.

456. *Id.* at 11.

457. *Id.* at 27.

458. *Id.* at 35.

459. *Id.*

460. *See id.* at 36 (noting the EPA has power to regulate power plant emissions, so long as they are not criteria pollutants).

461. *Id.* at 51–52.

462. *See In re* Murray Energy Corp., 788 F.3d 330, 335 (D.C. Cir. 2015) (holding the proposed rule was not a final agency action subject to judicial review; a final rule must be published before it is subject to judicial review).

463. *Id.* at 334 (citing Bennett v. Spear, 520 U.S. 154, 177–78 (1997)); *see also* Action on Smoking & Health v. Dep't of Labor, 28 F.3d 162, 165 (D.C. Cir. 1994) ("Agency action is final when it 'imposes an obligation, denies a right, or fixes some legal relationship' . . . [and an agency's] 'proposed rulemaking generates no such consequences.'" (quoting NRDC v. U.S. Nuclear Regulatory Comm'n, 680 F.2d 810, 815 (D.C. Cir. 1982))).

explicit congressional statutory terms.[464] Again in 2014, the Supreme Court, reversing a D.C. Circuit decision, upheld EPA executive environmental action.[465]

In 2015, the Supreme Court in *Michigan* reversed a split D.C. Circuit decision, overturning an EPA environmental rule.[466] In reaching its narrowly split decision in *Michigan*, the Supreme Court majority cited the dissent of Judge Kavanaugh in the D.C. Circuit decision in *White Stallion Energy Center LLC v. EPA*,[467] which on appeal became the seminal Supreme Court opinion in *Michigan*.[468] Judge Kavanaugh, as part of his confirmation process to the Supreme Court, expressly singled out his dissent in this case as one of the ten most important cases of his career, stating "the Supreme Court's majority opinion agreed with and cited my dissent" in *Michigan*.[469] With Justice Kavanaugh now seated on the Supreme Court, such new restrictions on EPA authority and discretion are elevated.

A. Lack of Agency Discretion to "Tailor" Agency Actions

The CPP addresses only electric power plant carbon emissions.[470] The Supreme Court already decided a matter construing EPA agency discretion on Clean Air Act carbon emission rules in the U.S.[471] Regarding GHG regulation under the Clean Air Act's so-called "Tailoring Rule," the EPA took a phased approach and chose only to regulate those sources whose GHG emissions exceeded 75,000 tons per year (tpy) for modification of sources or 100,000 tpy for new source construction.[472] However, the Clean

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464. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444–45 (2014) (concluding "that EPA's rewriting of the statutory thresholds was impermissible").

465. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1590 (2014).

466. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015); *see supra* notes 21, 361, 397 and accompanying text (discussing *Michigan* in further detail).

467. White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1238–40 (D.C. Cir. 2014), *rev'd*, *Michigan*, 135 S. Ct. at 2699.

468. *See Michigan*, 135 S. Ct. at 2707 (citing and relying on Justice Kavanaugh's dissenting opinion in *White Stallion Energy Center*).

469. Fatima Hussein, *Kavanaugh Touts Court Loss Among His Highest Accomplishments*, BNA (July 24, 2018) ("In my view, it was unreasonable—and therefore unlawful under the Administrative Procedure Act—for EPA not to consider the costs imposed by regulations in determining whether such regulations were 'appropriate and necessary' . . . . All nine Justices agreed with my position that the statute requires consideration of costs.").

470. *See supra* Part II.A (detailing the CPP's focus on emissions from electric power plants).

471. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 412 (2011) (holding that the EPA should be the first to decide emission standards, not the court).

472. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,523 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51 52, 70).

Air Act Prevention of Significant Deterioration provisions enacted by Congress, which provided the congressional authority for the EPA's tailoring rule, apply to all "major sources" that potentially can emit at least 100 tpy or 250 tpy of the relevant criteria pollutant.[473] This 400:1 ratio disparity between what the EPA chose to implement and what the congressional statute expressed, created a conflict between agency discretion and congressional mandate.[474]

The challenging petitioners in that case argued that Congress—by establishing an explicit quantitative tpy threshold for emissions at a much lower 250 tpy metric—left no room for the EPA to exempt all emission sources between 250–75,000 tpy from regulation.[475] The Supreme Court struck the EPA's Clean Air Act "Tailoring Rule" for CO_2, which altered the plain language of the statute, despite EPA's claim that it could cut corners for administrative agency convenience: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[476]

The Court concluded that the EPA's interpretation of the Act was neither compelled nor permissible to change the expressly specified statutory quantitative value.[477] Thus, the Court invalidated the EPA's "Tailoring Rule" as an impermissible exercise *de facto* amending the statute:

> We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's

473. *Id.* The Supreme Court also addressed this: "To qualify for a [PSD] permit, the facility must . . . comply with emissions limitations that reflect the 'best available control technology' (or BACT) for 'each pollutant subject to regulation under' the Act [in § 7475(a)(4)]." Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2435 (2014). Additionally, the Court stated that while the "EPA thought its conclusion that a source's greenhouse-gas emissions may necessitate a PSD or Title V permit followed from the Act's unambiguous language . . . . We disagree." *Id.* at 2439. "[W]here the term "air pollutant" appears in the Act's operative provisions, EPA has routinely given it a narrower, context-appropriate meaning." *Id.* When addressing concerns that BACT may not be suited to greenhouse-gas regulation, the Court "acknowledge[d] the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA's current approach, nor as a free rein for any future regulatory application of BACT in this distinct context." *Id.* at 2449.

474. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444–45.

475. Joint Reply Brief of Petitioners, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) (Nos. 12-1248, 12-1254, 12-1268, & 12-1272), 2014 WL 632086, at *31 (arguing that the statutory definitions should have guided the EPA to exempt from regulation emission sources at the 250–75,000 tpy level).

476. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (internal citations omitted).

477. *Id.* at 2444–45.

> interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress."[478]

The full contours and application of this *Utility Air Regulatory Group v. EPA* "tailoring" precedent will be defined as courts determine the legality of the CPP. In 2015, Senate Majority Leader McConnell urged states not to comply with filing required CPP state plans.[479] Senator McConnell raised this Supreme Court precedent as defining the limits of EPA rulemaking authority.[480]

B. Executive Power When Executives Change

The Trump Administration has taken a different approach than the Obama Administration on carbon emissions and climate change mitigation.[481] The Trump Administration is withdrawing from the international Kyoto Agreement's successor mechanism, the Paris Agreement, while simultaneously working to revoke domestic CPP regulation.[482] The CPP is being revoked and replaced with less vigorous regulation as a matter of administrative discretion.[483]

In 2017, the Trump Administration EPA switched gears. The Administration did not base its proposed repeal of the CPP on a change in policy goals or on any cost considerations, which under the recent Supreme Court decision in *Michigan* now could constitute a valid basis.[484] Rather,

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478. *Id*. at 2445 (quoting Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 665 (2007)).

479. Letter from Mitch McConnell, *supra* note 76.

480. *See id.* (citing *Util. Air Regulatory Grp. v. EPA* as a limit on agency rulemaking authority).

481. *See* Brad Plumer, *Trump Put a Low Cost on Carbon Emissions. Here's Why It Matters*, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/climate/social-cost-carbon.html (comparing the different interpretations of facts by the Trump and Obama Administrations).

482. Brady Dennis, *As Syria Embraces Paris Climate Deal, it's the United States Against the World*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/11/07/as-syria-embraces-paris-climate-deal-its-the-united-states-against-the-world/?utm_term=.ef742f6ea9a6; Annie Sneed, *Trump Pulls out of Paris: How Much Carbon will His Policies Add to the Air?*, SCI. AM. (May 31, 2017), https://www.scientificamerican.com/article/trump-pulls-out-of-paris-how-much-carbon-will-his-policies-add-to-the-air/.

483. *See EPA Takes Another Step*, *supra* note 127 (explaining the Trump Administration's decision to repeal the CPP).

484. *See id.* (explaining the Trump Administration's concerns with the Obama Administration's oversight of the CPP).

the current EPA regulatory repeal is predicated on a legal concern that the CPP violated the Clean Air Act.[485] The EPA asserts that the CPP regulates "outside the fence line" of individual power plant sources emitting carbon.[486] The CPP would have had costs exceeding benefits if the Obama Administration EPA had not counted indirect *co-benefits* in its 2015 assessment.[487] In 2017, the Trump Administration EPA no longer counted indirect *co-benefits*, and no longer added avoided generation costs to CPP costs.[488] The Obama Administration CPP stated that its purpose was to render it too expensive for existing coal-fired power generation plants to continue operation, by counting *co-benefits* from reduction of non-CPP-regulated pollutants when coal plants were forced to close.[489] The CPP regulation neither mentioned nor regulated the criteria pollutants whose indirect *co-benefits* were counted.[490]

There is no Supreme Court determination about this *new math* algorithm for justifying administration rules and law, although the Court provided a new interpretation of the *cost* issues in 2015.[491] The question remains whether an executive agency can add estimated indirect, incidental *co-benefits*, not included in what a rule regulates or addresses, to change the reported cost-effectiveness and impact assessment of a proposed rule. This question remains in contention and unresolved after the Supreme Court stayed the CPP.[492] A new calculus of what counts as benefits changes the otherwise determined net cost-effectiveness.[493]

Pending this awaited decision, the Trump Administration EPA also seeks continued federal court delay of a decision regarding the CPP.[494]

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485. *Id.*

486. *See id.* (discussing the difference between outside and inside fence line interpretations of traditional EPA authority); *see also* Michigan v. EPA, 135 S. Ct. 2699, 2699 (2015) (holding that the EPA unreasonably deemed cost irrelevant when it decided to regulate power plants).

487. *See supra* Part III.C.1 (noting how the Obama Administration added *co-benefits* to help balance the scales of benefits and cost resulting from the CPP).

488. Ted Gayer, *The Social Costs of Carbon*, BROOKINGS INST. (Feb. 28, 2017), https://www.brookings.edu/testimonies/the-social-costs-of-carbon/ (explaining that estimated total global climate benefits greatly exceed estimated domestic benefits).

489. *See supra* notes 75, 80, 101, 102, 110 and accompanying text (looking at the statistics from before and after CPP implementation).

490. *See id.* (noting that the CPP took into account various *co-benefits* without directly regulating the pollutants being affected).

491. *See supra* Part III.C.2 (discussing lack of precedent for counting *co-benefits*).

492. Plumer, *supra* note 481.

493. *See id.* (referencing the impact of the Supreme Court's decision on standards of proposed rule evaluation).

494. Sharyn Stein, *Trump Administration Seeks to Delay Judicial Review of Clean Power Plan*, ENVTL. DEF. FUND (Mar. 28, 2017), https://www.edf.org/media/trump-administration-seeks-delay-judicial-review-clean-power-plan.

Contrarily, environmental groups have continued to press for a decision from the D.C. Circuit Court to uphold the CPP as legal.[495] There is a shift in the contours of administrative law. The Supreme Court took the unprecedented step of staying enforcement of a regulation with disputed costs and benefits three years before a challenge on the merits could even reach it.[496] The Supreme Court has not taken such a peremptory step before.[497] This alteration restricting the powers of the executive branch is in even more sharp focus now that the Trump Administration is reversing course on climate warming mitigation and international cooperation.[498]

495. *See* Sharyn Stein, *D.C. Circuit Court Pauses Clean Power Plan Litigation for Sixty More Days*, ENVTL. DEF. FUND (Aug. 8, 2017), https://www.edf.org/media/dc-circuit-court-pauses-clean-power-plan-litigation-sixty-more-days ("EDF, along with millions of concerned Americans, will keep working to ensure EPA complies with its legal obligations and acts to protect our nation from climate pollution.").

496. *See Brakes on CPP*, *supra* note 1 (articulating the procedural timeline of the CPP litigation).

497. Liptak & Davenport, *supra* note 20.

498. *See Brakes on CPP*, *supra* note 1 (providing dates for timeline verification).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: A WORKPLACE PERSPECTIVE

Marina Sorkina Amendola*

INTRODUCTION

The concept of inequality of bargaining power in the employer-employee relationship has been continuously developing since the end of the Lochner era.[1] The employee no longer has the absolute "freedom" to

* Belgian attorney, member of the California State Bar, L.L.M. Graduate, Class of 2018, University of California at Davis, School of Law, msamendola@ucdavis.edu.

1. The Lochner era is a period in U.S. history from the late 19th century to 1937, where the U.S. Supreme Court had a strict laissez-faire policy in favor of absolute individual freedoms and against government regulation. *See, e.g.*, Michael J. Philips, *How Many Times Was* Lochner *Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1052 (1997) ("[M]any people say that the doctrine's practical effect was to knock out progressive social legislation designed to protect workers against the hazards of industrialization and their employers' superior bargaining power."); Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism,* 2 INT'L J. OF CONST. L. 1, 12 (2004) ("[T]he doctrinal categories employed by the *Lochner* Court reflected and furthered a normative commitment to the

accept extremely long hours, low wages, and horrendous working conditions.[2] The modern American society accepts that an employer has duties toward his employees.[3] Such duties include providing a safe workplace[4] and refraining from discrimination based on protected status, such as age, color, disability, race, religion, national origin, and sex.[5] Additionally, some private employers take the initiative to introduce anti-harassment policies in their workplaces.[6] However, as of this writing, no state has passed a general statute prohibiting workplace bullying.[7]

Thus, workers with protected status, and those with a claim of unsafe workplace who suffered harm, may sue their employer for compensation.[8] However, workers who have a workplace free of serious recognized hazards, and do not belong to a protected group, but are emotionally and physically bullied and harassed in the workplace have limited recourse to legal action.[9] In this situation, the tort of intentional infliction of emotional distress (IIED) serves as a basis for recovery of damages. This tort claim contains strict threshold requirements, and as a result, very few plaintiffs succeed in proving their case.[10]

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principles of freedom of contract and property, and to strict limits on the scope of state intervention in market relations.").

2. *See* Lochner v. New York, 198 U.S. 45, 46, 59 (1905) (striking down a state statute limiting bakery workers to a maximum of ten hours a day and sixty hours a week), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1936).

3. *See W. Coast Hotel Co.*, 300 U.S. at 393 (emphasizing that the legislature has broad discretion to ensure that employers provide employees a workplace that is safe, healthy, and free from unjust treatment).

4. *See infra* note 92 and accompanying text (referring to the Occupational Health & Safety Act and explaining that the law subjects employers to liability for failing to provide a safe working environment).

5. *See infra* notes 22, 93 (referring to the various federal statutes that prohibit status-based workplace discrimination).

6. *See infra* note 245 and accompanying text (noting that Facebook and Exxon Mobil have developed anti-harassment policies).

7. *See Healthy Workplace Bill*, HEALTHY WORKPLACE CAMPAIGN, http://healthyworkplacebill.org (last visited Nov. 25, 2018) [hereinafter *Healthy Workplace Bill*] (noting that several states have *proposed* healthy workplace legislation).

8. *See*, *e.g.*, Lopez v. Burris Logistics Co., 952 F. Supp. 2d 396, 414 n.22 (D. Conn. 2013) ("The Court herein finds the incident regarding removal of the water and ice on the date of the water main break sufficient to constitute an unsafe workplace condition . . . ."); Heinze v. S. Ill. Healthcare, No. 08-672-GPM, 2010 WL 276722, at *3 (S.D. Ill. Jan. 19, 2010) ("The Court concludes that [Plaintiff] has pled enough facts to show that her claim of gender discrimination and age discrimination indeed is plausible . . . .").

9. *See* RESTATEMENT (SECOND) OF TORTS: SEVERE EMOTIONAL DISTRESS § 46 cmt. j (AM. LAW INST. 1965) ("Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people.").

10. *See* Russell Fraker, *Reforming Outrage: A Critical Analysis of the Problematic Tort IIED*, 61 VAND. L. REV. 983, 994 (2008) ("[C]ourts routinely hear cases of indecent and intolerable behavior and reject the resulting IIED claims.").

"61% of Americans are aware of abusive conduct in the workplace."[11] "61% of bullies are bosses, the majority (63%) operate alone."[12] "40% of bullied targets are believed to suffer adverse health effects."[13] "To stop it, 65% of targets lose their original jobs."[14] These statistics are the result of an employment culture with the prevalence of at-will contracts.[15] Both employers and employees are free to terminate the relationship at any time and for any reason.[16] This would sound reasonable were it not for the stark contrast in bargaining power between the employer and the employee.[17] Employees are forced to endure unpleasant working environments to maintain their livelihoods.[18]

Bullying in the workplace is a slowly growing, silent epidemic affecting the wellbeing of many Americans.[19] *Workplace bullying* is defined as "repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviors that are threatening, intimidating, or humiliating; sabotage that prevents work from getting done; or some combination of the three."[20] Freedom from workplace bullying is not yet a generally accepted legally protected interest.[21] That is not to say there is no protection at all: certain groups of people are protected from workplace discrimination based on their race, color, religion, national origin, sex, age, and disability.[22]

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11. *2017 WBI U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INST. (June 2017), http://www.workplacebullying.org/wbiresearch/wbi-2017-survey/.

12. *Id.*

13. *Id.*

14. *Id.*

15. RESTATEMENT OF EMPLOYMENT LAW § 2.01 (AM. LAW INST. 2015).

16. *Id*. cmt. b ("The at-will presumption states a default rule that . . . does not provide for a definite term or contain a limit on the employer's power to terminate the relationship. The default rule is also subject to contrary statute, law, or public policy.").

17. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141 (2005) ("In contrast to the complex and sophisticated real-world understanding of power, American contract law rarely acknowledges power explicitly and typically assesses the legal consequences of relational power asymmetries from a two-dimensional, status-based perspective.").

18. Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 501 (2016) ("[R]elationships characterized by economic dependence or grossly unequal bargaining power . . . strip workers of important aspects of their freedom, or even turn them into second-class citizens.").

19. Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315, 334 (2004).

20. GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK: WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB 3 (2d ed. 2009).

21. *See Healthy Workplace Bill*, *supra* note 7 (identifying the states that have proposed healthy workplace legislation).

22. *See Laws Enforced by EEOC,* U.S. EEOC, https://www.eeoc.gov/laws/statutes/index.cfm (last visited Nov. 25, 2018) (listing federal laws that prohibit workplace discrimination on the basis of race, color, religion, national origin, sex, pregnancy, age, disability, and genetics).

It took the American society decades to formulate responses, in and out of courtrooms, to the plight of vulnerable workers.[23] Scholars in law and psychology have undertaken important initiatives to bring awareness and redress to the issue of workplace bullying.[24] This movement pioneered the Healthy Workplace Bill initiative, now introduced in 30 states and two territories.[25] While comprehensive state-sponsored solutions are in the making, this paper focuses on one of the avenues of legal redress currently available for workplace bullying—the tort claim of IIED.

Although IIED can be used in many different lawsuits, its application is especially interesting where the parties have unequal powers, such as most employment relationships.[26] The spectra of conduct and context range from employer's daily management decisions—negative job evaluations or dismissals—to extreme and outrageous conduct; from the acceptable daily stresses of a workplace to severe emotional distress.[27]

This paper first addresses the historical background of the tort of IIED as an innovation in tort law. Then, this paper defines and discusses each element of the tort, identifying the threshold requirements of *extreme and outrageous conduct* and *severe emotional distress*. Subsequently, the discussion focuses on the notion of control in employer-employee relationships and its consequences for IIED claims, using *Pollard v. DuPont* as the central example. The paper further investigates the notion of scope of employment and its effect on plaintiff's IIED claims, referring to *Richards v. U.S. Steel* for comparison and discussion. The goal of this inquiry is to ascertain whether the application of control and/or scope tests create predictable outcomes in favor of either the employer or the employee, and to discuss the possibility of context-neutral outcomes for both the employer and the employee, as well as to identify the dominant approach.

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23. David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 256 (2010).

24. *See History of the Workplace Bullying Institute*, WORKPLACE BULLYING INST. http://www.workplacebullying.org/history-of-wbi/ (last visited Nov. 25, 2018) (documenting the institute's historical work on the issue of workplace bullying).

25. *Healthy Workplace Bill*, *supra* note 7.

26. Meredith B. Stewart, *Outrage in the Workplace: Using the Tort of Intentional Infliction of Emotional Distress to Combat Employer Abuse of Immigrant Workers*, 41 U. MEM. L. REV. 187, 203 (2010).

27. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 494 (2000) (analyzing IIED claims in common "factual scenarios," including "'garden variety' workplace bullying;" "status-based discrimination or harassment;" and "discipline for poor job performance").

I. BACKGROUND

The tort of IIED is a relatively recent phenomenon: "It proceeded quickly from a concept proposed by scholars to ultimate recognition and inclusion in the 1948 *Restatement of Torts*."[28]

A. IIED was an Inconceivable Notion in Tort Law Before the 1930s

English common law of torts focused on damage to persons or property and on keeping the King's peace.[29] The law allowed for recovery of harmed reputation at the most.[30] The interests in bodily integrity and protection of property and reputation, however, are of a very different nature than the interest in freedom from emotional harm.[31] The dominant view was that the law cannot protect the interest in emotional peace and redress claims based solely on emotional harm.[32] Emotional distress was thought to be too vague for the law to measure and determine damages.[33]

In the 19th century, however, the case law had started to evolve. In 1936, Professor Calvert Magruder studied case law of the 19th century, and demonstrated that the courts had been protecting emotions and feelings all along, even though the courts denied it, and the cases were not consistent.[34] He predicted the emergence of a broad principle:

> [O]ne who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject

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28. Diane A. Lebedeff, *Intentional Infliction of Emotional Distress: A Trial Perspective,* LITIG., 1992–1993, at 5, 5 (emphasis in original) (citations omitted) (first citing Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1033 (1936); then citing William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939)).

29. Joshua Stein, *Privatizing Violence: A Transformation in the Jurisprudence of Assault*, 30 L. & HIST. REV. 423, 428 (2012).

30. MARK A. GEISTFELD, TORT LAW (ESSENTIALS) 134 (3d ed. 2008).

31. Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of* Snyder v. Phelps, 57 WAYNE L. REV. 473, 476–77 (2011).

32. *Id.*

33. *See* Magruder, *supra* note 28, at 1033 (discussing the early judicial rhetoric dismissing the interest in emotional peace and eloquently suggesting that in law, phrases that sound impressive are often accepted without criticism).

34. *Id.* at 1064; *see also* Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 111 (2003) ("The tort of intentional infliction of emotional distress, as a standalone legal wrong, has had a difficult journey in the history of the common law.").

> to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue.[35]

Magruder added, this formula would have a similar application as the standard of reasonable care in negligence cases, and the courts would avoid the unease of fabricating arguments to fit other tort actions in the absence of the protection of emotional tranquility.[36]

B. 1930–1948: Legal Protection of Emotional Tranquility Gains Traction

Magruder's authoritative stance on the judicial reality of protecting emotions and feelings invited a slow revolution in torts. Cases dealing with claims of mental distress started emerging with the central notion of extreme and outrageous conduct.[37] A subsequent landmark in the direction of independent protection of emotions and feelings was Dean William Prosser's invitation to leave the technicalities behind and recognize a clear independent standard for intentional infliction of severe mental suffering by outrageous conduct: "There is every indication that this will henceforth be done, and that [it] will be treated as a separate and independent tort."[38]

C. From 1948 Onwards: IIED is Officially Recognized as an Independent Tort

In the 1948 supplement to the Restatement of Torts (1934), the American Law Institute first recognized IIED as an independent tort.[39] The American Law Institute further refined this definition: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[40] This definition is now widely accepted.[41] In order to prevent suits

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35. Magruder, *supra* note 28, at 1058.

36. *Id.* at 1058–59.

37. *See* W. PAGE KEETON ET AL, PROSSER AND KEETON ON TORTS 60 (5th ed. 1984) ("So far as it is possible to generalize from the cases, the rule, which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society . . . .").

38. Prosser, *supra* note 28, at 892.

39. "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." RESTATEMENT OF THE LAW: 1948 SUPPLEMENT § 46 (AM. LAW INST. 1949).

40. RESTATEMENT (SECOND) OF TORTS: SEVERE EMOTIONAL DISTRESS § 46(1) (AM. LAW INST. 1965).

41. Fraker, *supra* note 10, at 994.

on fabricated grounds, or based on trivial conduct, the threshold that a plaintiff needs to meet to prove his case is set very high, especially regarding the defendant's conduct.[42]

II. ELEMENTS OF IIED

A. Extreme and Outrageous Conduct

There is no clear standard to measure extreme and outrageous conduct.[43] It depends on the facts of the case.[44] The judge guards the threshold of extreme and outrageous conduct more closely than in other factual matters where the jury decides upon sufficient evidence.[45] The words "extreme" and "outrageous" are not synonymous.[46] Rather, they function as a double threshold for the nature of the conduct and how unusual it is.[47] Defendant's actions have to go "beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community."[48]

B. Intentional or Reckless

Plaintiff has to prove the defendant had the purpose to cause severe emotional harm or that defendant knowingly disregarded an obvious risk of severe emotional harm, even though he could have easily prevented it.[49] The former is a subjective requirement, and the latter is an objective one.[50] As a counterbalance for the high threshold of proving outrageous and extreme conduct, the inclusion of reckless mental state makes it easier for the plaintiff to carry the burden of proof.[51] Additionally, and important in the employment context, the recklessness standard allows a plaintiff to

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42. Cavico, *supra* note 34, at 112–13 (citing KEETON ET AL., *supra* note 37, at 56, 60–61).

43. *See* Fraker, *supra* note 10, at 989 (explaining that the standard of extreme and outrageous conduct "provides little guidance to either courts or potential defendants as to the forms of conduct that produce liability").

44. *Id.* at 992.

45. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. g (AM. LAW INST. 2012).

46. *Id.* § 46 cmt. d.

47. *Id.*

48. *Id*.

49. *Id.* § 46 cmt. h.

50. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1143 (2001) (explaining that "intent involves subjective states of mind" while recklessness involves "both a subjective . . . and an objective component").

51. Stewart, *supra* note 26, at 205–06.

bring this action directly against a corporation based on agency, rather than on vicarious, liability:[52] "The liability is not based on vicarious liability, but on 'the entity's failure to act in the face of outrageous conduct by persons under its immediate control who are causing serious harm within the general scope of employment and within the knowledge of its officials.'"[53]

C. Causation

The harm suffered by the plaintiff must be the factual consequence of a defendant's outrageous and extreme conduct.[54] In other words, but for the defendant's conduct, the plaintiff would not have suffered the severe mental harm.[55] As opposed to the tort of negligence, where a scope analysis (also known as proximate cause) is required, factual causation is the only causal link required in IIED.[56] Negligence is a non-intentional tort and requires not only a cause in fact, but also a scope analysis as a safeguard against holding a defendant liable for other harms than those that result from risks created by his tortious conduct.[57] This would be disproportionate and unfair.[58] Conversely, the *intent* in IIED already brings the harm within the scope of the risk created by the tortious conduct.[59]

D. Severe Emotional Distress

Some level of mental harm is accepted as bearable and trivial as a compromise of living in a complicated, modern society and legal protection from emotional harm.[60] The requirement that the mental harm be *severe* is another threshold ensuring only genuine claims are brought.[61] The judge is,

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52. *Id.* at 206 (citing Pollard v. E.I. Dupont De Nemours, Inc., 412 F.3d 657, 665 (6th Cir. 2005)).

53. Estrada v. First Transit, Inc., No. 07-CV-02013-WYD-KMT, 2009 WL 598259, at *16 (D. Colo. Mar. 6, 2009) (citing *Pollard*, 412 F.3d at 665).

54. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. k.

55. *Id.*

56. *Id.* ("The rule stated . . . applies only when the actor's extreme and outrageous conduct is a factual cause of the plaintiff's severe emotional distress.").

57. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d (AM. LAW INST., Council Draft No. 9, 2010).

58. *Id.* § 29 cmt. e ("The risk standard appeals to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct . . . .").

59. *See id.* § 1 cmt. a (explaining that the definition of intent is "one that relates to the defendant's purpose to cause harm").

60. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. j (AM. LAW. INST. 2012).

61. *Id.*

as with the requirement of outrageous and extreme conduct, the screener of the factual evidence.[62] "Emotional distress includes all highly unpleasant mental reactions such as embarrassment, fright, horror, grief, shame, humiliation, and worry. Severe emotional distress is distress that is so severe that no reasonable person could be expected to endure it."[63]

E. Are All Elements Equally Important?

Courts screen the access to this tort via strict interpretation of the requirements of "'extreme and outrageous' conduct and 'severe' emotional harm."[64] "[T]he standard . . . is very high, and focuses on the defendant's conduct rather than on the plaintiff's emotional condition."[65] The primary threshold is the conduct requirement.[66] In case the circumstances are not clear, the severity of mental harm requirement allows the courts to determine whether the defendant is liable.[67]

III. IIED IN THE WORKPLACE

Work is stressful and emotionally draining for most people.[68] Nowadays, the pace is quick, and the demands are high. The law does not require employers and their managers to act with courtesy and respect.[69] Personal frictions, negative evaluations,[70] and dismissals[71] are part of the race. Yet, they do not amount to causes of action for emotional distress

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62. *Id.*

63. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1999) (citations omitted).

64. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. a (AM. LAW. INST. 2012).

65. Funderburk v. Johnson, 2004-CA-014460-COA (¶ 40) (Miss. Ct. App. 2006).

66. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. h (AM. LAW. INST. 2012).

67. *Id.* § 46 cmt. j.

68. *Cf.* Sheldon Cohen & Denise Janicki-Deverts, *Who's Stressed? Distributions of Psychological Stress in the United States in Probability Samples From 1983, 2006, and 2009*, 42 J. APPLIED SOC. PSYCHOL. 1320, 1329 (2012) ("[A]cross all three surveys, retirees reported less stress than did individuals in any other employment category.").

69. *See, e.g.*, Katz v. City of New York, No. 94 Civ. 8319 (RPP), 1996 WL 599668, at *11 (S.D.N.Y. Oct. 17, 1996) ("The alleged actions . . . include subjecting plaintiff to loud music . . . , failing to provide her with a computer , . . . [and] excluding her from staff meetings . . . . Such allegations, while troubling, do not amount to the extreme conduct required to show [IIED].").

70. *See* Kalil v. Johanns, 407 F. Supp. 2d 94, 97–98 (D.D.C. 2005) (concluding that negative evaluations and suspension of employee were within the scope of the supervisors' employment).

71. *See* Graham v. Commonwealth Edison Co., 742 N.E.2d 858, 868 (Ill. App. Ct. 2000) (rejecting retaliatory discharge claim based on demotion, but finding that employer's sham investigation was "sufficient to constitute extreme and outrageous behavior").

unless the conduct and consequences in question rise to the level required by IIED.[72]

A. Limited Scope of IIED in the Workplace

Through the civil rights movement and emancipation of different groups that have historically been repressed, American society has been through a monumental journey.[73] This ongoing journey is reflected, *inter alia*, in the extent to which states have integrated equality values in their tort systems.[74] The intersection of civil rights protection and tort law is unclear and not yet developed.[75] "Part of the disconnect between torts and civil rights stems from the fact that the older intentional tort causes of action—particularly battery, assault, and defamation—were designed to address harms far removed from the injuries caused by discrimination and are ill-suited to fit the prototypical bias injury."[76]

In 1999, the Supreme Court of New Mexico integrated equality values and IIED when it found sexual harassment in the workplace to be outrageous and extreme conduct.[77] The integration of anti-discrimination rights, however, is not a universally accepted approach.[78] The majority of states refuse to accept discrimination as a *per se* outrageous conduct.[79] On the one hand, state legislatures adopt statutes that preempt the application of IIED, creating a separate opportunity for redress.[80] On the other hand, judges use IIED as a gap filler when they categorize the most peculiar

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72. *Id.*

73. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423–25 nn.12–15 (2001).

74. For a thorough discussion of how states have integrated equality values into tort law, *see* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV 2115, 2122, 2124 (2007).

75. *Id.* at 2124.

76. *Id.* at 2124–25.

77. *See* Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1005 (N.M. 1999) ("Allowing a worker subjected to sexual harassment to seek civil damages 'not only vindicates the state's interest in enforcing public policy but also adequately redresses the harm to the individual naturally flowing from the violation of public policy.'" (quoting Michaels v. Anglo Am. Auto Auctions, Inc., 869 P.2d 279, 281 (N.M. 1994))).

78. *See* Sara Ruliffson, *R.I.P. I.I.E.D.: The Supreme Court of Texas Severely Limits the Tort of Intentional Infliction of Emotional Distress*, 58 BAYLOR L. REV. 587, 607 (2006) (providing a detailed description of IIED's limited application in the employment context in Texas).

79. *See* Chamallas, *supra* note 74, at 2127 & n.50 ("With the notable exception of California, courts have refused to classify discrimination as per se outrageous and have even hesitated to declare the 'severe' or 'pervasive' harassment required to prove a Title VII claim of hostile environment sufficient to satisfy the threshold tort requirement of 'extreme and outrageous' conduct.").

80. *Id.* at 2136.

cases, which do not entirely fit in other causes of action.[81] Amongst the situations where IIED is most likely limited in application are claims based on wrongful termination,[82] workers' compensation,[83] civil rights (discrimination),[84] federal labor law,[85] and arbitration agreements.[86]

B. Does the Workplace Setting Affect the Outcome in Either Party's Favor?

1. Favoring the Employee

One of the central tenets of American common law is freedom of choice, which translates into freedom of contract.[87] The extensive view of freedom of contract and laissez-faire philosophy culminated in the *Lochner* case, in which the U.S. Supreme Court struck down a New York statute that sought to limit working hours in bakeries: "[T]he freedom of master and employee to contract with each other . . . cannot be prohibited or interfered with, without violating the Federal Constitution."[88]

Pure proceduralist equality between the employer and employee is no longer the reigning view.[89] The parallel developments in contract law[90] and

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81. *Id.* at 2135–36.

82. *See* Lawrence v. Dixon Ticonderoga Co., 305 F. Supp. 2d 806, 812–13 (N.D. Ohio 2004) (holding that the plaintiff's IIED claim, which arose out of wrongful termination, was preempted).

83. *See, e.g.*, Onelum v. Best Buy Stores L.P., 948 F. Supp. 2d 1048, 1054 (C.D. Cal. 2013) (explaining that California workers' compensation statutes preempt IIED claims except "if the conduct of the employer has a 'questionable' relationship to the employment or where the employer steps out of his proper role").

84. Nischan v. Stratosphere Quality, LLC, 865 F.3d 922, 934 (7th Cir. 2017) (holding that IIED claim was preempted by Illinois Human Rights Act).

85. Rael v. Smith's Food & Drug Ctrs., Inc., No. 1:15-CV-000983-SCY/KK, 2016 WL 10179339, at *1, *3 (D.N.M. Sept. 19, 2016) (finding that plaintiff's IIED claim was preempted by the Labor Management Relations Act), *aff'd*, 2016 WL 9488772 (D.N.M. Dec. 1, 2016), *aff'd*, 712 F. App'x 802 (10th Cir. 2017).

86. Booker v. Beauty Express Salons, Inc., 2018-Ohio-581, No. CV–16–867751, 2018 WL 899075, at ¶¶ 3–5, 17–19.

87. *See* Samuel Williston, *Freedom of Contract,* 6 CORNELL L.Q. 365, 366–67 (1921) ("Jeffersonian democracy finds its cardinal tenet in restricting governmental activities and allowing the individual free play.").

88. Lochner v. New York, 198 U.S. 45, 64 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *as recognized in* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

89. Barnhizer, *supra* note 17, at 194.

90. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (recognizing that courts will refuse to enforce contracts that are *unconscionable*, reasoning that "[i]n many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power"). For a broad view on the history of courts recognizing unequal bargaining power in contract law, see Barnhizer, *supra* note 17, at 194–98.

in the organized labor movement[91] testify that in reality there is very often a weaker party who had no choice but to accept the terms of the stronger party to a contract. Thus, the power dynamic between an individual and a corporation is skewed in favor of the latter.

Whereas a corporation has the legal duty to provide a safe[92] and discrimination-free[93] workplace to its employees, the duty to provide a respectful workplace is merely an ethical one.[94] IIED claims arise in this space outside of these legal duties, when the conduct rises to the level proscribed by a state's tort laws.[95]

An example of blatant disregard of employee's safety and wellbeing can be found in *Pollard v. DuPont.*[96] Sharon Pollard braved a ten-year legal struggle after years of harassment at work to prevail on her IIED claim against her employer, DuPont de Nemours.[97] Pollard had worked at the factory for 19 years; she did her job well; and she was successful and organized.[98] After she got fired, she became depressed and lost her sense of self.[99] She was no longer able to concentrate or do daily chores.[100]

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91. *See* National Labor Relations Act of 1935 § 1, 29 U.S.C § 151 (2018) ("The *inequality of bargaining power* between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . ." (emphasis added)).

92. Occupational Safety and Health Act of 1970 § 5, 29 U.S.C. § 654 (2012); *see also* RESTATEMENT OF EMPLOYMENT LAW § 4.05 ("[A]n employer is subject to liability for harm caused to an employee by failing: (a) to provide a reasonably safe workplace . . . ; or (b) to warn of the risk of dangerous working conditions that the employer, but not the harmed employee, knew or should have known.").

93. See, *e.g.*, Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2017) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."); Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C. § 623(a) (2017) ("It shall be unlawful for an employer . . . [to] discriminate against any individual . . . because of such individual's age . . . ."); Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(a) (2017) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regards to [employment].").

94. *See* Michael Josephson, *Ethical Responsibilities in the Employer-Employee Relationship – Applying Ethical Principles*, JOSEPHSON INST.'S EXEMPLARY LEADERSHIP & BUS. ETHICS (Dec. 17, 2016), http://josephsononbusinessethics.com/2010/12/responsibilities-employer-employee-relationship/ ("Employers have a moral obligation to look out for the welfare of employees.").

95. *See* Fraker, *supra note* 10, at 988 ("Courts and commentators consistently have observed that emotional distress is common, and the vast majority of it . . . cannot be a basis for tort liability.").

96. Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 661–62 (6th Cir. 2005).

97. *Id.* at 660, 667.

98. Pollard v. E.I. DuPont de Nemours, Inc., 338 F. Supp. 2d 865, 86970 (W.D. Tenn. 2003), *aff'd*, 412 F.3d 657 (6th Cir. 2005).

99. *Id.* at 870.

100. *Id.*

The male members of Pollard's shift subjected her to continued sexual harassment between 1992 and 1996.[101] One of them "placed a Bible on her desk open to the passage 'I do not permit a woman to teach or have authority over man. She must be silent.'"[102] She was ostracized.[103] The men agreed not to talk to her, not to eat with her, not to spend any time with her during the break, and not to follow her instructions.[104] The court detailed the harassment Pollard faced:

> Plaintiff and Mark Cobb testified that Carney would go so far as to set off false alarms in plaintiff's area, misdirecting her and causing her to search for a non-existent problem. Cobb testified that Carney bragged to the other men that this was his way of showing that he, a man, was in control. If a false alarm was set while Pollard was on break cooking her dinner, the men would turn up the stove to burn her food while she was searching for the problem. In addition, Cobb testified that there were numerous incidents during which Carney would not tell plaintiff about actual alarms in her area. Plaintiff would therefore not respond to the problem, and it would appear to the operator on the next shift that she was not doing her job.[105]

Many grave incidents happened; all the while, Pollard was asking for help and attending DuPont's women's support group.[106] Her supervisor was aware of the situation; so was the company.[107] Yet, nothing was done to improve the working environment.[108] When she was about to come back from a short disability leave, the company told her they might schedule her to work with the same people again.[109] When she refused, they fired her.[110] The court summarized the trauma Pollard had faced:

> Defendant has taken away Plaintiff's sense of self-esteem. Plaintiff, formerly an outgoing, confident, self-assured, and professionally successful individual, has to a large degree lost each of these attributes due to the humiliating and degrading

101. Pollard v. E.I. DuPont de Nemours Co., 213 F.3d 933, 938–41 (6th Cir. 2000), *rev'd*, 532 U.S. 843 (2001).
102. *Id.* at 938.
103. Pollard v. E.I. DuPont de Nemours Co., 412 F.3d 657, 660 (6th Cir. 2005).
104. *Id.*
105. *Id.* at 661.
106. *Id.* at 661–62.
107. *Id.* at 662, 664.
108. *Id.* at 662.
109. *Id.* at 663.
110. *Id.*

> sexual harassment she suffered at DuPont and which her supervisors repeatedly failed to stop despite her requests for help.[111]

The court awarded her $2.2 million in compensatory damages, to make her whole, and $2.5 million in punitive damages.[112] While the abusive conduct was directed at Pollard and no one else, and the causal link is clear, this case offers an opportunity to look into the components of what the court accepted as *outrageous* behavior on the part of the employer.[113] Had the behavior of Pollard's co-workers been one single incident, it may not have risen to that level where a member of the community would exclaim: *It's outrageous*![114] A prank or a practical joke would have likely been an acceptable stressor as a consequence of working in an all-male shift.[115] However, here, the specific[116] repetitive[117] incidents taken together, as a whole,[118] collectively escalate to the level of egregious behavior that brought the claim over the threshold of outrageousness.[119]

Further, DuPont's repetitive failure to address the complaints and requests for help speaks to the element of intent.[120] Employers cannot deny knowledge of the situation and by their inaction knowingly subject

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111. Pollard v. E.I. DuPont de Nemours, Inc., 338 F. Supp. 2d 865, 884 (W.D. Tenn. 2003), *aff'd*, 412 F.3d 657 (6th Cir. 2005).

112. Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 659 (6th Cir. 2005).

113. Tennessee common law does not require the conduct to be "extreme," only "outrageous." Bain v. Wells, 936 S.W.2d. 618, 622 (Tenn. 1997).

114. *Compare* Curran v. JP Morgan Chase, N.A., 633 F. Supp. 2d 639, 644 (N.D. Ill. 2009) ("[P]laintiff's terse allegations that she was 'publicly scolded' . . . and 'shouted at'—without any contextual clues, such as the content or frequency of the scolding . . . evoke conduct that has been held to be short of IIED . . . ."), *with* Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 947 (6th Cir. 2000) ("We found ourselves, after reviewing the record, proclaiming a sense of moral outrage that DuPont managers allowed the conduct of the men in the peroxide area to persist for years in silence, and therefore silent approval."), *rev'd on other grounds*, 532 U.S. 843 (2001).

115. *See, e.g.*, Meagher v. Lamb-Weston, Inc., 839 F. Supp. 1403, 1410 (D. Or. 1993) (explaining that jokes and insults are only "sufficiently egregious [if] plaintiff is particularly sensitive, and defendant is aware of those sensitivities and seeks to exploit them").

116. *Cf.* Thai v. Cayre Grp., Ltd., 726 F. Supp. 2d 323, 336 (S.D.N.Y. 2010) ("What is essentially a discrimination dispute between Thai and her former employers cannot be transformed into an IIED claim without a *specific allegation* that Defendants' conduct that reasonably may be deemed 'atrocious,' 'outrageous,' or 'utterly intolerable,' as the law requires." (emphasis added)).

117. *Cf.* Cunningham v. Richeson Mgmt. Corp., 230 F. App'x 369, 372 (5th Cir. 2007) ("The memorandum sent to Cunningham was a *lone incident* that is not actionable for [IIED] under Texas law." (emphasis added)).

118. *See* GTE Sw., Inc., v. Bruce, 998 S.W.2d 605, 615 (Tex. 1999) ("When such repeated or ongoing harassment is alleged, the offensive conduct is evaluated as a whole.").

119. Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 947 (6th Cir. 2000), *rev'g* 16 F. Supp. 2d 913 (W.D. Tenn. 1998), *rev'd on other grounds*, 532 U.S. 843 (2001).

120. *Id.* at 947.

employees to substantial and unjustifiable risk, since this risk was easily preventable.[121] As the Sixth Circuit explained in *Dupont*:

> It may be true that the DuPont plant manager in Memphis and that upper management at its Wilmington headquarters did not deliberately set out to harm Pollard, but there can be no doubt that supervisors and management officials in both Memphis and Wilmington made no real effort to intervene to stop the harassment that had been brought to their attention on numerous occasions. The District Court found that no one from DuPont ever reprimanded, suspended, transferred, demoted or terminated Carney. Supervisors and other management officials stood idly by as the harassment continued day after day, week after week, month after month. Swartz, Pollard's immediate supervisor, watched the entire process unfold, and when Pollard left the unit he attended a party celebrating her departure—an act that raises a strong inference of the intent to cause emotional distress, as the District Court rightly concluded.[122]

The severity of emotional distress caused by the employer's reckless conduct seems undeniable in this case.[123] The continuous abuse, hostility, and repeated lack of protection broke Pollard's character and personality.[124] Treating psychologists and psychiatrist documented Pollard's post-traumatic-stress disorder, and other witnesses testified to changes in Pollard's personality.[125]

"[T]he right to control and supervise . . . is the most important factor for determining whether an employer-employee relationship exists."[126] Courts have regularly applied the control test.[127] In an employment

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121. *Id.* ("Inaction by an employer, or another actor in a position to exercise control, in the face of continuous, deliberate, degrading treatment of another may rise to the level of intentional infliction of emotional distress.").

122. Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 664–65 (6th Cir. 2005).

123. *Id.* at 664, 667.

124. *Id.* at 664; *see also* Pollard v. E.I. DuPont de Nemours, Inc., 16 F. Supp. 2d 913, 923 (W.D. Tenn. 1998) ("Plaintiff testified that she suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness.").

125. *Pollard*, 16 F. Supp. 2d at 923.

126. Nischan v. Stratosphere Quality, LLC, 865 F.3d 922, 929 (7th Cir. 2017).

127. *See id.* at 931 ("Because Sabbah was not Nischan's direct supervisor, [the defendant] is not strictly liable under Title VII."); McKee Foods Corp. v. Lawrence, 712 S.E.2d 79, 81 (Ga. Ct. App. 2011) ("Although an employer may be held vicariously liable for the torts of an employee, such liability does not extend to torts committed by an independent contractor."); GKN Co. v. Magness, 744 N.E.2d 397, 402 (Ind. 2001) (explaining that in "[d]etermining whether an employer-employee relationship exists[,]" courts should "give the greatest weight to the right of the employer to exercise control over the employee"); *In re* Corrente, 31 N.Y.S.3d 681, 682–83 (App. Div. 2016) ("Where, as here, 'the details of

relationship, as opposed to that with an independent contractor, the employer controls and directs the behavior of its employees to attain its corporate goal.[128] Supervisors and managers are closer to the top of the corporate structure than standard employees.[129] Arguably, the closer the employer controls the managers, the more likely it is that the employer is responsible for their actions.[130] This proportionality enhances the employees' protection from managers' tortious acts in the workplace.[131]

DuPont did not use its power to control and discipline its managers and supervisors, thereby *de facto* authorizing the "slow torture" inflicted upon Pollard.[132] This case hinges on the employer's knowledge of the ongoing harassment, its official denial, and the lack of effective measures taken to correct the situation.[133] Had Pollard been suffering silently, without asking her immediate supervisor for help or telling others how she felt, DuPont would not have known there was a need to control or discipline any behavior and would, therefore, not be liable.[134] The employer's knowledge of the abusive situation and disregard for her safety played an important role in the success of Pollard's claim in court.[135]

Subsequently, a 2011 Illinois case confirmed this view.[136] There, an employee alleged that the employer knew of the battery, assault, and harassment the employee received from a co-worker and could have prevented it.[137] It is not unthinkable that the employee was ashamed of what happened to him and wanted to wait it out, deal with the abuse himself, or was simply hoping it would go away. However, it was documented that the harassment started in August 2008, but the employee only told his supervisor about it in January 2009.[138] This gap in time was the reason the

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the work performed are difficult to control . . . , courts have applied the overall control test, which requires that the employer exercise control over important aspects of the services performed.'" (quoting *In re* Wright, 20 N.Y.S.3d 252, 254 (App. Div. 2015))). One author, however, in 1949, argued that the control test is outdated and inadequate, and called for a new approach. Edwin R. Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 175, 177 (1949). The control test is still the predominant approach, but not the only one. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

128. Alayne B. Adams, *Sexual Harassment and the Employer-Employee Relationship*, 84 W. VA. L. REV. 789, 800 (1982).

129. *Id.* at 807.

130. *Id.*

131. *Id.*

132. *See* Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 947 (6th Cir. 2000) ("Dupont managers allowed the conduct of the men in the peroxide area to persist for years in silence . . . .").

133. Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 664–65 (6th Cir. 2005).

134. *Id.* at 665.

135. *Id.* at 664–65.

136. Carr v. Avon Prods., Inc., No. 10C3124, 2011 WL 43033, at *1, *3 (N.D. Ill. Jan. 6, 2011).

137. *Id.* at *3.

138. *Id.* at *1, *3.

employee failed to prove the intent on the part of the employer.[139] The employer had no knowledge of the conduct between August 2008 and January 2009 and therefore, had no opportunity to take action to protect the employee.[140] Consequently, there was no period of time in which the employer knowingly failed to protect him.

Also noteworthy is the case law that supports two other theories of an employer liability for managerial conduct. On the one hand, is the situation where the employer leaves the manager in full control of a territory, without any further directions.[141] The manager is seen as the "alter ego" of the employer.[142] The employer is then liable for the manager's tortious conduct in the scope of employment.[143] On the other hand, an employer can be liable when a manager abuses their power in a way that goes far beyond usual job frictions. These abuses can amount to a knowing infliction of severe emotional distress.[144] Examples of such conduct are:

> [F]orcing [the employee] to climb up an unstable metal stairway to hook up computer equipment during her pregnancy; sabotaging [the employee]'s computer to deny her access and alter her files; . . . moving her office and her transportation files, causing her to be unable to locate necessary paperwork; and increasing the amount of work due . . . knowing that [the employee] would not be able to meet the deadlines.[145]

To conclude, the workplace setting, and thus the control of the employer, serves in the employee's favor when the outrageous conduct committed by co-workers was known by the company management or when the management clearly abused its power over the employee. In cases of workplace abuse, one would not advise the employee to be strong, to wait it out, or to suffer in silence—all incidents need to be documented and brought to the management and beyond.[146]

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139. *Id*. at *3.

140. *See id.* ("[P]laintiff's allegations do not support the inference that his alleged injuries were intentional.").

141. Toothman v. Hardee's Food Sys., Inc., 710 N.E.2d 880, 885–86 (Ill. App. Ct. 1999).

142. *See id.* ("[A]n employee can be considered the alter ego of a corporation by having authority to control the policies and procedures of the corporation as an officer, shareholder, or manager . . . .").

143. *Id.*

144. Naeem v. McKesson Drug Co., 444 F.3d 593, 605 (7th Cir. 2006).

145. *Id*. at 606.

146. The Workplace Bullying Institute has an empowering and useful Action Plan, which includes strategies for "[d]ocumenting [the] bullying experience," that teaches victims how to deal with the emotional and practical aspects of bullying. *Documenting Your Bullying Experience*, WORKPLACE BULLYING INST., http://www.workplacebullying.org/individuals/solutions/documentation/ (last visited

2. Favoring the Employer

The nature of an employment relationship is such that emotional stress cannot be avoided in the workplace.[147] The employer needs room to manage their business and to discipline the employees.[148] The employer's ability to manage their employees is protected because an employee's claim of IIED is only accepted when "the employer's conduct had been truly egregious."[149]

A 2017 case, *Richards v. U.S. Steel*, is an example of this approach.[150] Mary Richards had been bullied and harassed for nine months: her supervisor, Byrd, humiliated her in front of other male workers and told sexist jokes in her presence.[151] Byrd also once approached Richards, tore open her jacket, stared at her, and said "I like that."[152] When Richards was performing first aid on a co-worker who was suffering as a result of overheating, Byrd screamed at her.[153] On a different occasion, Byrd's supervisor approached Richards without notice and snapped the radio that was on her chest, attached to her bra, to make a call.[154] Byrd also had threatened to fire her and refused to issue her the tools necessary to do her job.[155]

Richards filed an internal discrimination complaint against Byrd.[156] At the meeting with human resources personnel to address this complaint, Richards was told that Byrd must have opened her jacket to look for an inside pocket and that Richards should "adjust to Byrd's rough management style."[157] There was no further investigation.[158] Richards sought out different people at the Human Resources (HR) Department and told them

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Nov. 25, 2018) (outlining various ways to document workplace bullying); *The WBI 3-Step Target Action Plan*, WORKPLACE BULLYING INST., https://www.workplacebullying.org/individuals/solutions/wbi-action-plan (last visited Nov. 25, 2018).

147. *See* Honaker v. Smith, 256 F.3d 477, 491 (7th Cir. 2001) ("[C]ourts have recognized that employers will often take actions that may cause their employees serious upset, but such actions have not been classified as 'extreme and outrageous' when they did not go well beyond the parameters of the typical workplace dispute.").

148. Tex. Farm Bureau Mut. Ins. v. Sears, 84 S.W.3d 604, 611 (Tex. 2002).

149. Richards v. U.S. Steel, 869 F.3d 557, 567 (7th Cir. 2017) (quoting Van Stan v. Fancy Colours & Co., 125 F.3d 563, 568 (7th Cir. 1997)).

150. *Id.* at 567–68.

151. *Id.* at 560–61.

152. *Id.* at 560.

153. *Id.*

154. *Id.*

155. *Id.* at 561.

156. *Id.*

157. *Id.*

158. *Id.*

her story.[159] Richards was told "she was too emotional and should see a psychiatrist."[160] Richards was examined by a psychologist.[161] The psychologist determined that Richards suffered from post-traumatic-stress and dysthymic disorder, and that the symptoms were the consequence of her experiences at work.[162]

Richards went through several proceedings before state and federal courts and a federal appeal.[163] Richards's initial complaint included three claims: retaliation, sexual harassment, and IIED.[164] The statute of limitations barred her first two claims,[165] and the third claim was struck down as preempted by the Human Rights Act because it was *inextricably* linked to her sexual discrimination claim, which was time-barred.[166] Consequently, after nine months of being bullied, two HR complaints that pointed the finger back at Richards, and two years of litigation, Richards's IIED claim did not even survive summary judgment.[167]

On appeal, the Seventh Circuit affirmed the district court's decision, finding that Byrd's conduct was not attributable to U.S. Steel and considered an acceptable part of the daily working routine—not outrageous enough to make it over the high threshold required by Illinois common law.[168] The court also mentioned that the behavior of the HR personnel was an acceptable everyday stressor in the workplace.[169] By comparison to Pollard, had Richards asked for help several times, and had the HR personnel been ignorant and insensitive in the same way, the court might have interpreted the conduct of the HR personnel as a knowing subjection of the employee to a substantial and unreasonable risk.[170]

The court emphasized that "[l]iability for emotional distress, as a common-law tort, is even more constrained in the employment context . . . . This is because 'personality conflicts and questioning of job performance are unavoidable aspects of employment and . . . frequently,

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 561–62.

163. *Id.* at 562.

164. *Id.*

165. Richards v. U.S. Steel, No. 12-CV-01195-JPG-DGW, 2015 WL 1598081, at *3, *10 (S.D. Ill. Apr. 9, 2015).

166. Richards v. U.S. Steel, No. 15-CV-00646-JPG-SCW, 2015 WL 2755003, at *2 (S.D. Ill. May 12, 2016).

167. *Richards,* 869 F.3d at 568.

168. *Id.* at 566, 568.

169. *Id.*

170. *Cf.* Pollard v. E.I. DuPont de Nemours, Co., 213 F.3d 933, 942 (6th Cir. 2000) (describing Pollard's frequent notice to her company regarding the abusive behavior she experienced while on the job).

they produce concern and distress.'"[171] One wonders whether the court here merely restates the requirement of *extreme and outrageous* conduct or adds another layer of protection for the employer.

Whereas the Illinois Human Rights Act makes the employer strictly liable for a supervisor's conduct, the common law in Illinois does not.[172] Common law of agency allows for the employer's vicarious liability only if the supervisor's tortious act was committed within the scope of employment.[173] Unfortunately for the plaintiffs in Illinois, sexual harassment is viewed as an act committed purely for the private benefit of the supervisor and, therefore, makes the supervisor no longer the agent or the alter ego of the employer.[174] "[I]n the specific context of sexual assault, the sexual nature of the misconduct generally disqualifies the employee's act as being taken in furtherance of the employer's interest."[175]

The Illinois court took a different approach to determining the employer's vicarious liability for the tortious acts of a supervisor as compared to the control-test approach discussed in the previous section. Whereas the courts in the previous section aim to determine the existence of the employer-employee relationship by using the control test, this court looks at the scope of the employment and whether the actions of the tortfeasor-employee are within that scope.[176] The *benefit-theory* is used to determine whether the employee acted within the scope of employment, and thus for the benefit of the employer, or outside the scope, and for employee's own benefit.[177] The Restatements (Second) of Agency explains:

> Proof that the actor was in the general employment of the master does not of itself create an inference that a given act done by him was within the scope of employment. If, however, it is also proved that the act tended to accomplish an authorized purpose

171. *Richards*, 869 F.3d at 567 (second alteration in original) (quoting Van Stan v. Fancy Colours & Co., 125 F.3d 563, 567 (7th Cir. 1997)).

172. *Id.* at 565.

173. *Id.*

174. *Id.* at 565–66.

175. *Id.* at 565.

176. RESTATEMENT (THIRD) OF AGENCY § 7.07(1) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment."); *see also* RESTATEMENT (SECOND) OF AGENCY § 228 cmt. d ("The question whether or not the act done is so different from the act authorized that it is not within the scope of the employment is decided by the court if the answer is clearly indicated; otherwise, it is decided by the jury.").

177. RESTATEMENT (SECOND) OF AGENCY § 229 cmt. c.

> and was done at an authorized place and time, there is an inference that it was within the scope of employment.[178]

In comparison, the control approach is much broader, and the employer is more likely to be held liable for the tortious act of its employee.[179] Correspondingly, the benefit approach is more nuanced.[180] It assumes the existence of the employment relationship, but distinguishes the conduct based on its character and on the factual circumstances.[181]

> Illinois courts look to the criteria identified in Section 228 of the Restatement (Second) of Agency to determine whether an employee's conduct is within the scope of employment:
>
> (1) Conduct of servant is within the scope of employment if, *but only if*:
>
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, *at least in part*, by a purpose to serve the master, and
> (d) if force is *intentionally* used by the servant against another, the use of force is not *unexpectable* by the master.
>
> (2) Conduct of a servant is not within the scope of employment *if it is different in kind* from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.[182]

Applying this provision to most situations of IIED, the following can be concluded. First, a company will rarely hire a supervisor or a co-worker with the purpose of committing an IIED on a co-worker. Section (1)(a) limits the conduct within the scope only to conduct which is in the job description; most forms of bullying, assault, harassment, excommunication, and work sabotage do not readily fit into this category.[183] It follows that the only way this category can be used as a basis for outrageous conduct is

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178. *Id.* § 228 cmt. b.

179. *Id.* § 220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."); *see also id.* § 229(2) (listing the factors to consider when determining the scope of employment).

180. *Id.* § 229.

181. *See, e.g.*, *id.* § 229(2) (enumerating the many specific factual circumstances determining the scope of an assumed employment).

182. Richards v. U. S. Steel, 869 F.3d 557, 565 (7th Cir. 2017) (emphasis added) (quoting RESTATEMENT (SECOND) OF AGENCY § 228).

183. RESTATEMENT (SECOND) OF AGENCY § 228(1)(a).

when the tortfeasor clearly abuses their discretion in performing the tasks they were hired to do.[184] Second, Section (1)(c) seems less restrictive because it puts only the purely personal conduct out of the scope of employment, leaving the actions committed for both the benefit of the employer and that of the employee within the ambit of this provision.[185] Third, Section (1)(d) seems to include intentional conduct within the scope, but, at the same time, it is limited to conduct foreseeable by the employer.[186] Finally, Section (2) seems to echo the situation alleged by Richards, where sexual harassment is found to always be for purely personal benefit and thus outside the scope of employment.[187] The Restatement provides:

> The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business. In such cases, the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm.[188]

In a 2011 case from the District of Columbia, a hotel employee working in room service alleged he had been suffering ongoing threats of physical violence and death from his co-workers, spread over a three-year period.[189] The District Court stated that although the conduct could have been found extreme and outrageous, there was no vicarious liability of the employer because the conduct was outside the scope of the tortfeasors' employment.[190]

In another 2011 case from the same jurisdiction, the District Court declined to hold an employer vicariously liable for a manager's rape of an employee because the conduct was outside the scope of employment.[191] In that case, the plaintiff alleged another basis of liability—the aided-by-

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184. *See, e.g.*, Naeem v. McKesson Drug Co., 444 F.3d 593, 606 (7th Cir. 2006) ("[T]he actions taken against [the plaintiff] clearly *go far beyond* typical on-the-job disagreements . . . ." (emphasis added)).

185. RESTATEMENT (SECOND) OF AGENCY § 236 ("Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.").

186. *Id.* § 231 cmt. a ("The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result.").

187. *Richards*, 869 F.3d at 565–66.

188. RESTATEMENT (SECOND) OF AGENCY § 235 cmt. c (citation omitted).

189. Beyene v. Hilton Hotels Corp., 815 F. Supp. 2d 235, 239–40 (D.D.C. 2011).

190. *Id.* at 250–51.

191. Doe v. Sipper, 821 F. Supp. 2d 384, 390 (D.D.C. 2011).

agency concept.[192] Although the court did not address this issue, it acknowledged that the United States Supreme Court used this approach in determining vicarious liability for a sexual harassment claim.[193] One of the clearest examples of aided-by-agency liability, although outside the employment context, is a prison guard's abuse of his status and power to sexually assault female inmates.[194] The guard exercised full authority over the inmates at any time of day or night: he could enter anywhere unannounced; command the inmates to do whatever he wanted; and discipline them.[195] The inmates were afraid of retaliation and therefore obeyed his commands.[196] While ruling in favor of the inmates, the Supreme Court of New Mexico:

> [A]cknowledge[d] the concerns of other courts "that aided-in-agency as a theory independent of apparent authority risks an unjustified expansion of employer tort liability for acts of employees." [The Court] agree[d] that the theory should not apply to all situations in which the commission of a tort is facilitated by the tortfeasor's employment.[197]

Drawing from the case law discussed in this section, one may conclude that when courts use the criterion of *scope of employment* to determine the employer's vicarious liability, the plaintiff is less likely to prevail on the IIED claim in the workplace. The *workplace* setting in this case disadvantages the plaintiff because courts are reluctant to limit the employers' freedom to organize their businesses.[198] Many examples of daily stressors are accepted as incidental to being employed and are not outrageous or extreme.[199] Considering a wide range of conduct is accepted

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192. *Id.*; *see also* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

193. *Doe*, 821 F. Supp. 2d at 391 ("The United States Supreme Court, conversely, has employed [§ 219(2)(d)] in analyzing vicarious liability for federal Title VII sexual-harassment claims." (citing Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998))).

194. Spurlock v. Townes, 2016-NMSC-014, ¶¶ 18, 20–21, 368 P.3d 1213.

195. *Id.* ¶ 20.

196. *Id.*

197. *Id.* ¶¶ 12, 16 (citation omitted) (quoting Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1199 (Alaska 2009)).

198. *See* Richards v. U.S. Steel, 869 F.3d 557, 567 (7th Cir. 2017) ("[T]here is general hesitation 'to find intentional infliction of emotional distress in the workplace because, if everyday job stresses resulting from discipline, personality conflicts, job transfers or even terminations could give rise to a cause of action . . . nearly every employee would have a cause of action.'" (quoting Naeem v. McKesson Drug Co., 444 F.3d 593, 606 (7th Cir. 2006))).

199. *See, e.g.*, Honaker v. Smith, 256 F.3d 477, 491 (7th Cir. 2001) (recognizing that "creditors who aggressively request payment" and "legal authorities who assertively carry out their enforcement duties" are not acting *extreme or outrageous*); Graham v. Commonwealth Edison Co., 742 N.E.2d 858,

as trivial work interaction, minor abuses of power are arguably included in this category.[200]

This, arguably, makes the exception of the clear abuse of power somewhat self-evident. The exception would only apply if the abuse of power is unambiguous.[201] Relating to the abuse of power, the aided-by-agency concept has the potential to undo the scope-of-employment limitation in favor of the employee.[202] However, this concept is not popular, and its advantages to employee plaintiffs are limited.[203]

3. Neutral Outcomes

This paper intended to research cases where the situational element of *workplace* and the employment relationship did not influence the reasoning of the court. This would mean the court would decide on an IIED case in the workplace without according the employment relationship a deciding voice. Soured personal relationships between employees where the employer is not a party to the case could possibly fit in this category, but this seems to be stepping away from the very core of IIED in the workplace. After a review of the case law, neutrality does not seem likely for a number of reasons.

First, the disparity of power is inherent in the typically hierarchical structure of most workplaces.[204] This fundamental disparity shifts the advantage in court either in favor of the employer or the employee. Were the power to be equal, there would no longer be an employment relationship, but possibly a partnership or independent contractor relationship—this is an altogether different context.[205]

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868 (Ill. App. Ct. 2000) (holding that "temporary reassignment and demotion" were "everyday stress[ors] of the workplace").

200. *Honaker*, 256 F.3d at 491 ("Another factor considered by the courts is whether the defendant reasonably believed that his objective was legitimate; greater latitude is given to a defendant pursuing a reasonable objective even if that pursuit results in some amount of distress for a plaintiff.").

201. *See, e.g.*, *Naeem*, 444 F.3d at 605–06 ("[T]he actions taken against [the plaintiff] clearly go far beyond typical on-the-job disagreements . . . .").

202. *See* Kalley R. Aman, *No Remedy for Hostile Environment Sexual Harassment?: Balancing A Plaintiff's Right To Relief Against Protection of Small Business Employers*, 4 J. SMALL & EMERGING BUS. L. 319, 324–25 (2000) (outlining the "aided-by-agency-relation standard" in the Title VII context).

203. *See id.* at 325–26 (explaining that the Supreme Court recognized affirmative defenses to aided-by-agency liability because it furthers Title VII's "policies of encouraging prevention of sexual harassment by employers and [reducing lawsuits filed] by employees").

204. *See supra* note 91 (explaining that the National Labor Relations Act recognizes the inherent inequality in bargaining power between employers and employees).

205. This distinction is important for tax purposes, amongst other things. *See* INTERNAL REVENUE SERV., INDEPENDENT CONTRACTOR OR EMPLOYEE?, https://www.irs.gov/pub/irs-

Second, when people are working together for hours over a period of time,[206] any disagreements or grudges have enough opportunity to take root and to explode into outrageous behavior, either in intensity or repetitiveness.[207] This makes a place of employment, where employees do not choose each other's company but have to work together, a very likely place for an escalating situation of bullying. This also makes the low-wage employees who are at the bottom of the hierarchy the most vulnerable to abuses because they have to hold on to their jobs for their day-to-day survival.[208]

Third, the employee suffering the harassment often sues the employer as well as the supervisor and individual co-workers.[209] An employee has a better chance to recover from an employer than from an individual tortfeasor,[210] and the conduct of the tortfeasor needs to be evaluated against the background of his position or job description.[211]

Consequently, an IIED claim in an employment context cannot by its nature have a context-neutral outcome.

C. What is the Dominant Approach?

In evaluating an IIED claim in an employment context, courts rely on a variety of theories of liability: vicarious liability with different control tests,[212] agency,[213] and aided-by-agency.[214] No matter which liability theory courts apply, a plaintiff has to prove that all elements of the tort IIED are satisfied: the outrageous and extreme conduct, the knowledge thereof,

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pdf/p1779.pdf (last visited Nov. 25, 2018) (clarifying the distinction between independent contractors and employees for personal tax filing purposes).

206. *See supra* notes 101–09 and accompanying text (describing Sharon Pollard's daily work environment).

207. *See* E. Christine Reyes Lola, *Low-Wage Workers and Bullying in the Workplace: How Current Workplace Harassment Law Makes the Most Vulnerable Invisible*, 14 HASTINGS RACE & POVERTY L.J. 231, 233 (2017) (noting that because employees spend a lot of time together, the workplace can provide a ripe environment for bullying).

208. *See id.* at 237 (explaining that low-wage workers face "barriers to asserting their rights").

209. *See*, *e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) ("In 1992, Faragher brought an action against [her supervisors] and the City, asserting claims under Title VII . . . and Florida law." (citation omitted)).

210. Z.V. v. Cty. of Riverside, 189 Cal. Rptr. 3d 570, 580 (Cal. Ct. App. 2015) ("Respondeat superior always helps to assure victim compensation, if only by bringing in another—usually deeper—pocket to provide that compensation.").

211. GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 617–18 (Tex. 1999).

212. *Id.* at 618.

213. Richards v. U.S. Steel, 869 F.3d 557, 565 (7th Cir. 2017).

214. Doe v. Sipper, 821 F. Supp. 2d 384, 39091 (D.D.C. 2011).

intent, and the resulting severe emotional distress.[215] Every element in an IIED claim is examined through the lens of the employment relationship using the concepts of power, control, scope, and aided-by-agency.[216] Most claims are dismissed on procedural grounds.[217] If a claim makes it to court, the litigation is usually focused on one of the elements of IIED. This is either because the plaintiff fails to prove the outrageous and extreme conduct[218] or the court rules that the conduct, by its nature, is outside the scope of employment.[219]

There are cases using a hybrid approach utilizing the control test and the scope-of-employment test.[220] While the former is more favorable to the plaintiff-employee, the latter is advantageous to the employer.[221] Nevertheless, every case turns on the specific facts and circumstances.[222] Besides the facts of the case, however, the court's view on the use of IIED in the employment context is important. Some courts are reluctant to use this tort in general: "IIED . . . remains a 'highly disfavored [tort] under New York law.' It 'is to be invoked only as a last resort.'"[223] Other courts are specifically opposed to the use of IIED in the employment context: "North Carolina courts have been particularly hesitant in finding [IIED] claims actionable within an employment claim."[224]

Courts have the task to square the triangular relationship between the employer, the tortfeasor-employee, and the victim-employee. Courts use

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215. *See* RESTATMENT (SECOND) OF TORTS: SEVERE EMOTIONAL DISTRESS § 46 (AM. LAW INST. 1965) (amended 2018) (outlining the elements of IIED).

216. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 777, 800 (1998) (examining the plaintiff and defendant's employee-employer relationship using power, control, scope, and aided-by-agency).

217. *See, e.g.*, *Court Finds Employee's IIED Claim Against Columbia Employer Hopeless*, JDSUPRA (Oct. 27, 2017), https://www.jdsupra.com/legalnews/court-finds-employee-s-iied-claim-59560/ (dismissing plaintiff's claim early in proceedings for failure to state a claim upon which relief could be granted).

218. *See supra* notes 69, 116, 147, 199 and accompanying text (outlining several claims that did not meet the high threshold standard of extreme and outrageous conduct).

219. Richards v. U.S. Steel, 869 F.3d 557, 566 (7th Cir. 2017).

220. *See, e.g.*, Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 161 (2d Cir. 2014) (discussing the application of the scope-of-employment test); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1999) (discussing the application of the control test).

221. *Compare Bruce*, 998 S.W.2d at 618 (demonstrating the far reach of the control test), *with Turley*, 774 F.3d at 161 (emphasizing that harassment is generally motivated by something personal and thus does not fall under the scope of employment).

222. *See Bruce*, 998 S.W.2d at 616 ("[W]hen repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous.").

223. *Turley*, 774 F.3d at 158 (second alteration in original) (first quoting Nevin v. Citibank, N.A., 107 F. Supp. 2d 333, 345–46 (S.D.N.Y. 2000); then quoting McIntyre v. Manhattan Ford Lincoln-Mercury, Inc., 256 A.D.2d 269, 270 (N.Y. App. Div. 1998)).

224. Jackson v. Blue Dolphin Comm. of N.C., LLC, 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002).

different approaches from the theories of torts, contracts, and agency law. Therefore, the outcomes are not consistent enough to identify a dominant approach.

CONCLUSION

Sharon Pollard and Mary Richards were in a similar situation:[225] they were women working in factories in male dominated peroxide and steel industries.[226] Pollard, however, underwent bullying for a longer period of time, which was known around the factory.[227] Had Richards experienced more harassment over a longer period of time, she might have succeeded in her claim.

IIED is a fairly new tort, and it is a welcome departure from physicalism in tort law.[228] However, in order to avoid flooding the courts with trivial emotional harm claims,[229] the high threshold requirement of *extreme and outrageous* behavior and *severe* emotional harm were put in place.[230] While many cases allege claims for IIED, very few of them survive summary judgment.[231] Thus, the advantage of protecting emotional tranquility in the workplace is limited due to the high thresholds in IIED claims.

A claim of IIED in the workplace presents further challenges to plaintiffs. Whereas the employee has to prove the conduct goes far beyond

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225. Richards v. U.S. Steel, 869 F.3d 557, 560–62 (7th Cir. 2017); Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 660–63 (6th Cir. 2005).

226. *Richards*, 869 F.3d at 559–62; *Pollard*, 412 F.3d at 660.

227. *Compare Pollard*, 412 F.3d at 664 ("Supervisors and other management officials stood idly by as the harassment continued day after day, week after week, month after month."), *with Richards*, 869 F.3d at 566 ("U.S. Steel cannot be held liable for two of the instances of misconduct that Richards has alleged . . . .").

228. *See* Fraker, *supra* note 10, at 987–88 (outlining the emergence of IIED and the abandonment of the physical-injury requirement).

229. Cavico, *supra* note 34, at 174.

230. Fraker, *supra* note 10, at 988.

231. *See, e.g.*, Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1728 (1996) (explaining that over a five-year period, "[o]ut of seventy-one wrongful termination cases in which a claim of defamation or intentional infliction of emotional distress was pleaded," employers successfully got cases dismissed on summary judgment forty-five times). Besides serving its purpose to protect the plaintiff, creative lawyering gives IIED an alternative function—as a strategy to influence the jury and to set the emotional playing field for outrageousness. Lebedeff, *supra* note 28, at 5. Strategically, IIED may merely be one of the theories of recovery, and it may be used to influence the outcome based on another theory, even if IIED itself is not accepted. *Id.* This approach, however, is refuted by a trial judge, writing that juries often lack the emotional response aimed at by lawyers. *Id.*

the normal workplace interaction with its acceptable stressors,[232] the conduct should not go too far beyond or it will fall outside the employment context.[233] This is a tricky balance to strike.

When courts assess an IIED claim in the employment context, they favor either the control-test approach,[234] the scope approach,[235] or a hybrid of both.[236] This choice does not make the outcome predictable, as this tort is highly context and content dependent.

The power disparity in an employment relationship is central. This means that "the employee's entire case may hinge on a judge's willingness to consider the immense power that the employer holds over the employee's livelihood and the stressful impact on the employee when the employer wields that power as a weapon of coercion."[237]

An unfortunate observation from this survey of the case law is that situations of bullying and harassment often fall between the cracks of discrimination claims and IIED claims.[238] This sends the message that general harassment,[239] as well as sexual assaults in the workplace,[240] are generally acceptable behaviors.[241] In calling for a change, one author puts the responsibility "on the judiciary as the guardians of the common law to delineate this tort more precisely and then to apply it more forcefully . . . . This will provide a viable legal instrument to counterbalance the inherent inequality of economic bargaining power in the typical employment relationship."[242]

Judicial efforts alone may not suffice, as not all cases of bullying and harassment find their way to the courts. Community lobbying efforts for

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232. *See supra* notes 70, 115, 198 and accompanying text (explaining that negative job evaluations, practical jokes, demotion, and temporary reassignment are normal workplace stressors).

233. Cavico, *supra* note 34, at 152.

234. *See* GTE Sw., Inc. v. Bruce 998 S.W.2d 605, 618 (Tex. 1999) (discussing the control test approach).

235. *See supra* notes 220–21, 236 and accompanying text (analyzing the pros and cons of the scope approach).

236. *See Bruce*, 998 S.W.2d at 612–13 (discussing both the control test and the scope of employment test).

237. James F. Bleeke, *Intentional Infliction of Emotional Distress in the Employment at Will Setting: Limiting the Employer's Manner of Discharge*, 60 IND. L.J. 365, 372 (1985).

238. *See* Lola, *supra* note 207, at 240 (explaining that neither of the "two types of laws that address harassment or abuse in the workplace" provide a "useful tool for bullying victims").

239. *Id.* at 232 ("[W]orkers have no legal protection from harassment or bullying that is not clearly discriminatory. This type of behavior is known as general harassment or bullying, and it constitutes one of the most common and serious problems facing employees in today's workplace.").

240. *See* Doe v. Sipper, 821 F. Supp. 2d 384, 388 (D.D.C. 2011) (recognizing that in many jurisdictions, sexual assault falls outside the scope of employment).

241. Chamallas, *supra* note 74, at 2132.

242. Cavico, *supra* note 34, at 182.

legislation that prohibits general harassment in the workplace have been successful to varying degrees in different jurisdictions.[243] Educating and empowering the community about workplace bullying and its effects is the slow but steady way of instilling values of respect for personal dignity in the workplace.[244] These efforts are strengthened by employers willing to adjust their policies and offer special training.[245] In the meantime, "[t]he tort of outrage should be more than just a repository for the bizarre; it should mark the place where the law struggles to define and redefine the meaning of decency, humanity, and equality."[246]

243. *See Healthy Workplace Bill, supra note* 7 (noting that "32 legislatures . . . have introduced the [Healthy Workplace Bill]").

244. *See* Gary Namie & Ruth Namie, *Being Bullied? Start Here*, WORKPLACE BULLYING INST., http://www.workplacebullying.org/individuals/problem/being-bullied/ (last visited Nov, 25, 2018) (offering information and trainings to address workplace bullying).

245. *See, e.g.*, *Managing Unconscious Bias*, FACEBOOK, https://managingbias.fb.com (last visited Nov. 25, 2018); *Facebook's Harassment Policy*, FACEBOOK, https://peoplepractices.fb.com/harassment-policy/ (last visited Nov. 25, 2018); EXXON MOBIL, STANDARDS OF BUSINESS CONDUCT 22 (2017), http://cdn.exxonmobil.com/~/media/global/files/other/2017/standards-of-business-conduct_apr.pdf.

246. Chamallas, *supra* note 74, at 2187.

INTERACTION OF HUMAN RIGHTS LAW AND COMPETITION LAW: THE RIGHT TO ACCESS TO MEDICINES AND CONSUMER WELFARE IN THE U.S. PHARMACEUTICAL SECTOR

Kwanghyuk Yoo[*†]

ABSTRACT

Access to essential medicines as public goods arguably forms an integral part of fundamental human rights. The current pharmaceutical industry faces serious challenges to access to medicines that result from anticompetitive business activities and structural shortcomings. Competition and human rights policies, though historically and theoretically following divergent paths, have vigorously interacted with each other, partly sharing policy goals one way or another. While such interaction occurs throughout a wide range of industries, those two policies commonly seek to safeguard and promote economic interests of consumers in the pharmaceutical industry. The right to access to medicines has a normative point of contact with consumer welfare in the competition context, inasmuch as both right and welfare can receive sustainable protection particularly when the pharmaceutical industry effectively functions in a way to ensure the public equal and full access to lower-cost and higher-quality medicines.

* Post-Doctoral Researcher & SJD Candidate, University of Iowa College of Law. The author can be reached at: kwyoo1997@gmail.com. This paper was presented at the 2018 Iowa Human Rights Research Conference jointly organized by the Iowa Network of Human Rights Academics and the University of Iowa Center for Human Rights, held on April 14, 2018 in Iowa, U.S.A.

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INTRODUCTION

In these advanced times, when modern conveniences are at hand and easily and readily enjoyable, access to essential medicines as public goods arguably forms an integral part of fundamental human rights.[1] Indeed, access to medicines is well-founded in international law.[2] It is generally recognized as a first or second generation human right.[3] Thus, access to medicines may fall under the right to life as provided for in the International Covenant on Civil and Political Rights (ICCPR) or the right to health as set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[4]

Notably, competition and human rights policies, though historically and theoretically following divergent paths, have

1. JOO-YOUNG LEE, A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY, INNOVATION AND ACCESS TO MEDICINES 204 (2015) ("The right to access to medicines is an essential element of the right to health and the right to life.").

2. *See* Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 B.U. INT'L L.J. 325, 329–51 (2003) (providing an overview of the norms relating to access to medications under international human rights law).

3. *See* LEE, *supra* note 1, at 204 (illustrating that medical access constitues an integral component of "the right to health and the right to life"); *see also* Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER, Nov. 1977, at 29 (defining negative rights, such as the right to life as enshrined in the International Covenant on Civil and Political Rights, as first-generation human rights, and rights that require positive action, such as the right to health as enshrined in the International Covenant on Economic, Social and Cultural Rights, as second-generation human rights).

4. International Covenant on Civil and Political Rights art. 6, ¶ 1, *adopted* Dec. 19, 1966, 999 U.N.T.S. 14668 (entered into force Mar. 23, 1976); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 12, ¶ 1 (Dec. 16, 1966).

vigorously interacted with each other, partly sharing policy goals one way or another.[5] While such interaction occurs throughout a wide range of industries, those two policies commonly seek to safeguard and promote economic interests of consumers in the pharmaceutical industry.[6] The right to access to medicines has a normative point of contact with consumer welfare in the competition policy context, inasmuch as both right and welfare can be properly and sustainably protected, particularly when the pharmaceutical industry effectively ensures the public equal and full access to lower-cost and higher-quality medicines.[7]

The pharmaceutical industry, however, has encountered a surge of challenges to the right to access to medicines and to robust competition. A myriad of corporate practices have led to substantial consumer harm—resulting in a serious deterioration in access to medicines.[8] With this recognition, this article is aimed at unveiling and clarifying the nature of corporate responsibilities to respect the right to access to medicines and abstain from engaging in business practices to lessen competition and injure consumer welfare with particular emphasis on the U.S. pharmaceutical sector. This sector is arguably marked by the lack of pricing transparency controversially attributed to the excessive market power of pharmacy benefit managers as well as a well-known loophole in the Hatch-Waxman Act, which leads to anticompetitive abuses by means of pay-for-delay collusions. That being said, the article posits that the U.S. pharmaceutical market is not fully competitive, resulting in higher medicine prices than would prevail in a fully competitive market. First, the article examines the nature of the right to access to medicines as widely recognized in various international instruments.

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5. *Cf.* J. Janewa OseiTutu, *Human Development as a Core Objective of Global Intellectual Property*, 105 KY. L.J. 1, 7 (2016) ("[I]ntellectual property rights play an increasingly important role in society . . . where information and technology have tremendous social and financial value.").

6. *See, e.g.*, *id.* (examining the role of technology and intellectual property rights in the food, social media, and education industries).

7. *See id.* at 43 (arguing that patent protection should promote access to medicine due to the intersectionality of intellectual property protection and human development).

8. *See, e.g.*, DUNCAN MATTHEWS & OLGA GURGULA, THE IMPORTANCE OF COMPETITION LAW IN FACILITATING ACCESS TO MEDICINES 11–12 (2016), https://static1.squarespace.com/static/562094dee4b0d00c1a3ef761/t/5755bda2d51cd4f6f57d96af/1465236909052/Submission+to+the+UN+HLP_on+competition++policy_final%255b1%255d.pdf (outlining the corporate practice of defensive patenting, which interferes with the development of new medicines, thereby reducing access).

Second, the article provides an analysis of the normative interaction of access to medicines and consumer welfare in the U.S. pharmaceutical sector. Specifically, it investigates the nature of corporate responsibilities in relation to access to medicines, and subsequently discusses normative implications of corporate human rights responsibilities for safeguarding consumer welfare in the pharmaceutical sector. Consumer welfare discussions focus on how corporate practices—especially patent dispute settlements between pioneer drug manufacturers and generic drug manufacturers—and structural shortcomings in the pharmaceutical industry distort competition in the market, and thereby harm consumer welfare in relation to access to medicines.[9] The article concludes with policy suggestions to counterbalance the imperfections of the structure of the pharmaceutical market, which destabilizes accessibility and affordability of health care.

I. THE NATURE OF THE RIGHT TO ACCESS TO MEDICINES IN A NUTSHELL

Access to medicines is a fundamental human right well recognized in international law.[10] Access to medicines is an essential condition for the human enjoyment of sustainable life and health.[11] Thus, the right to access to medicines represents a legal norm that is derived from the right to life as a first generation human right and the right to health as a second generation right.[12] This characterization of the right to access to medicines creates State obligations to ensure public access to essential medicines both under the right to health and under the right to life.[13] This Section provides an overview of the nature of the human right to access to medicines as unequivocally manifested in a variety of international instruments.

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9. *See id.* at 7–8 (providing an overview of the landscape of patent dispute settlements as an anticompetitive practice that extends market exclusivity by preventing generic medicines from entering the market).

10. LEE, *supra* note 1, at 125, 134 (concluding that the right to access to medicines forms an essential element of the right to health and the right to life: two well-recognized doctrines of international law).

11. *Id.* at 121.

12. *Id.* at 204.

13. *Id.* at 125–32 (defining the responsibilities of States to ensure the right to access to medicines and the norms of international law that govern such obligations).

A. Access to Medicines as the Right to Health

The Constitution of the World Health Organization (WHO), adopted in 1946, provides the foundation for the right to health.[14] The preamble of the WHO Constitution provides that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[15] Article 25.1 of the Universal Declaration of Human Rights (UDHR), adopted in 1948, affirms access to medicines as an element of the right to health by laying down that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."[16] Furthermore, Article 12 of the ICESCR, adopted in 1966, assures "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and calls upon States to take appropriate steps necessary to achieve the progressive and full realization of the right of health.[17]

Notably, General Comment 14 of the UN Committee on Economic, Social and Cultural Rights, adopted in 2000, provides for four interrelated elements essential to the right to public health facilities, goods, and services, including essential medicines as defined by the WHO Programme on Essential Drugs.[18] First, functioning public health facilities, goods, and services must be available in sufficient quantities.[19] Second, health facilities, goods, and services must be accessible to everyone without discrimination.[20] This means that everyone should be able to physically access, and economically afford, health facilities, goods, and services and further

14. CONSTITUTION OF THE WORLD HEALTH ORGANIZATION DOCUMENTS, WORLD HEALTH ORGANIZATION [WHO] 1 (2016), http://www.who.int/governance/eb/who_constitution_en.pdf.

15. *Id.*

16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25, ¶ 1 (Dec. 10, 1948).

17. G.A. Res. 2200A (XXI), *supra* note 4, ¶¶ 1–2(d).

18. Comm. on Econ., Soc. & Cultural Rights, Rep. of the Econ. & Soc. Council on Its Twenty-Second, Twenty-Third and Twenty-Fourth Sessions, U.N. Doc. E/C.12/2000/21, Supp. 2, annex IV, ¶ 12 (2001). The WHO releases the model lists of essential medicines on a biennial basis since 1977. *See* MODEL LISTS OF ESSENTIAL MEDICINES: 20TH LIST, WORLD HEALTH ORGANIZATION [WHO] (2017), http://apps.who.int/iris/bitstream/handle/10665/273826/EML-20-eng.pdf?ua=1 (detailing a core list of medicine needed for a basic health-care system).

19. Comm. on Econ., Soc. & Cultural Rights, *supra* note 18, ¶ 12(a).

20. *Id.* ¶ 12(b).

receive and impart information concerning health issues.[21] Third, health facilities, goods, and services must be deferential to medical ethics and culturally appropriate.[22] Fourth, "health facilities, goods and services must also be scientifically and medically appropriate and of good quality."[23]

While numerous resolutions of the UN Human Rights Council (HRC), the former Commission on Human Rights, by and large echo the common principles set forth in the foregoing provisions, Resolution 12/24, adopted in 2009, emphasizes that access to medicines is an integral part of the right to health by reiterating that "access to medicines as one of the fundamental elements in achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[24]

B. Access to Medicines as the Right to Life

The right to life is one of the basic human rights and "is a prerequisite to the realisation of all other human rights."[25] Article 3 of the UDHR and Article 6 of the ICCPR, adopted in 1966, proclaim the inherent right to life.[26] The right to life in a broad context is construed as including the right not to be arbitrarily deprived of one's life by lack of access to essential medicines.[27] General Comment 6 of the UN Human Rights Committee, adopted in 1982, precludes the right to life from being narrowly interpreted in any event.[28] It recommends that "States [desirably] take all possible measures to

21. *See id.* (explaining that everyone should have physical access to and ability to afford health care).

22. *Id.* ¶ 12(c).

23. *Id.* ¶ 12(d).

24. Human Rights Council Res. 12/24, U.N. Doc. A/HRC/RES/12/24, ¶ 7 (Oct. 12, 2009).

25. LEE, *supra* note 1, at 132.

26. G.A. Res. 217 (III) A, *supra* note 16, art. 3; International Covenant on Civil and Political Rights, *supra* note 4, art. 6, ¶ 1.

27. G.A. Res. 217 (III) A, *supra* note 16, art. 3 (declaring that "[e]veryone has the right to life, liberty and the security of person"); International Covenant on Civil and Political Rights, *supra* note 4, art. 6, ¶ 1 (declaring that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life").

28. Human Rights Comm., General Comment No. 6, art. 6, The Right to Life, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 30, 1982).

reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[29]

C. Resistance to Conceptualizing Access to Medicines as a Fundamental Human Right

In reality, the perspective conceptualizing access to medicines as a fundamental human right has often encountered external obstacles arising from misaligned interests between pharmaceutical companies and consumers. This is particularly so in cases of brand-name drugs. Branded drug manufacturers tend to prioritize a patent as a more important right, arguing that the protection of a patent is imperative to ensure that they enjoy a sufficient economic incentive for new drug research and development.[30] Indeed, a patent may serve as an effective drive for pharmaceutical innovation, and the properly regulated patent enforcement system may contribute to the promotion of access to medicines from an institutional perspective.[31] However, given that in practice, the business judgment of pharmaceutical companies is more likely driven by a profit motive, such incentive-based justification for deferring to intellectual property rights with more weight and de-categorizing access to medicines from a set of fundamental human rights may be deemed farfetched and unwarranted.[32] In general, pharmaceutical companies are highly profit-oriented so that they have often engaged in anticompetitive patent practices in which they abuse the patent-conferred right to exclude others from commercial exploitation of the invention.[33] In fact, patent-holding manufacturers are in a position to exert monopoly power during the valid patent term by overcharging drug prices.[34]

Moreover, pharmaceutical companies tend to overstate the costs of drug research and development to justify the need for higher economic incentives and appropriate them for developing such drugs as used to treat an illness that is less life-threatening but more

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29. *Id.*

30. DEBRA L. DELAET, THE GLOBAL STRUGGLE FOR HUMAN RIGHTS: UNIVERSAL PRINCIPLES IN WORLD POLITICS 113 (2d ed. 2014).

31. *Id.*

32. *Id.* at 114.

33. *Id.*

34. *Id.*

lucrative.[35] Hence, the rationale behind pharmaceutical companies' resistance to the perspective advocating access to medicines as a fundamental human right overall seems ill-founded and, therefore, unable to be vindicated.

II. NORMATIVE INTERACTION OF ACCESS TO MEDICINES AND CONSUMER WELFARE IN THE PHARMACEUTICAL SECTOR

Facilitating access to medicines as the right to health or life warrants the vigorous implementation of the competition policy in the pharmaceutical sector with a view to protect consumer welfare.[36] The full realization of access to medicines may be assumedly conducive to the maximization of consumer welfare in the pharmaceutical sector.[37] The better access consumers have to lower-cost medicines of like quality, the more likely consumer savings are to increase.[38] General Comment 14 makes it clear that States are obligated to protect the right to health by means of taking all necessary measures to safeguard consumers against human rights infringements by third parties.[39] These measures include, *inter alia*, preventing pharmaceutical companies from engaging in practices detrimental to health.[40] Apart from States' obligations, General Comment 14 outlines the significance of human rights responsibilities of non-State actors.[41] It states that all members of society, including individuals and the private business sector, are accountable for the realization of the right to health.[42] This section examines the nature of corporate responsibilities in relation to the right to access to medicines and their normative implications for

35. *Id.*

36. U.N. Dev. Programme [UNDP], Issue Brief on Using Competition Law to Promote Access to Medicines and Related Health Technologies in Low- and Middle-Income Countries, at 7, U.N. Doc. Issue Brief (Aug. 2017).

37. *See generally* LEE, *supra* note 1 (examining various frameworks that could help reach full realization of access to medicines and the benefits consumers would incur within the pharmaceutical market from such access).

38. *See* FTC v. Actavis, Inc., 570 U.S. 136, 154 (2013) (discussing how increased competition leads to lower priced medication that directly benefits consumers).

39. Comm. on Econ., Soc. & Cultural Rights, *supra* note 18, ¶ 51.

40. *See id.* (noting that these necessary measures include stopping pharmaceutical companies from engaging in practices that are harmful to health).

41. *See id.* ¶ 12(b) (adding that General Comment 14 outlines the importance of non-State actors' responsibility to human rights).

42. *Id.* ¶ 42.

safeguarding consumer welfare in the pharmaceutical sector, which underpins competition law and policy.

A. The Nature of Corporate Responsibilities in Relation to Access to Medicines

In 2008, John Ruggie, the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, proposed the human rights framework of *Protect, Respect and Remedy*, comprised of three core principles: the State duty to protect against human rights abuses by non-State actors, including businesses; the corporate responsibility to respect human rights; and access to appropriate and effective remedies.[43] A central notion underlying this framework is that while it is incumbent on both States and corporations to defer to human rights, their human rights obligations are by nature, distinct.[44] Ruggie notes that "as economic actors, companies have unique responsibilities."[45] "While corporations may be considered organs of society, they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States."[46]

He characterizes the corporate responsibility to respect human rights as the "baseline responsibility," that is "the baseline expectation for all companies in all situations."[47] He interprets the responsibility to respect rights as "essentially mean[ing] not to infringe on the rights of others – put simply, to do no harm."[48] This responsibility requires companies to maintain due diligence by complying with national laws and managing the risk of human rights infringement.[49] The due diligence expected of companies is determined "by the context in which a company is operating, its

43. John Ruggie (Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶¶ 18, 23, 26, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter Ruggie Rep. 2008].

44. Suerie Moon, *Respecting the Right to Access to Medicines: Implications of the UN Guiding Principles on Business and Human Rights for the Pharmaceutical Industry*, 15 HEALTH & HUM. RTS. J. 32, 35 (2013).

45. Ruggie Rep. 2008, *supra* note 43, ¶ 6.

46. *Id.* ¶ 53 (internal quotations omitted).

47. *Id.* ¶¶ 24, 54.

48. *Id.* ¶ 24.

49. *Id.* ¶ 25.

activities, and the relationships associated with those activities."[50] But he conceives additional corporate responsibilities arising "where [companies] perform certain public functions, or because they have undertaken additional commitments voluntarily."[51]

In his 2011 report, Ruggie further developed the *Protect, Respect and Remedy* framework by advancing the UN Guiding Principles on Business and Human Rights, which later the HRC unanimously endorsed in 2011—Resolution 17/4.[52] The HRC, for the first time, emphasized the importance of establishing "a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity."[53] It recognized the Guiding Principles as playing a role in the authoritative global guidance "that will contribute to enhancing standards and practices with regard to business and human rights, and thereby contribute to a socially sustainable globalization, without foreclosing any other long-term development, including further enhancement of standards."[54] The Ruggie Principles elaborate how the *Protect, Respect and Remedy* Framework applies to corporations and provide recommendations for the Framework's implementation.[55] A set of guiding principles ensure that corporations do not violate human rights in the course of their transactions and provide appropriate redress when they encroach on those rights.[56]

The Ruggie Principles as general standards, however, set out horizontal human rights commitments that apply to all business activities in all industrial sectors.[57] Hence, the Ruggie Principles

50. *Id.*

51. *Id.* ¶ 24.

52. John Ruggie (Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2011) [hereinafter Ruggie Rep. 2011]; Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶ 1 (July 6, 2011) [hereinafter H.R.C. Res. 17/4].

53. U.N. Human Rights Off. of the High Comm'r, Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx (last visited Nov. 25, 2018).

54. H.R.C. Res. 17/4, *supra* note 52, ¶ 4; U.N. News, U.N. Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights (June 16, 2011), https://news.un.org/en/story/2011/06/378662.

55. Ruggie Rep. 2011, *supra* note 52, annex.

56. *Id.*

57. Joo-Young Lee & Paul Hunt, *Human Rights Responsibilities of Pharmaceutical Companies in Relation to Access to Medicines*, 40 J.L. MED. & ETHICS 220, 224 (2012).

themselves do not provide clear normative implications for the pharmaceutical sector. The 2008 Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines as presented by UN Special Rapporteur on the Right to Health, Paul Hunt may serve as the useful supplement to the Ruggie Principles. The Hunt Guidelines articulate specific norms regarding corporate responsibilities in the pharmaceutical sector.[58] They affirm the notion of General Comment 14: that while the ICESCR provides for the progressive realization of the right to health, States are obligated to immediately make essential medicines available.[59] According to the Hunt Guidelines, the policies and practices of pharmaceutical companies in relation to pricing, intellectual property, research and development, clinical trials, and marketing may have negative effects on access to medicines by "constitut[ing] obstacles to States' implementation of the right to the highest attainable standard of health and, in particular, their endeavours to enhance access to medicines."[60]

In his 2009 report, Hunt streamlined the structure of the right-to-health responsibilities of pharmaceutical companies, including innovator, generic, and biotechnology companies.[61] He noted that all pharmaceutical companies assume the common corporate responsibility to ensure the public fair and full access to medicines in terms of availability, accessibility, acceptability, quality, transparency, and monitoring and accountability, whereas patent-holding pharmaceutical companies have distinctively special obligations since "the 'social expectations' of a company holding a patent on a life-saving medicine are different from a pharmaceutical company that does not hold such a patent."[62]

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58. Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *The Right to Health*, ¶¶ 26, 29–30, U.N. Doc. A/63/263 (Aug. 11, 2008) [hereinafter Hunt Rep. 2008].

59. Comm. on Econ., Soc. & Cultural Rights, *supra* note 18, ¶ 30; Moon, *supra* note 44, at 36.

60. Hunt Rep. 2008, *supra* note 58, ¶ 23.

61. Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶¶ 5, 8, 20, U.N. Doc. A/11/12/Add.2, annex (May 5, 2009) [hereinafter Hunt Rep. 2009].

62. *Id.* ¶¶ 18, 36. ("Society has legitimate expectations of a company holding the patent on a life-saving medicine. In relation to such a patent, the right-to-health framework helps to clarify what these terms, and expectations, are. Because of its critical social function, a patent on a life-saving medicine places important right-to-health responsibilities on the patent holder. These responsibilities are

Although the Ruggie Principles and Hunt Guidelines have different focal points for the right-to-health responsibilities, the underlying notions in both works are not at much variance with each other, but they rather complement each other. A close look at the Hunt Guidelines through the lens of the Ruggie Principles provides meaningful insight into the nature of corporate responsibilities in relation to access to medicines. Thus, all pharmaceutical companies, whether generic or brand-name drug manufacturers, have the baseline corporate responsibility to respect the right to access to medicines, which is predicated upon "social expectations – as part of what is sometimes called a company's social licence to operate."[63] But patent-holding, brand-name drug manufacturers have additional responsibilities beyond the corporate responsibility outlined in Ruggie's *Protect, Respect and Remedy* Framework because these manufactures perform public functions by researching and developing innovative drugs that are crucial and essential to the human enjoyment of sustainable health and life.[64] But it should be noted that additional responsibilities cannot substitute for the corporate responsibility to respect.[65] Thus, pharmaceutical companies that have engaged in business practices thwarting legitimate patent and competition policies "cannot compensate for human rights harm by performing good deeds elsewhere," such as offering a voluntary price discount on their newly patented drugs.[66]

B. Normative Implications of Corporate Human Rights Responsibilities for Safeguarding Consumer Welfare in the Pharmaceutical Sector

Access to medicines is an essential element of consumer welfare protection in the pharmaceutical industry.[67] The human rights policy to safeguard access to medicines well complements the competition policy to protect the economic interest of consumers in seeking to

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reinforced when the patented life-saving medicine benefited from research and development undertaken in publicly funded laboratories.").

63. Ruggie Rep. 2008, *supra* note 43, ¶ 54.

64. Moon, *supra* note 44, at 37.

65. *Id.* at 35.

66. *Id.* at 37.

67. *See supra* Parts I & I.A (outlining the nature of the human right to access to medicines and explaining that this responsibility applies to all pharmaceutical companies).

obtain cheaper, generic versions of patented pioneer drug products.[68] These two policies pursue a common goal of enhancing economic and social welfare of consumers in need of essential medicines.[69] However, a close look at the pharmaceutical industry reveals that the consumer welfare policy often tends to be impeded by anticompetitive practices by pharmaceutical companies, sometimes in collusion with other market participants in the pharmaceutical supply chain.[70] For example, a certain collusive practice between a patent-holding branded manufacturer and a generic manufacturer may constitute anticompetitive joint conduct that substantially harms consumers by restricting their access to cheaper medicines.[71] As noted below, in this case, consumer harm occurs where a patent-holding branded manufacturer pays a generic manufacturer to delay market entry, which forecloses robust generic competition.[72]

Also, pharmaceutical companies may engage in horizontal conspiracies with market participants to fix prices and allocate markets for their drugs.[73] The collusion between pharmaceutical companies and so-called pharmacy benefit managers (PBMs) is precipitated by the strong anticompetitive incentive to buy off the pivotal and dominant role of PBMs in the pharmaceutical supply chain, which has been facilitated by structural shortcomings of the pharmaceutical industry, as proven by lack of transparency leading to the asymmetry of price information.[74] A close look at the full spectrum of the PBM-centric distribution chain clearly vindicates that they work as a negative force toward realizing access to medicines as human rights by exerting a substantial leverage over the pricing dynamics that are richly rewarding themselves and pharmaceutical

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68. *See supra* notes 36–38 and accompanying text (explaining that competition policy complements human rights policy by supporting consumer access to low-cost medicines).

69. *See supra* notes 63–66 and accompanying text (discussing the interaction between the corporate responsibility to respect and competition policy).

70. *See infra* notes 89–90, 147–49 and accompanying text (introducing anticompetitive practices within the U.S. pharmaceutical industry and potential collusive practices in the pharmaceutical supply chain).

71. *See infra* notes 89–100 and accompanying text (describing pay-for-delay settlements in the U.S. and how they can harm consumer access to affordable medicines).

72. *See infra* notes 106–07 and accompanying text (summarizing the European Commission's findings that pay-for-delay settlements reduce industry competition and harm consumers).

73. *See infra* notes 139–49 and accompanying text (describing how PBMs collude with other pharmaceutical supply chain members to control prices and markets).

74. *See infra* notes 125, 139–49 and accompanying text (highlighting PBMs' pivotal role in the industry and explaining their collusive practices).

companies in collusion, *inter alia* patent holding branded firms which the Hunt Guidelines quite appropriately target for special responsibilities.[75] In sum, anticompetitive company behavior coupled with structural drawbacks pervasive in the industry results in market failure that eventually harms consumers, hindering them from accessing essential medicines.[76]

Therefore, while the regulatory overhaul compelling corporate responsibilities to respect the right to access to medicines may significantly contribute to the resolution of social and economic inequality in people's pursuing the right to health, it cannot exclusively and fully settle this human rights infringement concern.[77] The proper understanding of the nature of the right to access to medicines and its interaction with the competition policy centering on consumer welfare warrants the introduction of both behavioral and structural remedies as a long-term and fundamental solution.[78] The following discussions profoundly unveil the mechanics of how certain corporate behavior and structural shortcomings in the pharmaceutical industry seriously impair the right to access to medicines and consumer welfare.

1. Corporate Behavior Against Access to Medicines and Consumer Welfare: Pay-for-Delay Patent Dispute Settlements

Competition law and policy seek to establish a level playing field in the market and thereby protect consumer welfare.[79] While the regulatory reach of competition law extends over a wide range of industries, including agriculture, communication, energy, financial institutions and markets, health care, insurance, organized labor, sport, and transportation, the regulatory reach especially came into

75. *See infra* notes 125–66 and accompanying text (analyzing the pivotal role of PBMs in the pharmaceutical supply process).

76. *See infra* notes 160–66 and accompanying text (explaining that both structural and behavioral shortcomings in the pharmaceutical industry harm consumers).

77. *See infra* notes 160–66 and accompanying text (emphasizing the need for both structural and behavioral remedies to reduce PBMs' monopoly power).

78. *See infra* notes 160–66 and accompanying text (demonstrating the effectiveness of behavioral and structural remedies).

79. *See* 2 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1091 (8th ed. 2017) (demonstrating that Congress enacted the Hatch-Waxman Act to allow generic drug manufacturers to compete with branded drug manufacturers, inevitably driving down drug prices for the consumers).

vivid and dynamic play in the pharmaceutical sector in 1984. The Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, was enacted in 1984 to strike a balance between conflicting interests between pioneer drug manufacturers, and generic drug manufacturers and consumers that benefit from increased generic competition in the market.[80] In representing this hard-fought compromise, the Hatch-Waxman Act, on the one hand, provides incentives for brand-name drug manufacturers to make the investments necessary to research and develop new drug products by allowing them to enjoy longer effective patent life, which encourages them to assume the increased costs of research and development.[81]

On the other hand, the Act streamlines the procedure for obtaining U.S. Food and Drug Administration (FDA) approval for generic drugs (bioequivalents of brand-name, or innovator, drugs) that do not infringe valid patents.[82] Thus, the Act establishes a regulatory scheme that enables generic manufacturers to challenge the patents held by branded manufacturers to bring their cheaper generics to market as quickly as possible.[83] Pursuant to the regulatory process, a patent-holding branded manufacturer must file a New Drug Application for FDA approval of their pioneer drug.[84] "A would-be competitor seeking to market a generic bioequivalent must submit an Abbreviated New Drug Application (ANDA) for FDA approval."[85] The ANDA filer seeking to market before the patent expires must certify that the relevant patent is invalid or that the generic drug will not infringe the patent.[86] If a patent holder brings a patent infringement action against the potential generic entrant in a timely manner, the FDA approval of the generic drug is stayed for 30 months, which means the patent holder obtains an automatic preliminary injunction against the sale of the competing generics.[87]

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80. *See id.* at 1090 (describing the background behind the Hatch-Waxman Act's enactment to resolve conflicts between branded drug manufacturers and generic drug manufacturers).

81. ABA SECTION OF ANTITRUST LAW, PHARMACEUTICAL INDUSTRY ANTITRUST HANDBOOK 81 (2009).

82. 2 ABA SECTION OF ANTITRUST LAW, *supra* note 79, at 1471.

83. *See id.* (describing how the Hatch-Waxman Act gives generic drug manufacturers ways to market their drugs as quickly as possible).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1090–91.

However, the first ANDA filer retains the right to market its generic versions without competition from other generics for a 180-day period of exclusivity beginning on the date of the first commercial marketing.[88]

Problematically, branded manufacturers have sought a way to manipulate this Hatch-Waxman regulatory mechanism by engaging in various types of patent practices.[89] Among other things, they have settled patent infringement disputes with generic manufacturers in anticompetitive ways, including posing contractual limitations on generic manufacturers in return for offering inducements to accept those limitations.[90] Thus, branded manufacturers unsure of prevailing in patent infringement litigation tend to pay generic competitors to stay out of the market for a negotiated term.[91] Large payments may serve as a strong incentive for generic competitors to delay market entry.[92] Horizontal agreements of this kind are referred to as "reverse payment" or "pay-for-delay" settlements.[93]

Patent dispute settlements that simply authorize a patent holder to practice a patent in exchange for a specified royalty do not create antitrust concerns.[94] Pay-for-delay settlements, however, are subject to antitrust scrutiny because they aim to allocate markets and thwart competition to the detriment of other bona fide generic competitors and consumers.[95] Where the first ANDA-filing generic challenger does not enter the market, 180-day exclusivity is not triggered from the outset, which blocks the entry of other generic competitors waiting in the wings.[96] Furthermore, consumers are locked between the brand name drug and the generic version of the successful ANDA filer, and forfeit the right to access to other, cheaper generics.[97] Therefore, pay-for-delay settlements are simply characterized as

88. *Id.* at 1472.

89. *See id.* at 1091 (demonstrating how branded drug manufacturers negotiate deals with generic drug manufacturers to get around the Hatch-Waxman Act).

90. *See id.* (describing how branded drug manufacturers settle with generic drug manufacturers to impose contractual limitations of delaying sales of generic drugs).

91. *Id.*

92. *Id.*

93. *Id.*

94. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 326 (5th ed. 2016).

95. *Id.*

96. *Id.* at 326–27.

97. *See id.* at 327 (describing effective bilateral monopolies arising between ANDA filers and brand-name drug manufacturers).

exclusion arrangements and constitute a *per se* antitrust violation.[98] Notably, the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) contributed to mitigating regulatory concerns that statutory 180-day exclusivity was vulnerable to arbitrary manipulation through pay-for-delay settlements.[99] The MMA set forth, *inter alia*, the exclusivity forfeiture provision, granting a certain period of time for the generic ANDA filer to begin marketing its generics, or otherwise forfeit exclusivity.[100]

The MMA's significant impact, notwithstanding antitrust concerns over pay-for-delay settlements, persists because they, though less incentivized, may occur outside the Hatch-Waxman context.[101] Indeed, the European Union does not have a regulatory system equivalent to the Hatch-Waxman Act, which provides a framework for patent dispute settlements between pioneers and generics.[102] Pay-for-delay settlements, however, have been perceived as a critical antitrust challenge to the pharmaceutical sector in the European Union.[103]

The European Commission carried out an extensive sector inquiry to investigate the reasons for lack of competition in Europe's market for human medicines.[104] In its final report issued in 2009, the Commission found competition in the pharmaceutical market not properly functional because of structural shortcomings requiring lengthy market authorization and, more importantly, corporate

98. *Id.* at 326.

99. *See* Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 1102(a)(1), 117 Stat. 2066, 2458–59 (2003) (defining an agreement with another applicant, the listed drug application holder, or a patent holder as an event that forfeits the 180-day exclusivity period).

100. 2 ABA SECTION OF ANTITRUST LAW, *supra* note 79, at 1472.

101. *See, e.g.*, Damien Geradin, Douglas H. Ginsburg & Graham Safty, *Reverse Settlements in the European Union and the United States*, *in* COMPETITION AND PATENT LAW IN THE PHARMACEUTICAL SECTOR: AN INTERNATIONAL PERSPECTIVE 125, 137 (Giovanni Pitruzzella & Gabriella Muscolo eds., 2016) (discussing an example where reverse settlements occur outside of the Hatch-Waxman context).

102. *Id.*

103. *Pharmaceuticals & Health Services: Antitrust*, EUR. COMM'N: DIRECTORATE GEN. FOR COMPETITION, http://ec.europa.eu/competition/sectors/pharmaceuticals/antitrust_en.html (last updated Mar. 20, 2017).

104. DIRECTORATE GEN. FOR COMPETITION, EUR. COMM'N, FINAL REP. ON THE PHARMACEUTICAL SECTOR INQUIRY, ¶ 14 (July 8, 2009), http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf.

practices typified by pay-for-delay settlements.[105] The Commission stated that through pay-for-delay settlements a branded manufacturer sought to lessen competitive pressure from generic drugs simply by sharing its monopoly profits with potential generic competitors.[106] The Commission concluded that those settlements constituted anticompetitive collusion causing substantial consumer harm.[107] The Commission has adopted a number of decisions against pharmaceutical companies in pay-for-delay cases including *Lundbeck*, *Servier*, and *Fentanyl*.[108]

As the U.S. Federal Courts of Appeals were divided with respect to the legal approach for evaluating pay-for-delay settlements, the theoretical and normative controversy surrounding these anticompetitive settlements remained unsolved, which invited heated discussions from antitrust scholars and practitioners.[109] It was 2013 when this controversy was eventually resolved by the highest authority. The Supreme Court, in its landmark decision *FTC v. Actavis*, held that the legality of pay-for-delay settlements should be examined under the standard "rule-of-reason" analysis, which requires a detailed factual inquiry into the nature and the effect of the practice concerned and market circumstances.[110]

The *Actavis* Court found that pay-for-delay settlements were "to maintain supracompetitive [profits] to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness."[111] The *Actavis* Court contributed to resolving the circuit split by providing a well-marked roadmap by which factfinders could properly navigate in investigating the legality of pay-for-delay settlements.[112] The Court, however, declined to establish the specific framework for the proper rule-of-reason analysis, and mandated the lower courts to "structure

105. *Id.* ¶¶ 1365, 1372; Eur. Comm'n, Memo on Antitrust: Commission Enforcement Action in Pharmaceutical Sector Following Sector Inquiry, at 1, U.N. Doc. MEMO/13/56 (Jan. 31, 2013) [hereinafter Eur. Comm'n Memo 2013].

106. *Id.*

107. *Id.*

108. *Id.* at 2.

109. *See infra* notes 110–13 and accompanying text (discussing a split court decision in regard to pay-for-delay settlements and complex unresolved issues).

110. FTC v. Actavis, Inc., 570 U.S. 136, 158–59 (2013).

111. *Id.* at 157.

112. *Id.* at 153–58.

antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question."[113] Hence, the Court's finding left more complex issues behind for further discussions about how the rule-of-reason should be applied in the pay-for-delay context on a case-by-case basis.

Actavis merits special attention, particularly in that the Court took the consumer welfare approach when examining the legality of pay-for-delay settlements.[114] In other words, the Court structured an antitrust analysis by answering the cardinal question of whether the settlements at issue create, maintain, or strengthen the patentee's monopoly to the detriment of consumers.[115] *Actavis* holds that the anticompetitive nature and effects of pay-for-delay settlements are attributed to their adverse impacts on competition in terms of consumer welfare, not total welfare.[116] By contrast, the total welfare approach examines *all* welfare effects in the market.[117] Thus, a bright line exists between the consumer welfare approach and the total welfare approach.[118] Where pay-for-delay settlements harm consumers by increasing drug prices, but benefit producers by lowering manufacturing costs, the consumer welfare approach may identify consumer loss as a degree of the anticompetitive effect of settlements, while the total welfare approach may generate the net competitive effect by having consumer loss offset by producer profits.[119]

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113. *Id.* at 159–60.

114. *See id.* at 154 (observing that pay-for-delay settlements benefit the patentees and the generic challengers while hurting consumers). Likewise, in his dissenting opinion, Chief Justice Roberts states that "[t]he point of antitrust law is to encourage competitive markets to promote consumer welfare." *Id.* at 161 (Roberts, C.J., dissenting).

115. *See id.* at 154 (holding that large, unjustified reverse payments seeking to bring about anticompetitive consequences may be subject to antitrust liability).

116. *See id.* (emphasizing how settlements acting as "payment[s] in return for staying out of the market" benefit the patentee and the generic challenger to the detriment of consumers).

117. *See id*. (stating that pay-for-delay settlements benefit the parties by producing monopoly returns for the branded form that the generic shares, which otherwise would flow to consumers but for the settlements).

118. *See id.* (focusing on the detrimental effects that unjustified reverse settlements' anticompetitive consequences cause consumers in deciding potential antitrust liability).

119. Herbert Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's* Actavis *Decision*, 15 MINN. J.L. SCI. & TECH. 3, 7 (2014); Aron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating* Actavis, 28 ANTITRUST 16, 17 (2013).

Notably, although a branded manufacture and a generic manufacturer are both subject to antitrust liability of a similar nature for pay-for-delay settlements under competition law, they may have different human rights responsibilities.[120] Both branded and generic manufacturers have the common baseline responsibility to respect access to medicines under the social expectation as laid down in the Ruggie Principles.[121] As previously noted, the Hunt Guidelines describe this basic corporate responsibility as maintaining due diligence by properly assuring the public that medicines are available, accessible, acceptable, of good quality, and all business activities in relation to access to medicines are transparent.[122] On another note, unlike a generic manufacturer, a branded manufacturer holding a patent on an essential medicine has additional responsibilities to safeguard the right to access to medicines because it performs a public function mandated by society for the public health by researching and developing innovative drugs.[123] Therefore, while the competition policy condemns pay-for-delay settlements for injuring consumer welfare and imposes antitrust responsibilities of the same nature on branded and generic manufacturers, the human rights policy may treat them differently by making a branded manufacturer assume additional responsibilities.

2. Structural Shortcoming Against Access to Medicines and Consumer Welfare: Functional Abuse of the Pivotal Role of PBMs in the Pharmaceutical Supply Process

The pharmaceutical supply market where the prescription drugs are distributed and dispensed to patients is a highly complex structure mainly attributed to the existence of multiplayers who operate at a different level of the supply chain, but interact with one another.[124]

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120. *See* Hunt Rep. 2008, *supra* note 58, annex (discussing pharmaceutical companies' various human rights responsibilities).

121. Hunt Rep. 2009, *supra* note 61, ¶ 17.

122. *Id.* ¶¶ 17, 24, 32.

123. *Id.* ¶¶ 34–35.

124. *See* Org. for Econ. Coop. & Dev. [OECD], Competition Comm., *Competition Issues in the Distribution of Pharmaceuticals*, Contribution from the United States, ¶ 4, OECD Doc. DAF/COMP/GF/WD(2014)43 (Feb. 10, 2014) [hereinafter OECD Competition Comm.], https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/pharmaceuticals_us_oecd.pdf (describing the complex structure of the pharmaceutical distribution system).

Among other things, the PBMs, in particular, play pivotal, extensive roles as intermediaries by vigorously intervening in nearly every stage of the process.[125]

PBMs reportedly administer prescription drug benefits for 266 million insured people in the U.S.[126] The market concentration in the PBM industry is so high that the three largest PBMs—Express Scripts, CVS Health, and OptumRx—administer prescriptions for over 180 million people, cover over 80 percent of the market share, and earn annual record revenues amounting to $200 billion.[127] The key services and intermediary roles of PBMs are mainly described as negotiating drug prices with manufacturers, creating formularies where prescription drugs are listed by cost and quality, providing claims adjudication, controlling generic substitution and therapeutic interchange, providing mail-order pharmacy services, and establishing pharmacy networks.[128]

In more detailed description, PBMs are retained by health insurers and provide them with access to an established network of pharmacies, including mail-order pharmacies, and certain formulary services; all of which permit health insurers' members (customers) to obtain drugs at established prices.[129] Thus, PBMs represent multiple health insurers and "allow for collective reimbursement rate negotiations, avoiding the unworkable situation where each [insurer] would need to negotiate separately with each pharmacy."[130] PBMs also contract with retail pharmacies for reimbursement when

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125. *See* Pharm. Care Mgmt. Ass'n. v. Rowe, 429 F.3d 294, 298 (1st Cir. 2005) (stating that PBMs serve as intermediaries between pharmaceutical manufacturers, pharmacies, and health benefit providers).

126. Visante, *Pharmacy Benefit Managers (PBMs): Generating Savings for Plan Sponsors and Consumers*, PHARMACEUTICAL CARE MGMT. ASS'N. 1, 3 (Feb. 2016), https://www.pcmanet.org/wp-content/uploads/2016/08/visante-pbm-savings-feb-2016.pdf.

127. Complaint & Demand for Jury Trial ¶¶ 5–6, Boss v. CVS Health Corp., No. 3:17-cv-01823-BRM-LHG (D.N.J. Mar. 17, 2017).

128. OECD Competition Comm., *supra* note 124, ¶ 7; KAISER FAMILY FOUND., FOLLOW THE PILL: UNDERSTANDING THE U.S. COMMERCIAL PHARMACEUTICAL SUPPLY CHAIN 14–15 (2005); U.S. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION 11 (2004), https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf.

129. Pharm. Care Mgmt. Ass'n v. Rowe, No. Civ. 03-153-B-H, 2005 WL 757608, at *1 (D. Me. Feb. 2, 2005).

130. Memorandum at 4, *In re* Pharmacy Benefit Managers Antitrust Litig., No. 2:06-md-01782-CDJ (E.D. Pa. Jan. 18, 2017).

prescriptions are filled for plan members.[131] This service is referred to as claim adjudication.[132] The dynamic process of pharmacy reimbursement is as follows:

> All PBMs use a real-time, point-of-sale system linked to retail and mail-order pharmacies and distribution centers. This process provides verification of coverage, formulary restrictions, drug interactions, and individual co-pay information. This process also provides prescription drug information back at the PBM data warehouse, where it can be used for customized reporting and quality-focused clinical and intervention programs.[133]

When a consumer fills a prescription at a local pharmacy, complex computer processing interactions between the pharmacy and a PBM occur.[134] An FTC study describes these interactions as follows:

> [T]he pharmacy transmits the insurance coverage information to a PBM, which verifies the insurance and determines if the consumer's insurance plan covers the prescribed drug. If so, the PBM determines three amounts: (a) the consumer's copayment; (b) how much the PBM will reimburse the pharmacy to dispense the drug; and (c) how much the PBM will bill the [health insurer] for the transaction. The PBM transmits the first two items (the consumer copayment and the pharmacy reimbursement amount) back to the pharmacy, logs the payment information on its computer system, and transmits the billing information to the [health insurer]. The [health insurer] then remits payment to the PBM, which then pays the local pharmacy. This process, known as

131. *See* KAISER FAMILY FOUND., *supra* note 128, at 14 (outlining PBM services regarding pharmacy network and reduced reimbursement rates).

132. *Id.* at 15.

133. *Id.*

134. *Id.*

> claims adjudication, is handled electronically through the PBMs' sophisticated networks of databases.[135]

Furthermore, PBMs negotiate deeper volume discounts and rebates with manufacturers by pooling the prescription drug purchasing power of a substantial number of health-benefit providers.[136] This pooling not only provides PBMs' customers with savings on prescription drugs and other pharmaceutical products, but also gives PBMs "tremendous market power to demand concessions from the manufacturers."[137] As such, a variety of services offered by PBMs are designed to work to achieve market efficiencies and savings for health insurers, pharmacies, and consumers.[138]

Problematically, structural shortcomings of the pharmaceutical sector arise mainly from the fact that while each market entity has different price information, PBMs enjoy exclusive accessibility to full price information.[139] This is particularly because other market entities, including pharmaceutical companies, are completely locked in the far-reaching roles of PBMs; therefore, they are strongly incentivized to contract with PBMs for their services, simply with a view to avoid falling behind in robust competition with other rivals in the same market.[140] This pattern of behavior eventually makes PBMs privy to all the price information that remains undisclosed to the public.[141] As the flow of price information converges on PBMs, they can have an overwhelming ascendancy over other entities in the

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135. FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES 1–2 (2005) [hereinafter U.S. FED. TRADE COMM'N Rep. 2005], https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managers-ownership-mail-order-pharmacies-federal-trade-commission-report/050906pharmbenefitrpt_0.pdf; *see also* Complaint ¶ 28, Klein v. Prime Therapeutics, LLC, No. 0:17-cv-01884-PAM-HB (D. Minn. June 2, 2017) (describing the process, between a PBM and a pharmacy, that follows a plan member presenting a prescription).

136. Pharm. Care Mgmt. Ass'n v. Rowe, No. Civ. 03-153-B-H, 2005 WL 757608, at *1 (D. Me. Feb. 2, 2005).

137. Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 298 (1st Cir. 2005).

138. *In re* Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 434 (3d Cir. 2009).

139. *Cf.* Visante, *supra* note 126, at 4 (explaining that PBMs negotiate drug prices with drug manufacturers and retail pharmacies, providing PBMs with full price information on drugs).

140. *Cf. id.* (demonstrating that PBMs create market incentives by providing specific drugs to health benefit providers by negotiating deals with drug manufacturers and pharmacies).

141. *See id.* (demonstrating that PBMs negotiate drug prices with every level of the pharmaceutical industry, providing PBMs with exclusive information on drug prices).

course of negotiation of rebates, discounts, and reimbursements.[142] Thus, the asymmetry of price information allows PBMs to hold significant bargaining power, which, in turn, incentivizes other market players to elect to buy PBMs off in order to exploit their market dominant position, and thereby outrival competitors or gain supra-competitive profits in the market.[143]

Consequently, this concentrated market structure gives PBMs market power whereby they can exert constant, substantial control over the price and business relations between market entities in the supply chain.[144] Therefore, PBMs have been in the cross-hairs of antitrust lawsuits alleging that their practices restrain competition in violation of federal antitrust law.[145] Those practices take various forms such as: unilateral conduct by a single PBM, horizontal collusion between multiple PBMs, or collusion between PBMs and other entities—especially pharmaceutical companies and health insurers.[146] However, as discussed below, given that the market power of PBMs is overreaching enough to influence retail pharmacies, the purview of the plausible antitrust allegations can be broadened to include a conspiracy between PBMs and pharmacies.[147] Indeed, in their roles as intermediaries, PBMs can have the opportunity and ability to engage in activities that may align their interest with those of other market players.[148]

In short, an increasingly concentrated market where pharmaceutical transactions and distribution processes center around PBMs and lack of transparency leading to the asymmetry of

142. *See id.* at 13 (explaining that PBMs can negotiate significant discounts and rebates with drug manufacturers).

143. *Cf.* Pharm. Care Mgmt. Ass'n. v. Rowe, 429 F.3d 294, 298 (1st Cir. 2005) (describing methods whereby drug manufacturers buy PBMs off to substitute a more expensive brand drug for a cheaper generic drug or to withhold discounts given by drug manufacturers to the health benefit provider).

144. *See id.* at 298 (demonstrating that PBMs have the power to negotiate for the financial benefit of health care providers or drug manufacturers).

145. *See* OECD Competition Comm., *supra* note 124, ¶ 21 (demonstrating that the FTC regularly investigates PBMs for antitrust violations).

146. *See generally id.* ¶ 23 (demonstrating that the FTC investigates claims of horizontal collusion).

147. Steve Pociask, *Pharmacy Benefit Managers: Market Power and Lack of* Transparency, AM. CONSUMER INST. 1, 2 http://www.theamericanconsumer.org/wp-content/uploads/2017/03/ACI-PBM-CG-Final.pdf (last visited Nov. 25, 2018).

148. *See Rowe*, 429 F.3d at 298 (demonstrating how the intermediary role of PBMs includes aligning their interests with those of other market players by negotiating drug prices between drug manufacturers and health benefit providers).

information (*i.e.*, market failure) has allowed PBMs to become price-makers and hold market power.[149] Thus, PBMs privy to better price and cost information have leverage in dealing with other players and exercise substantial bargaining power.[150] In particular, it seems clear that a myriad of generic collusion alleged in ongoing, multistate generic-pricing litigation are likely furthered by the proactive functioning of PBMs.[151] Hence, it follows that but for PBMs engaging in overarching generic conspiracy, generic manufacturers cannot succeed in anticompetitive horizontal conspiracy schemes to fix prices and allocate markets for certain generic drugs or to thereby gain supra-competitive profits.[152]

While the functioning of PBMs in relation to generic collusion is overall far-reaching and determinative, the key driving force behind likely engagements of PBMs in anticompetitive practices is opaque manufacturer rebates and pharmacy reimbursement schemes.[153] PBMs can negotiate with generic manufacturers to extract steep rebates or various forms of kickbacks in return for providing better formulary placement or raising the market share of that manufacturer's drug to the negotiated level.[154] Manufacturer rebates are *typically* not available for generic drugs since pharmacies can dispense either a brand drug or generic when a generic version of the prescribed brand drug is available and therefore, manufacturer rebates passed by PBMs on to pharmacies cannot serve as an effective inducement to influence retail pharmacies to dispense generics.[155] This may be generally right, but cannot always be the

149. Pociask, *supra* note 147, at 2, 5; David Dayen, *The Hidden Monopolies that Raise Drug Prices: How Pharmacy Benefit Managers Morphed from Processors to Predators*, AM. PROSPECT (Mar. 28, 2017), http://prospect.org/article/hidden-monopolies-raise-drug-prices.

150. Pociask, *supra* note 147, at 6.

151. *Id.* at 6–7.

152. *See* CONG. BUDGET OFFICE, PUB. NO. 4043, EFFECTS OF USING GENERIC DRUGS ON MEDICARE'S PRESCRIPTION DRUG SPENDING 7 (2010), https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/reports/09-15-prescriptiondrugs.pdf (examining the market dynamics of generic drugs and the financial incentives for plans utilizing them).

153. *See id.* at 5–6 (examining the original design of PBM services, noting the negotiation of rebate pricing, price fixing, and user access to medicines).

154. *See, e.g.*, *id.* at 6 ("Pharmacies may be willing to accept lower payments per prescription in exchange for the greater volume of sales that can result from being part of a plan's pharmacy network.").

155. A recent study of the U.S. Congressional Budget Office (CBO) states that rebates are generally not prone to be granted for multiple-source brand drugs and generic drugs. *Id.*; *see also* U.S. FED. TRADE COMM'N Rep. 2005, *supra* note 135, at 56 (noting that drug manufacturers paid PBMs to administer formularies including their drugs); HEALTH CARE FIN. ADMIN., STUDY OF PHARMACEUTICAL

case. In practice, pharmacies may still be incentivized to favor the particular generic drug in return for higher reimbursements for ingredient costs and dispensing fees, which results from rebates or purchase discounts offered by a generic manufacturer of that drug.[156]

In fact, the bona fide roles of PBMs have been generally understood as utilizing some of those rebates and reimbursements to reduce costs of health plan providers (health insurers), retail pharmacies, and consumers.[157] In 2017, the Pennsylvania District Court in *In re Pharmacy Benefit Managers Antitrust Litigation* confirmed the prior opinion of the Illinois District Court that proper "PBM administration of prescription drug benefit programs achieves a number of [market] efficiencies" and cost savings.[158] However, the exact amount of rebates and reimbursements is not publicly disclosed, but rather has been settled through under-the-table negotiations between PBMs and drug manufacturers.[159] Hence, recent antitrust concerns contend that anomalously large rebates and reimbursements paid by pharmaceutical companies serve as circumstantial or economic evidence that demonstrate the collusive ties between those companies and PBMs.

As such, the structural framework for the pharmaceutical supply process allows PBMs to abuse their market dominant positions and pharmaceutical companies to exploit the pivotal role of PBMs for anticompetitive purposes.[160] These structural shortcomings harm consumer welfare by hindering consumers from enjoying full access to essential medicines.[161] The regulatory mandate calling upon pharmaceutical companies and PBMs to abide by the baseline

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BENEFIT MANAGEMENT 9 (2001), https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Reports/downloads/cms_2001_4.pdf; JACK HOADLEY, KAISER FAMILY FOUND., COST CONTAINMENT STRATEGIES FOR PRESCRIPTION DRUGS: ASSESSING THE EVIDENCE IN THE LITERATURE 84 (2005), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/cost-containment-strategies-for-precription-drugs-assessing-the-evidence-in-the-literature-report.pdf.

156. *Cf.* KAISER FAMILY FOUND., *supra* note 128, at 17 (listing types of discounts and rebates commonly used by generic pharmaceutical manufacturers).

157. *Id.* at 14 (emphasizing that PBMs work with public health programs to reduce "the amounts that the pharmacy will receive and the consumer must pay out-of-pocket. . . ").

158. Memorandum, *supra* note 130.

159. *Id.* at 6.

160. *Id.* at 7.

161. Hunt Rep. 2008, *supra* note 58, ¶¶ 23, 33.

corporate obligation to respect the right to access to medicines might contribute to the correction of market distortion.[162]

However, it should be noted that the source of monopoly power held by PBMs in the market is exclusive accessibility to price information, which results from structural imperfections such as lack of transparency, facilitating the asymmetry.[163] Hence, this case is out of line with the situation where corporate practices such as pay-for-delay settlements play an important role in the infringement of the right to access to medicines.[164] Seeking corporate responsibility may not be an effective remedy against structural shortcomings.[165] Rather, the structural remedy mandating the reduced role of PBMs or strengthening market transparency is likely to be more effective and have functional superiority over the behavioral remedy.[166]

CONCLUSION

The quintessence of Ruggie's *Protect, Respect and Remedy* framework connotes that non-state actors play a crucial, central role in facilitating humankind's access to fundamental human rights.[167] However, a close look at the relevant market signals that, in reality, business practices of for-profit corporations have often put the promotion of human rights at stake rather than mobilize support for universal principles.[168]

While access to medicines is crucial and imperative to the human enjoyment of sustainable health and life, corporate practices and structural shortcomings in the pharmaceutical industry increasingly drive derogation from this fundamental right.[169] Actual or potential concerns over pharmaceutical companies infringement of the right to access to medicines capture that profit-maximizing business activities often tend to fall short of their baseline corporate responsibility to

162. Ruggie Rep. 2008, *supra* note 43, ¶¶ 2–3, 29–30, 55.

163. Complaint, *supra* note 135, ¶ 47.

164. *See supra* Part II.B.1 (discussing pharmaceutical behavioral shortcomings mainly resulting from pay-for-delay dispute settlements).

165. *See, e.g.*, Complaint, *supra* note 135, ¶ 73 (noting the shortcomings of corporate decisions).

166. *See supra* Part II.B.2 (analyzing the structural shortcomings of the pharmaceutical industry and the benefits of increased market transparency).

167. DELAET, *supra* note 30, at 206.

168. *Id.* at 114.

169. *See supra* Part II.B.2 (discussing corporate practices and structural shortcomings in the pharmaceutical industry, which have impeded the fundamental right of sustainable health).

respect human rights as patently laid down in the Ruggie Principles.[170] For example, a pay-for-delay settlement that constitutes an antitrust violation indicates that parties to such a settlement, a brand-name drug manufacturer and a generic manufacturer, have fallen afoul of the fundamental human rights responsibility in relation to access to medicines in terms of availability, accessibility, acceptability, quality, transparency, and monitoring and accountability as set out in the Hunt Guidelines.[171] Additionally, the brand-name manufacturer holding the patent on an innovative medicine is subject to additional responsibilities as the manufacturer is deemed to have performed the public function of promoting the public health.[172] As such, reading the Hunt Guidelines in light of the Ruggie Principles provides significant insight into the human rights mandate to regulate corporate violations of the right to access to medicines through their business activities. Notably, a close look at cases where human rights law and competition law interact closely with each other in the pharmaceutical sector implies that corporate anticompetitive practices, like pay-for-delay settlements, incur concurrent, serious harm to the right to access to medicines and consumer welfare.[173] Hence, the human rights mandate to call upon pharmaceutical companies to live up to baseline and additional corporate obligations serves as an effective behavioral remedy conducive to the promotion of consumer welfare in the context of competition law.[174]

A coherent and coterminous policy suggestion arising from the interface between Ruggie Principles and Hunt Guidelines is that pharmaceutical companies have accountability to guarantee the public fair and full access to medicines. Recourse to voluntary or compulsory fulfillment of corporate responsibilities may clearly carry weight in global efforts to regulate corporate practices against the

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170. *See supra* notes 47–51 and accompanying text (emphasizing that corporations may have responsibilities beyond the baseline responsibility of respect).

171. Hunt Rep. 2008, *supra* note 58, annex.

172. Hunt Rep. 2009, *supra* note 61, ¶ 35.

173. *See supra* notes 105–07 and accompanying text (emphasizing that in the pharmaceutical sector where human rights and competition law intersect, there is an implication that corporate anticompetitive practices cause harm).

174. *See supra* notes 43–56 and accompanying text (discussing how John Ruggie's characterization of corporate baseline responsibilities to respect human rights has developed into a global standard).

right to access to medicines.[175] The preventive arm of the behavioral remedy aims to ensure sound compliance policies by setting parameters for corporate business judgments and decision making processes.[176] The corrective arm of the behavioral remedy ensures that corporate violations of human rights norms are adequately and timely sanctioned and that corporations adopt an appropriate policy response to correct such violations.[177]

However, corporate responsibility recourse as a behavioral remedy may have limited function where an impediment to access to medicines results from structural shortcomings of the pharmaceutical sector.[178] One of the main structural drawbacks is attributed to the pivotal and far-reaching role of PBMs, which is strongly vulnerable to arbitrary exploitation by pharmaceutical companies with support of PBMs for anticompetitive purposes.[179] PBMs are in a position to abuse their market dominance; therefore, pharmaceutical companies are strongly incentivized to buy off PBMs' market power for supra-competitive profits at the cost of consumers.[180] Hence, the pharmaceutical supply process concentrating on PBMs induces structural manipulation by market entities, which harms the right to access to medicines and consumer welfare.[181]

Where structural shortcomings serve as a determinative barrier to access to medicines and consumer welfare, corporate practices may carry less weight than where they play a critical role in impacting human rights and causing consumer harm.[182] An effective means in this case is likely to be the structural remedy that entails a complete overhaul of the regulatory and institutional frameworks of the

175. *See supra* Part II.A (hypothesizing that corporate responsibilities may improve the right to access medicine).

176. *See supra* notes 53–56 and accompanying text (summarizing how the HRC's policies ensure companies will not engage in human rights abuses).

177. *See supra* notes 53–56 and accompanying text (noting that guiding principles redress corporate violations of human rights).

178. *See supra* notes 160–66 and accompanying text (discussing how corporate behavior and structural drawbacks can hinder one's access to health care).

179. *See supra* Part II.B.2 (positing that a main structural drawback is the role of PBMs who are vulnerable to pharmaceutical companies).

180. *See supra* Part II.B.2 (explaining that PBMs are able to abuse their position in the market because of the structural shortcomings of the lack of transparency regarding drug prices).

181. *See supra* Part II.B.2 (discussing how consumer welfare is impeded by pharmaceutical companies who are engaged in conspiracies and manipulation tactics).

182. *See supra* Part II.B (discussing corporate human rights responsibilities for protecting consumer welfare).

pharmaceutical sector.[183] Effective structural remedies for the establishment of the desirable pharmaceutical supply process may include structural reforms to secure market transparency. Thereby solving the problem of asymmetry of price information, curtailing the scope of the extensive intermediary role and function of PBMs, and establishing the due process and appropriate mechanisms to hold PBMs in check.

183. *See supra* Part II.B (noting the benefits of a regulatory and institutional overhaul).

AMERICA'S BIG LEAGUE NATIONAL MONUMENTS: CAN PRESIDENT TRUMP MAKE THEM SMALLER?

> "If any administration thinks they're going to start divesting us of a hundred-year history of lands that belong to every American, they're going to have to do it over my dead body."
>
> *- Sen. Martin Heinrich.*[1]

1. Andy Stiny, *Trump Urged to Abolish National Monuments, Including 2 in NM*, ALBUQUERQUE J. (Nov. 25, 2016), https://www.abqjournal.com/895610/trump-urged-to-abolish-national-monuments.html.

INTRODUCTION

In 1906, Congress passed the Antiquities Act,[2] which gave the President broad authority to designate national monuments containing objects of historic or scientific interest.[3] In 1943, acting pursuant to his authority under the Antiquities Act, President Franklin Delano Roosevelt (FDR) withdrew over 200,000 acres from the public domain to establish the Jackson Hole National Monument.[4] At the time, many criticized FDR's action. Wyoming Senator Edward Robertson referred to the Monument as a "foul, sneaking Pearl Harbor blow."[5] Armed local ranchers protested the Monument designation.[6] Local leaders claimed the Monument would "forever debar home seekers and investors" and "impoverish [the] ranges."[7] The State of Wyoming claimed the designation was unconstitutional,

2. National Monuments, 54 U.S.C. § 320301 (Supp. III 2016).

3. Mark Udall, *Scaling New Heights or Retreating From Progress: How Will the Environment Fare Under the Administration of President George W. Bush?*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 12, 15 (2001).

4. Proclamation No. 2578, 3 C.F.R. 327 (1943); Hal Rothman, *America's National Monuments: The Politics of Preservation*, NAT'L PARK SERV., https://www.nps.gov/parkhistory/online_books/rothman/ (last visited Nov. 25, 2018).

5. Erik Molvar, *What Utah and Trump Can Learn from Wyoming About the Value of National Monuments*, DESERT NEWS (May 22, 2017), https://www.deseretnews.com/article/865680497/Op-ed-What-Utah-and-Trump-can-learn-from-Wyoming-about-the-value-of-national-monuments.html.

6. Hal Rothman, *Showdown at Jackson Hole: A Monumental Backlash Against the Antiquities Act*, *in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 81, 83 (David Harmon et al. eds., 2006).

7. Molvar, *supra* note 5.

challenging it in federal court.[8] Congress even passed a bill to abolish the Monument.[9] Both of these efforts failed: FDR vetoed the bill[10] and a district court upheld the designation.[11]

A little over 20 years later, public opinion had changed drastically.[12] Congress picked up where FDR left off and turned Jackson Hole into a National Park.[13] In 1967, Senator Cliff Hanson—who previously testified against the Monument[14]—acknowledged, "I'm glad I lost, because I now know I was wrong. Grand Teton National Park is one of the greatest natural heritages of Wyoming and the nation and one of our great assets."[15] A poll released in January 2018 found that 95% of Wyoming residents thought that national monuments were "important places to be conserved for future generations" and 88% believed they contribute to "the economy of nearby communities."[16]

President Donald J. Trump is continuing the controversial legacy of the Antiquities Act for a very different reason. Instead of using the Antiquities Act to designate national monuments, President Trump is attempting to use it to significantly *reduce* them.[17] On December 4, 2017, standing on the steps of the Utah State Capitol building, President Trump proclaimed that

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8. Wyoming v. Franke, 58 F. Supp. 890, 893 (D. Wyo. 1945).

9. George Wuerthner, *Some People Have Always Hated National Monuments—Until They Love Them*, SIERRA (May 4, 2017), http://www.sierraclub.org/sierra/some-people-have-always-hated-national-monuments-until-they-love-them; Lisa Raffensperger, *The Highs and Lows of the Antiquities Act*, NAT'L PUB. RADIO (May 23, 2008), http://www.npr.org/templates/story/story.php?storyId=90631198.

10. Molvar, *supra* note 5.

11. *Franke*, 58 F. Supp. at 897.

12. *See infra* text accompanying notes 14–16 (discussing Senator Cliff Hanson and Wyoming residents' change of opinion).

13. Act of Sept. 14, 1950, Pub. L. No. 787, 64 Stat. 849, 849. Technically, re-designating a national monument as a national park involves abolishing the monument. *E.g.*, Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241, 1241 ("[T]he Mount Olympus National Monument . . . is hereby abolished, and the tracts of land . . . are hereby reserved and withdrawn from settlement, . . . and dedicated and set apart as a public park . . . known as the Olympic National Park."); Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1356 (2002) (discussing the technical abolition of monuments when establishing a national park). However, because a national park designation provides further protection under federal law, it affirms a president's former monument designation. 54 U.S.C. § 100101 (Supp. II 2015) (describing national parks as areas containing "superlative natural, historic, and recreation" qualities); Klein, *supra*.

14. Molvar, *supra* note 5.

15. *Id.*

16. Arno Rosenfeld, *Poll: Wyoming Voters Still Support Trump but Disagree with Many of His Environmental Policies*, CASPER STAR TRIB. (Jan. 25, 2018), http://trib.com/news/state-and-regional/govt-and-politics/poll-wyoming-voters-still-support-trump-but-disagree-with-many/article_aedc68e4-2c5f-56ae-8a85-96152ce39803.html.

17. Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html.

"past administrations have severely abused the purpose, spirit, and intent of . . . the Antiquities Act."[18] To remedy this overreach, President Trump announced he intended to significantly reduce Grand Staircase-Escalante and Bears Ears National Monuments.[19] In one day, President Trump eliminated almost four times the amount of land that all presidents before him had eliminated from national monuments in the 100-year history of the Antiquities Act.[20] The clothing retailer Patagonia immediately proclaimed on its website that "The President Stole Your Land" and filed suit a few days later.[21] Democratic Senator Tom Carper of Delaware also criticized the decision, exclaiming that "[p]rotecting these lands for the enjoyment and education of future generations was truly one of our country's best ideas, and President Trump's short-sighted decision threatens that bipartisan legacy."[22] Similarly, Tom Udall, Senator from New Mexico, called President Trump's action "the largest attack on public lands . . . we have ever seen."[23]

While President Trump believes he has the authority to reduce national monuments,[24] many disagree: several groups, in addition to Patagonia, have

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18. Remarks by President Trump on Antiquities Act Designations (Dec. 4, 2017), https://www.whitehouse.gov/the-press-office/2017/12/04/remarks-president-trump-antiquities-act-designations.

19. Turkewitz, *supra* note 17.

20. Andy Kerr estimates that previous presidents have removed approximately 462,573 acres from national monuments over the past 100 years. Andy Kerr, *Precedent for Secretary Zinke's Gut-Job on the National Monuments*, ANDY KERR'S PUB. LANDS BLOG (Sept. 22, 2017), http://www.andykerr.net/kerr-public-lands-blog/2017/9/22/precedent-for-secretary-zinkes-gut-job-on-the-national-monuments/. But in one day, President Trump removed almost 2 million acres. Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,085 (Dec. 4, 2017) [hereinafter Proclamation Modifying Bears Ears National Monument] (reducing Bears Ears by 1,150,860 acres); Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017) [hereinafter Proclamation Modifying Grand Staircase-Escalante National Monument] (reducing Grand Staircase by 861,974 acres).

21. Maya Oppenheim, *Donald Trump Faces Lawsuit From Clothing Brand Patagonia Over National Monument Rollback*, INDEPENDENT (Dec. 5, 2017), http://www.independent.co.uk/news/world/americasdonald-trump-patagonia-lawsuit-national-monuments-outdoor-brand-utah-federal-land-protection-a8092606.html.

22. Press Release, Sen. Carper (D-Del.), U.S. SENATE COMM. ON ENV'T AND PUB. WORKS, Carper Statement on President Trump's Unprecedented Move to Strip Protections from Existing National Monuments (Dec. 4, 2017), https://www.epw.senate.gov/public/index.cfm/2017/12/carper-statement-on-president-trump-s-unprecedented-move-to-strip-protections-from-existing-national-monuments.

23. Katy Steinmetz, *Donald Trump's Move to Shrink Two National Monuments Sets Stage for Battle Over 111-Year-Old Law*, TIME (Dec. 5, 2017), http://time.com/5047904/bears-ears-grand-staircase-trump-shrinks/.

24. *See* Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. at 58,085 ("I, Donald J. Trump, President of the United States of America, by the authority vested in me by [the Antiquities Act] hereby proclaim that the boundaries of the Bears Ears National Monument are hereby modified and reduced . . . .").

filed lawsuits challenging President Trump's proclamations.[25] The litigation they have started may outlast President Trump's time in the White House.[26] Although the Antiquities Act does not explicitly grant the President the authority to reduce national monuments, those challenging President Trump's actions face an undeniable reality: several presidents have reduced national monuments in the past.[27] The Trump Administration is undoubtedly going to rely on this historical practice to argue that the President has the authority to reduce national monuments.[28]

This Note discusses whether presidents can reduce national monuments based upon this historical practice. Part I outlines the various occasions that presidents have reduced national monuments.[29] Part II briefly summarizes existing scholarship on the Antiquities Act.[30] Part III introduces a framework for analyzing the President's authority to reduce national monuments.[31] Part IV provides two reasons why the past practice of presidents reducing national monuments may be irrelevant.[32] Lastly, Part V argues that even if a court considers this past practice, most of this history does not support the claim that presidents can significantly reduce national monuments established by their predecessors.[33]

I. BACKGROUND

On June 8, 1906—after more than a decade of debate in Congress[34]—President Theodore Roosevelt signed the Antiquities Act into law.[35] Soon

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25. Oppenheim, *supra* note 21.

26. President Bill Clinton's designation of Grand Staircase-Escalante National Monument sparked a series of lawsuits. Tulare County, one of the counties inside of Grand Staircase, filed a complaint against President Clinton in early 2000. Tulare County v. Bush, 306 F.3d 1138, 1138 (D.C. Cir. 2002). The district court dismissed their case and the Court of Appeals for the District of Columbia affirmed. *Id.* By the time the Supreme Court denied *certiorari* in October 2003, almost three full years had passed. *Id.* at 1139, *cert. denied*, 540 U.S. 813 (2003).

27. *See infra* Part I (discussing the previous instances that presidents have reduced national monuments).

28. *See infra* Part I.S (discussing Secretary Zinke's Final National Monument Report where he concludes that President Trump has the authority to reduce national monuments because several presidents have reduced monuments in the past).

29. *See infra* Part I (discussing past president reductions of national monuments).

30. *See infra* Part II (providing an overview of existing scholarship on the Antiquities Act).

31. *See infra* Part III (discussing framework for analyzing presidential power).

32. *See infra* Part IV (discussing why the past practice of presidents reducing national monuments may be irrelevant).

33. *See infra* Part V (alternatively arguing that past practice does not provide the President with the authority to significantly reduce national monuments).

34. Ronald F. Lee, *The Origins of the Antiquities Act*, *in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORY PRESERVATION, AND NATURE CONSERVATION 15, 27–33 (David Harmon et al. eds., 2006).

thereafter, President Roosevelt designated Devil's Tower in eastern Wyoming as the nation's first national monument.[36] Throughout his presidency, President Roosevelt designated now iconic areas, such as the Grand Canyon, Muir Woods, and Mount Olympus, as national monuments.[37] As the first President to use the Antiquities Act, President Roosevelt set important precedents for how later presidents would use the law.[38]

Following in Roosevelt's footsteps, over the last 100 years, 15 presidents from both parties have used the Antiquities Act to designate 140 national monuments across the U.S.[39] The Antiquities Act has collectively protected more than 70 million acres—or 10% of all federal land—and about half of all national parks started as national monuments.[40] Many writers and scholars have documented this history well.[41] What is less well known and documented, however, is that several presidents have modified national monuments in a variety of settings. Each of these modifications is discussed below.

A. Petrified Forest National Monument

Throughout the 19th Century, the prehistoric petrified forests in Arizona were vandalized.[42] The General Land Office (GLO)—the precursor to the Bureau of Land Management—received reports that thieves were

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35. HAL ROTHMAN, PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS 48 (1989) [hereinafter ROTHMAN, PRESERVING].

36. *Id.* at 55.

37. *Id.* at 69.

38. *Id.* at 55–71.

39. *Monuments Protected Under the Antiquities Act*, NAT'L PARKS CONSERVATION ASS'N (Jan. 13, 2017), https://www.npca.org/resources/2658-monuments-protected-under-the-antiquitiesact. Richard Nixon, Ronald Reagan, and George H.W. Bush were the only presidents that did not use the Antiquities Act. *National Monuments Designated by Presidents 1906-2009*, NAT'L PARK SERV., https://www.nps.gov/parkhistory/hisnps/NPSHistory/national_monuments.pdf (last visited Nov. 25, 2018).

40. CAROL HARDY VINCENT & PAMELA BALDWIN, CONG. RESEARCH SERV., RL 30528, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: RECENT DESIGNATIONS AND ISSUES 3, 4 (2001).

41. *See generally* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 475 (2003) [hereinafter Squillace, *Monumental*] ("This Article explores the Antiquities Act and its long and remarkable legacy."); David Harmon et al., *Introduction* to THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 1, 7 (David Harmon et al. eds., 2006) ("While the creation of the national monuments occupies center stage [of this book], we also have made a conscious effort to highlight the Act's other contributions to archaeology, conservation, and historic preservation."); ROTHMAN, PRESERVING, *supra* note 35, at xi ("This is the story of the American national monuments and the way in which they became an important part of the American preservation movement.").

42. ROTHMAN, PRESERVING, *supra* note 35, at 57.

using dynamite to break up and haul away the petrified trees.[43] While Congress considered designating the petrified forests as a national park, the GLO temporarily protected several thousand acres of the forests.[44] But Congress never voted on the proposal.[45]

In response to this congressional inaction, on December 8, 1906—only a few months after the passage of the Antiquities Act—Theodore Roosevelt designated Petrified Forest as a national monument.[46] President Roosevelt identified the Petrified Forest as an area of great scientific interest and determined that it would be in the public good to protect the forest as part of a national monument.[47] Several years later, President William Howard Taft reduced the size of Petrified Forest National Monument by over 25,000 acres, or about half of the Monument.[48] In his reducing proclamation, President Taft explained that a geologic survey identified that the original proclamation reserved a much larger area of land than was necessary "to protect the objects for which the Monument was created."[49] Between 1930 and 1932, President Herbert Hoover enlarged the Monument on three occasions, collectively adding more than 60,000 acres.[50] On each occasion, President Hoover simply claimed that it would be in the public interest to add lands to the Monument.[51]

In 1930, Congress also authorized the Secretary of the Interior to acquire private land inside the Monument.[52] Almost thirty years later,

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43. *Id.*

44. *Id.*

45. *Id.* at 57–58.

46. Proclamation No. 697, 34 Stat. 3266 (1906) [hereinafter Proclamation Establishing Petrified Forest National Monument]; President Theodore Roosevelt, Sixth Annual Message to the Senate and House of Representatives (Dec. 3, 1906) (transcript available in the Collection of Messages and Papers of the Presidents, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/sixth-annual-message-4).

47. *Monument Profiles: Petrified Forest National Park, Arizona*, NAT'L PARK SERV., https://www.nps.gov/archeology/sites/antiquities/profilePetrified.htm (last visited Nov. 25, 2018) [hereinafter Monument Profiles: Petrified Forest National Park].

48. *Antiquities Act 1906-2006 Maps, Facts, & Figures*, NAT'L PARK SERV., https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm (last visited Nov. 25, 2018) [hereinafter *Antiquities Act*, NAT'L PARK SERV.] (indicating that President Taft reduced the Monument by 40.04 square miles, which is equivalent to 25,625 acres).

49. Proclamation No. 62, 37 Stat. 1716 (1911) [hereinafter Proclamation Reducing Petrified Forest National Monument].

50. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

51. HERBERT HOOVER: PROCLAMATIONS AND EXECUTIVE ORDERS, MARCH 4, 1929 TO MARCH 4, 1933, at 87, 171, 235 (1974), https://babel.hathitrust.org/cgi/pt?id=uiug.30112005184806;view=1up;seq=179 ("[I]t appears that the public interest would be promoted by adding to the Petrified Forest National Monument . . . .").

52. Act of May 14, 1930, Pub. L. No. 215, 46 Stat. 278.

Congress designated the Petrified Forest as a national park.[53] Soon after, Congress designated over 50,000 acres within the National Park as a wilderness area.[54] Finally, in 2004, President George W. Bush signed a bill authorizing the Secretary of the Interior to increase the size of the Park[55] from 93,533 to 218,533 acres.[56]

B. Navajo National Monument

On March 20, 1909, President Taft established the Navajo National Monument[57] on the Navajo reservation in northeastern Arizona.[58] President Taft found that the prehistoric cliff dwellings and pueblo ruins in the Monument were of the "greatest ethnological, scientific and educational interest."[59] Three years later, however, President Taft issued a proclamation[60] *clarifying* the boundaries of the Monument, reducing it to 360 acres.[61] In his proclamation—similar to his proclamation reducing the Petrified Forest National Monument[62]—President Taft concluded that "after

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53. Act of Mar. 28, 1958, Pub. L. No. 85-358, 72 Stat. 69.

54. Act of Oct. 23, 1970, Pub. L. No. 91-504, 84 Stat. 1104, 1106. Congress passed the Wilderness Act in 1964 to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness." National Wilderness Preservation System, 16 U.S.C. § 1131(a) (1964). The Act allows Congress to designate areas as "wilderness" to ensure that they will remain "unimpaired for future use and enjoyment." *Id.* The Act identifies the criteria for what makes an area wilderness, which includes, among other things, that an area "contain ecological, geological, or other features of scientific, educational, scenic or historical value." *Id.* § 1131(c). This language is very similar to the Antiquities Act's requirement that monuments contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." National Monuments, 54 U.S.C. § 320301(a) (Supp. III 2016). Accordingly, when Congress designates lands within a national monument as wilderness, Congress affirms a president's monument designation. Klein, *supra* note 13, at 1361 (describing the similarities between the Wilderness Act and the Antiquities Act).

55. Petrified Forest National Park Expansion Act of 2004, Pub. L. 108-430, 118 Stat. 2606.

56. *Petrified Forest National Park Arizona: Brief Administrative History*, NAT'L PARK. SERV., https://www.nps.gov/pefo/planyourvisit/brief-administrative-history.htm (last updated Mar. 16, 2018) [hereinafter Petrified Forest National Park].

57. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

58. Char Miller, *Landmark Decision: The Antiquities Act, Big-Stick Conservation, and the Modern State*, *in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 64, 75 (David Harmon et al. eds., 2006).

59. Proclamation No. 873, 36 Stat. 2491 (1909).

60. Proclamation No. 1186, 37 Stat. 1733–34 (1912) [hereinafter Proclamation Reducing Navajo National Monument].

61. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

62. Proclamation Reducing Petrified Forest National Monument, 37 Stat. 1716 (1911) (concluding that the original proclamation reserved a much larger area of land than was necessary "to protect the objects for which the Monument was created").

careful examination and survey," the original designation reserved more land than was necessary to protect the objects in the Monument.[63]

C. Natural Bridges National Monument

In 1908, Theodore Roosevelt designated Utah's first monument:[64] the 120-acre Natural Bridges National Monument,[65] naming it after three water-carved stone bridges.[66] President Roosevelt claimed that the bridges were "of the greatest scientific interest" because they have "heights more lofty and spans far greater than any heretofore known to exist."[67] Apparently agreeing with Roosevelt's determination, President Taft expanded the Monument by more than 2,500 acres only a year later.[68] In 1916, President Woodrow Wilson updated the survey information describing the Monument's boundaries.[69]

Several decades later, President John F. Kennedy adjusted the boundaries of the Monument. On August 14, 1962, President Kennedy issued a proclamation identifying 320 acres in the Monument that he claimed no longer contained "features of archeological value" and were therefore not needed for the Monument's "proper care, management, protection, interpretation, and preservation."[70] But at the same time, President Kennedy added approximately 5,236 acres to the Monument, claiming it would be in the public interest to add the land, which contained "prehistoric Indian ruins and suitable space for construction of a visitor center."[71] As of 2017, the Monument had grown to 7,630 acres.[72]

D. Mount Olympus National Monument

Days before his final term came to a close, President Roosevelt designated Mount Olympus National Monument.[73] At over 600,000 acres,

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63. Proclamation Reducing Navajo National Monument, 37 Stat. at 1733–34.

64. *Natural Bridges National Monument Utah: Utah's First National Monument*, NAT'L PARK SERV., https://www.nps.gov/nabr/index.htm (last visited Nov. 25, 2018) [hereinafter *Natural Bridges, First*].

65. Proclamation No. 804, 35 Stat. 2183–84 (1908) [hereinafter Proclamation Establishing Natural Bridges National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

66. *Natural Bridges, First*, *supra* note 64.

67. Proclamation Establishing Natural Bridges National Monument, 35 Stat. at 2183.

68. Proclamation No. 881, 36 Stat. 2502 (1909); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

69. Proclamation No. 1323, 39 Stat. 1764 (1916).

70. Proclamation No. 3486, 3 C.F.R. 82, 82 (1962), *reprinted in* 76 Stat. 1495–97 (1963).

71. *Id.* at 1495–96.

72. Kerr, *supra* note 20, at 9.

73. Squillace, *Monumental*, *supra* note 41, at 492–93.

Mount Olympus was the second largest monument ever designated at that time.[74] Interpreting the Antiquities Act's "objects of . . . scientific interest" phrase broadly, Prestident Roosevelt identified glaciers and elk as objects of scientific interest.[75]

Following President Roosevelt's designation, several presidents both reduced and enlarged the Monument. First, President Taft reduced the Monument by 160 acres.[76] Then, three years later, President Wilson reduced the Monument by half.[77] Many have noted that President Wilson reduced the Monument to appease mining and logging companies that thought the Monument restricted access to large tracts of valuable land.[78] At the time, conservationists criticized President Wilson's reduction, calling it the "rape of 1915."[79] Following President Wilson's reduction, President Calvin Coolidge further reduced the Monument by 640 acres[80] so a dam could be built on the Elwha River.[81]

Less than ten years later, Congress designated Mount Olympus National Monument as a national park[82] and put most of the land that earlier presidents had removed from the Monument into the National Park.[83] In 1988, Congress designated 95% of Mount Olympus as a wilderness area.[84] As of 2016, the Park contained 922,000 acres.[85]

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74. ROTHMAN, PRESERVING, *supra* note 35, at 68. The largest national monument designated up to that point was the Grand Canyon National Monument. *See id.* (recognizing that when President Roosevelt designated Grand Canyon National Monument it was over 800,000 acres).

75. Proclamation No. 2247, 35 Stat. 2247 (1909) [hereinafter Proclamation Establishing Mount Olympus National Monument].

76. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

77. *Id.*

78. Squillace, *Monumental*, *supra* note 41, at 563.

79. *Id.* at 563–64.

80. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

81. James Rasband, *Stroke of the Pen, Law of the Land?*, 63 ROCKY MT. MIN. L. INST. 21-1, 21-21 (2017) [hereinafter Rasband, *Stroke*].

82. Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241.

83. Squillace, *Monumental*, *supra* note 41, at 564.

84. Washington Park Wilderness Act of 1998, Pub L. No. 100-668, 102 Stat. 3961–62; *Monument Profiles: Mount Olympus National Monument (now Olympic National Park), Washington*, NAT'L PARK SERV., https://www.nps.gov/archeology/sites/antiquities/profileOlympic.htm (last visited Nov. 25, 2018) [hereinafter *Monument Profiles: Mount Olympus*]. The National Park Service (NPS) is required to manage national parks to promote both recreation and conservation. Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 851, 862 (2009). Unfortunately, these two values can create "inherent conflicts." *Id.* Creating a wilderness designation inside a national park prioritizes conservation over recreation and creates an additional layer of legal protection for federal lands. *Id.* at 868.

85. *Monument Profiles: Mount Olympus*, *supra* note 84.

E. White Sands National Monument

The White Sands National Monument consists of a series of wave-like gypsum sand dunes located in New Mexico's Tularosa Basin.[86] In the early 1900s, prior to the Monument's designation, several attempts to commercially mine the sands failed due to the unprocessed gypsum's low market value.[87] In the 1920s, local residents began to advocate for the dunes' protection.[88] Tom Charles, a local resident and businessman—referred to as the "father" of White Sands—wrote several congressmen and National Park Service (NPS) officials asking them to designate the White Sands area as a national park.[89] Although Charles did not get the national park he had hoped for, in 1933, President Hoover designated 142,987 acres in New Mexico as White Sands National Monument.[90]

A year later, FDR increased the Monument by 158 acres.[91] In 1938, however, FDR removed 87 acres from the Monument that was on Route 70's right-of-way, claiming it would be in the public interest to exclude the land from the Monument.[92] Following this reduction, President Eisenhower enlarged the Monument by approximately 478 acres.[93] Congress revised the boundaries of the Monument in 1978, adding 320 acres and eliminating 760 acres.[94]

F. Wupatki National Monument

In 1924, President Coolidge established the Wupatki National Monument,[95] identifying approximately 2,234 acres of ancestral ruins outside of Flagstaff, Arizona, that were worthy of protection.[96] In 1937,

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86. *White Sands National Monument New Mexico: Like No Place Else on Earth*, NAT'L PARK SERV., https://www.nps.gov/whsa/index.htm (last visited Nov. 25, 2018).

87. *White Sands National Monument New Mexico: White Sands National Monument History*, NAT'L PARK SERV., https://www.nps.gov/whsa/learn/historyculture/white-sands-national-monument-history.htm (last updated Nov. 12, 2016).

88. *Id.*

89. *Id.*

90. *Id.*; Proclamation No. 2025, 47 Stat. 2551 (1933); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

91. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

92. Proclamation No. 2295, 3 C.F.R. 46, 46 (1938) [hereinafter Proclamation Reducing White Sands National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 4.

93. Proclamation No. 3024, 3 C.F.R. 33, 33 (1953), *reprinted in* 67 Stat. c53 (1953); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

94. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3475.

95. Proclamation No. 1721, 43 Stat. 1977 (1924).

96. *Id.*; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

FDR expanded the Monument by 33,631 acres.[97] But four years later, FDR reduced the Monument by 53 acres so a diversion dam, designed to facilitate irrigation on the neighboring Navajo Indian Reservation, could be built on the Little Colorado River.[98] In 2014, the Monument was 35,422 acres.[99]

G. Grand Canyon National Monument

In 1882, Senator Benjamin Harrison—concerned about development near the Grand Canyon—proposed turning the area into a national park.[100] Unfortunately, this original effort failed.[101] Senator Harrison overcame this legislative defeat when he became president by designating the area as a forest preserve under the now-repealed Forest Preserve Act of 1891, which allowed the President to set aside forest reserves from the public domain.[102] By 1908, President Roosevelt was concerned that the Grand Canyon's status as a forest preserve was insufficient to protect it from encroaching development.[103] In response to these concerns, President Roosevelt designated the Grand Canyon as a national monument.[104] At that time, the Monument was the largest ever designated, totaling over 800,000 acres.[105] President Roosevelt identified the entire Grand Canyon as an object of scientific interest.[106]

President Roosevelt's designation initiated a bitter feud with a local entrepreneur named Ralph Henry Cameron, who ultimately challenged President Roosevelt's authority to designate the Monument.[107] In what would be a prelude to later cases upholding presidential authority under the Antiquities Act, the District of Arizona, the Ninth Circuit, and the Supreme Court all held in a conclusory manner that President Roosevelt acted within

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97. Proclamation No. 2243, 3 C.F.R. 90, 90 (1937), *reprinted in* 50 Stat. 1841 (1937).

98. Proclamation No. 2454, 3 C.F.R. 52, 52 (1941) [hereinafter Proclamation Reducing Wupatki National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

99. Kerr, *supra* note 20, at 11.

100. ROTHMAN, PRESERVING, *supra* note 35, at 64.

101. *Id.*

102. *Id.*

103. *Id.* at 66–67.

104. *Id.* at 68.

105. Miller, *supra* note 58, at 72.

106. Proclamation No. 794, 35 Stat. 2175 (1908) [hereinafter Proclamation Establishing Grand Canyon National Monument] ("Whereas, the Grand Canyon of the Colorado River . . . is an object of unusual scientific interest, being the greatest eroded canyon within the United States . . . ."); Miller, *supra* note 58, at 72.

107. Squillace, *Monumental*, *supra* note 41, at 491–92.

his authority when he designated the Monument.[108] In 1919, Congress re-designated Grand Canyon National Monument as a national park.[109]

Several years after Congress designated Grand Canyon National Park,[110] President Hoover designated 270,000 acres on the west boundary of the Park as another national monument[111]—sometimes referred to as Grand Canyon National Monument II.[112] Like many other monuments, Grand Canyon II generated opposition from both ranchers and county officials.[113] Congress responded by trying to abolish the Monument.[114] To appease Congress and local ranchers, FDR reduced the Monument by 71,000 acres.[115] In his reducing proclamation, FDR claimed that the deleted lands were not necessary for the proper care and management of the Monument.[116] In 1975, Congress expanded Grand Canyon National Park in order to "further protect[] . . . the Grand Canyon in accordance with its true significance."[117] The 1975 Act incorporates the Grand Canyon National Monument II as defined by FDR in his reducing proclamation.[118]

H. Craters of the Moon National Monument

In 1924, President Coolidge established Craters of the Moon National Monument, identifying the area's "volcanic cones, craters, rifts, lava flows, caves, natural bridges, and other phenomena characteristic of volcanic action" as objects of unusual scientific value.[119] Four years later, President

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108. Cameron v. United States, 252 U.S. 450, 455–56 (1920) ("The act under which the President proceeded empowered him to establish reserves embracing 'objects of historic or scientific interest.' The Grand Canyon, as stated in his proclamation, 'is an object of unusual scientific interest.'"); Cameron v. United States, 250 F. 943, 946 (9th Cir. 1918) ("We think there is no merit in any of the contentions referred to, or in the argument made in support of them.").

109. Act of Feb. 26, 1919, Pub. L. No. 277, 40 Stat. 1175.

110. *Id.*

111. Proclamation No. 2022, 47 Stat. 2547–48 (1932) [hereinafter Proclamation Establishing Grand Canyon National Monument II]; Squillace, *Monumental*, *supra* note 41, at 564.

112. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

113. Squillace, *Monumental*, *supra* note 41, at 564.

114. *Id.*

115. Proclamation No. 2393, 3 C.F.R. 32, 32 (1940), *reprinted in* 54 Stat. 2692 (1941) [hereinafter Proclamation Reducing Grand Canyon National Monument II].

116. *Id.* ("[C]ertain lands within the Grand Canyon National Monument in the State of Arizona . . . are not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument . . . ." (citation omitted)).

117. Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975).

118. Jeff Ingram, *GCNP Boundary K: A Haunted Monument*, CELEBRATING THE GRAND CANYON (Sept. 16, 2010, 5:39 PM), http://gcfutures.blogspot.com/2010/09/gcnp-boundary-k-haunted-monument.html.

119. Proclamation No. 1694, 43 Stat. 1947–48 (1924).

Coolidge increased the Monument by 26,240 acres.[120] In 1930, President Hoover also added an undefined amount of land to the Monument.[121] But, in 1941, FDR reduced the Monument so that Idaho State Highway No. 22 could be built.[122]

Following FDR's reduction, several presidents and congressional acts significantly expanded the Monument. First, President Kennedy added an island surrounded by lava to the Monument, which increased it by about 5,360 acres.[123] In 1996, Congress adjusted the size of the Monument and authorized the Secretary of the Interior to acquire private lands and interests within the Monument.[124] In 1970, Congress designated part of the Monument as a wilderness area.[125] Thirty years later, President Clinton added over 410,000 acres to the Monument to "assure protection of the entire Great Rift volcanic zone and associated lava features."[126] Congress proceeded to designate most of President Clinton's expansion as a national preserve.[127] In 2017, the Idaho Senate passed a non-binding resolution asking Congress to designate Craters of the Moon as a national park.[128]

I. Santa Rosa Island National Monument

In 1939, FDR established the 9,500-acre Santa Rosa Island National Monument because the area contained "various objects of geological and scientific interest."[129] Six years later, however, President Harry Truman reduced the Monument by almost 5,000 acres, claiming that the land—

120. Proclamation No. 1843, 45 Stat. 2959 (1929); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48 (indicating that President Hoover increased the Monument by 41 square miles, which is equivalent to 26,240 acres).

121. Proclamation No. 1916, 46 Stat. 3029 (1930); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

122. Proclamation No. 2499, 3 C.F.R. 87, 87–88 (1941), *reprinted in* 55 Stat. 1660 (1942) [hereinafter Proclamation Reducing Craters of the Moon National Monument].

123. Proclamation No. 3506, 3 C.F.R. 104, 104–05 (1962), *reprinted in* 77 Stat. 960 (1964); *Craters of the Moon National Monument & Preserve Idaho: History and Culture*, NAT'L PARK SERV., https://www.nps.gov/crmo/learn/historyculture/index.htm (last updated Dec. 19, 2017).

124. *Id.*

125. Act of Oct. 23, 1970, Pub. L. No. 91-504, 84 Stat. 1104, 1105–06.

126. Proclamation No. 7373, 3 C.F.R. 194, 195 (2001), *reprinted in* 114 Stat. 3419 (2001); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

127. Act of Aug. 21, 2002, Pub. L. No. 107-213, 116 Stat. 1052. A national preserve closely resembles a national park. Steven C. Forrest, *Creating New Opportunities for Ecosystem Restoration on Public Lands: An Analysis of the Potential for Bureau of Land Management Lands*, 23 PUB. LAND & RES. L. REV. 21, 57 (2002). The only difference is that national preserves allow "hunting, trapping, and limited oil and gas" activity. *Id.*

128. S.J. Memorial 101, 64th Leg., 1st Reg. Sess. (Idaho 2017).

129. Proclamation No. 2337, 3 C.F.R. 32, 32–33 (1939) [hereinafter Proclamation Establishing Santa Rosa Island National Monument].

which the Army was using for military purposes—was not necessary for the administration of the Monument.[130] In 1971, Congress incorporated the Monument into the Gulf Islands National Seashore and specifically stated that, unless otherwise noted, the "Secretary shall administer the seashore in accordance with the [Antiquities Act]."[131]

J. Glacier Bay National Monument

In 1925, President Coolidge established Glacier Bay National Monument.[132] As a precursor to many of the large monuments created by later presidents, Glacier Bay was over a million acres in 1925.[133] In 1939, FDR enlarged the Monument by 904,000 acres.[134] In his proclamation increasing the Monument, FDR found that it would be in the public interest to add glaciers—which were already a part of the adjacent Tongass National Forest—to the Monument because of their geologic and scientific interest.[135]

With the advent of World War II, Lieutenant General John Dewitt ordered the construction of an army-shipping base on Excursion Inlet, which was within the boundaries of the Monument.[136] Several months later, the Army also began building an airfield inside the Monument near Point Gustavus.[137] Eventually, the Army withdrew its forces and gave the airfield to the Civil Aeronautics Administration, creating a long debate about whether to eliminate the airfield from the Monument.[138] The NPS initially recommended keeping the land in the Monument.[139] Several years after this recommendation, President Eisenhower eliminated the 29,000 acres containing the military airfield from the Monument.[140] At the same time,

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130. Proclamation No. 2659, 3 C.F.R. 35, 35 (1946) [hereinafter Proclamation Reducing Santa Rosa Island National Monument].

131. Act of Jan. 8, 1971, Pub. L. No. 91-669, 84 Stat. 1967, 1968.

132. Proclamation No. 1733, 43 Stat. 1988–89 (1925) [hereinafter Proclamation Establishing Glacier Bay National Monument].

133. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48 (indicating that the Monument was 1,820 square miles, which is equivalent to 1,164,800 acres).

134. Proclamation No. 2330, 3 C.F.R. 28, 28 (1939), *reprinted in* 53 Stat. 2534 (1939).

135. *Id.*

136. THEODORE CATTON, LAND REBORN: A HISTORY OF ADMINISTRATION AND VISITOR USE IN GLACIER BAY NATIONAL PARK AND PRESERVE CH. 5 (1995), https://www.nps.gov/parkhistory/online_books/glba/adhi/chap5.htm.

137. *Id.*

138. *Id.*

139. *Id.*

140. Proclamation No. 3089, 3 C.F.R. 24, 36 (1955) [hereinafter Proclamation Reducing Glacier Bay National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

President Eisenhower eliminated private land that he claimed was not necessary for the management of the Monument.[141]

In 1978, President Jimmy Carter—as part of a larger effort to conserve lands about to lose their federally protected status[142]—added 550,000 acres to the Monument,[143] bringing its total size to almost 2.5 million acres.[144] In response to President Carter's actions, and as part of broader legislation dealing with public lands and Alaska native lands and mineral rights,[145] Congress designated the area as a national park containing over 3 million acres.[146] Congress also designated an additional 58,000 acres adjacent to the National Park as a National Preserve.[147] Most of the land that President Eisenhower removed from the Monument is now firmly inside the boundaries of Glacier Bay National Park.[148]

K. Great Sand Dunes National Monument

At the end of his presidency, President Hoover designated 44,000 acres in southern Colorado as the Great Sand Dunes National Monument.[149] The Great Sand Dunes are the tallest sand dunes in North America.[150] In 1946, President Truman issued a proclamation "redefining" the Monument's boundaries based on the most recent geologic survey.[151] Several years later,

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141. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36.

142. In 1978, President Carter designated 56 million acres in Alaska as national monuments as part of an effort to protect federal lands that were about to lose federal protection under the Alaska Native Claims Settlement Act. For a full description of the controversy surrounding President Carter's actions see Cecil D. Andrus & John C. Freemuth, *President Carter's Coup: An Inside View of the 1978 Alaska Monument Designations*, *in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 93 (David Harmon et al. eds., 2006).

143. Proclamation No. 4618, 3 C.F.R. 84, 85 (1978), *reprinted in* 93 Stat. 1458 (1981).

144. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

145. Andrus & Freemuth, *supra* note 142, at 98–102.

146. *Id.*; Kerr, *supra* note 20, at 6.

147. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, 2382 (1980).

148. *See Glacier Bay National Park & Preserve Alaska: Maps*, NAT'L PARK SERV., https://www.nps.gov/glba/planyourvisit/maps.htm (last updated May 1, 2018) (depicting, on a map, Point Gustavus, the area President Eisenhower removed from Glacier Bay National Monument, within the boundaries of Glacier Bay National Park).

149. Proclamation No. 1993, 47 Stat. 2506–07 (1932) [hereinafter Proclamation Establishing Great Sand Dunes National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 7.

150. *Great Sand Dunes National Park & Preserve Colorado: Dunes Among Diversity*, NAT'L PARK SERV., https://www.nps.gov/grsa/index.htm (last updated Dec. 31, 2017).

151. Proclamation No. 2681, 3 C.F.R. 55, 55 (1946) [hereinafter Proclamation Updating Great Sand Dunes National Monument].

President Eisenhower reduced the Monument by about 20%,[152] claiming that the lands were no longer necessary for the Monument's purpose.[153]

Starting in 1976, however, Congress began protecting the area. First, Congress designated most of the Monument as wilderness[154] and then enlarged the Monument by 1,000 acres.[155] In 2000, Congress turned the Monument into a national park and a separate national preserve.[156] By 2014, the National Park contained 107,000 acres and the Preserve contained 41,000 acres.[157]

L. Hovenweep National Monument

In 1923, President Warren Harding established the 285-acre Hovenweep National Monument.[158] President Truman proceeded to enlarge the Monument by 80 acres, claiming that it would be in the public interest to add two prehistoric ruins to the Monument.[159] Following both of these proclamations, in 1956, President Eisenhower removed 40 acres from the Monument that he claimed did not contain objects of historical or archeological value.[160] President Eisenhower also claimed that President Harding "erroneously" included this land when he initially created the Monument.[161] In the same proclamation, President Eisenhower added an undefined amount of acreage to the Monument, which resulted in a slight gain in the Monument's size.[162] While the original Monument contained only 285 acres, by 2014, the Monument was over 700 acres.[163]

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152. Kerr, *supra* note 20, at 7.

153. Proclamation No. 3138, 3 C.F.R. 23, 23–24 (1956), *reprinted in* 70 Stat. c31–32 (1957) [hereinafter Proclamation Reducing Great Sand Dunes National Monument].

154. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

155. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3474.

156. Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, 114 Stat. 2527, 2529.

157. Kerr, *supra* note 20, at 7.

158. Proclamation No. 1654, 42 Stat. 2299–3000 (1923); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

159. Proclamation No. 2924, 3 C.F.R. 25, 25 (1951), *reprinted in* 65 Stat. c8 (1952); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

160. Proclamation No. 3132, 3 C.F.R. 70, 70 (1956), *reprinted in* 70 Stat. 26 (1957) [hereinafter Proclamation Reducing Hovenweep National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

161. Proclamation Reducing Hovenweep National Monument, 3 C.F.R. at 70; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

162. Proclamation Reducing Hovenweep National Monument, 3 C.F.R. at 70; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

163. Kerr, *supra* note 20, at 7–8.

M. Colorado National Monument

In 1911, President Wilson designated Colorado National Monument.[164] Fifty years later, President Eisenhower deleted 211 acres from the Monument, claiming, as some earlier presidents had, that the deleted lands were not necessary for the care and management of the Monument.[165] At the same time, President Eisenhower added 120 acres to the monument that were needed for "administrative purposes and for the proper care, management, and protection of the objects of scientific interest" in the Monument.[166]

N. Black Canyon of the Gunnison National Monument

In 1933, President Hoover designated the 10,000-acre Black Canyon of the Gunnison National Monument.[167] Several decades later, Congress authorized an exchange of federal and privately owned lands "to facilitate the administration of [the] monument."[168] In response to this Act, President Eisenhower reduced the Monument by 470 acres.[169] President Eisenhower claimed that because of the exchange, the 470 acres were no longer necessary for the management of the Monument.[170] After President Eisenhower's reduction, Congress designated more than 11,000 acres inside of Black Canyon of the Gunnison National Monument as a wilderness area.[171] Fifteen years later, Congress designated the Monument as a national park.[172] As part of the Black Canyon National Park designation, Congress also designated 57,000 acres adjacent to the Park as a national conservation area.[173]

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164. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

165. Proclamation No. 3307, 3 C.F.R. 56, 56 (1959), *reprinted in* 73 Stat. c69 (1959) [hereinafter Proclamation Reducing Colorado National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

166. Proclamation Reducing Colorado National Monument, 3 C.F.R. at 56.

167. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

168. Act of May 1, 1958, Pub. L. No. 85-391, 72 Stat. 102.

169. Proclamation No. 3344, 3 C.F.R. 23, 23 (1960), *reprinted in* 74 Stat. c56 (1960) [hereinafter Proclamation Reducing Black Canyon National Monument].

170. *Id.*

171. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.

172. Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, Pub. L. No. 106-76, 113 Stat. 1126–27.

173. *Id.* at 1129. A National Conservation Area (NCA) is another type of public land designation. E. Barrett Ristroph & Anwar Hussein, *Wilderness: Good for Alaska*, 4 WA. J. ENVTL. L. & POL'Y 424, 432 (2015). Unlike national parks, there are no uniform standards for establishing NCAs. Andy Kerr & Mark Salvo, *Bureau of Land Management National Conservation Areas: Legitimate Conservation or Satan's Spawn?*, 20 UCLA J. ENVTL. L. & POL'Y 67, 67 (2001–2002). Although there

O. Arches National Monument

In 1968, Edward Abbey, the famous wilderness writer, recounting on his time as a park ranger in Arches National Park, called Arches "the most beautiful place on earth."[174] Several decades earlier, President Hoover established Arches National Monument.[175] At the time, the Monument contained two pieces of land: the "Devils Garden" at 2,600 acres and the "Windows" at 1,920 acres.[176] In 1938, FDR expanded the Monument by 29,000 acres, claiming that certain lands contiguous to the Monument were "necessary for the proper care, management, and protection of the . . . monument."[177]

In 1960, President Eisenhower issued a proclamation "modifying" the Monument.[178] In this proclamation, President Eisenhower added about 480 acres to the Monument—which contained "outstanding geologic features of great scientific interest"—and eliminated about 720 acres—that were "used for grazing" and had "no known scenic or scientific value."[179] Several years later, President Lyndon B. Johnson enlarged the Monument by 48,000 acres.[180] Congress responded by incorporating the enlarged Monument into a national park.[181] By 2014, Arches National Park contained over 76,000 acres.[182]

P. Timpanogas Cave National Monument

President Harding established the 250-acre Monument in 1924.[183] In 1962, President Kennedy "redefine[d]" the Monument to more accurately

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are some similarities between NCAs, the exact level of protection depends upon the enacting legislation. Ristroph & Hussein, *supra*. Generally speaking, NCAs are less protective than a wilderness designation. Kerr & Salvo, *supra*, at 68.

174. EDWARD ABBEY, DESERT SOLITAIRE 1 (1968).

175. Proclamation No. 71, 46 Stat. 2988–89 (1929).

176. *Arches National Park Utah: Park Founders*, NAT'L PARK SERV., https://www.nps.gov/arch/learn/historyculture/founders.htm (last updated Aug. 15, 2017).

177. Proclamation No. 2312, 3 C.F.R. 38, 38 (Supp. 1938); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

178. Proclamation No. 3360, 3 C.F.R. 32, 32–33 (1960), *reprinted in* 74 Stat. c79 (1961) [hereinafter Proclamation Reducing Arches National Monument].

179. *Id.* at 32; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

180. Proclamation No. 3887, 3 C.F.R. 385, 385 (1969), *reprinted in* 83 Stat. 920 (1970); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

181. Act of Nov. 12, 1971, Pub. L. No. 92-155, 85 Stat. 422.

182. Kerr, *supra* note 20, at 4.

183. Proclamation No. 1640, 42 Stat. 2285 (1922); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

reflect the boundaries of the Monument based on the most recent geologic survey.[184]

Q. Bandelier National Monument

At the time of its designation, Bandelier National Monument was a 22,400-acre tract in New Mexico containing archaeological ruins.[185] Prior to its designation, more than 15 bills were introduced in Congress to designate the area as a national park.[186] But none of them passed.[187] As a result of this inaction, President Wilson designated the area as a monument.[188]

Several years later, President Hoover enlarged the Monument by 3,626 acres.[189] In 1961, President Eisenhower further enlarged the Monument by adding 3,600 acres of archeological ruins that the Atomic Energy Commission (AEC) had previously managed.[190] Just a year later, however, President Kennedy revised the boundaries of the Monument.[191] President Kennedy added 2,882 acres that the AEC also formerly administered.[192] At the same time, President Kennedy excluded other land from the Monument, resulting in a 1,000-acre reduction.[193] President Kennedy claimed that the excluded lands were not necessary to "complete the interpretive story" of the Monument because they contained limited archaeological value.[194] But in 1976, Congress enlarged the Monument by almost 4,000 acres and

184. Proclamation No. 3457, 3 C.F.R. 39, 39 (1962), *reprinted in* 76 Stat. 1457 (1963) [hereinafter Proclamation Updating Timpanogas Cave National Monument].

185. ROTHMAN, PRESERVING, *supra* note 35, at 143.

186. *Id.* at 145.

187. *Id.*

188. Proclamation No. 1322, 39 Stat. 1764 (1916) [hereinafter Proclamation Establishing Bandelier National Monument]; ROTHMAN, PRESERVING, *supra* note 35, at 145.

189. Proclamation No. 1990, 47 Stat. 2503–04 (1932); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

190. Proclamation No. 3388, 3 C.F.R. 21, 21–23 (Supp. 1961), *reprinted in* 75 Stat. 1014 (1961).

191. Proclamation No. 3539, 3 C.F.R. 62, 63–65 (1963), *reprinted in* 77 Stat. 1006 (1963) [hereinafter Proclamation Reducing Bandelier National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

192. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

193. *Id.*

194. Proclamation Reducing Bandelier National Monument, 3 C.F.R. at 63.

designated 70% of it as wilderness two years later.[195] Finally, in 1998, Congress increased the Monument by 935 acres.[196]

R. Buck Island Reef National Monument

In 1961, President Kennedy established the 850-acre Buck Island Reef National Monument.[197] In 1975, President Gerald Ford added 30 acres to the Monument to "insure the proper care and management of the shoals, rocks, undersea coral reef formations and other objects of scientific and historical interest."[198] A month later, President Ford issued a proclamation fixing a typographical error in his original proclamation, resulting in no change to the Monument's size.[199]

S. The Trump Administration's National Monument Review

On April 26, 2017, President Trump issued Executive Order 13792, which directed Secretary of the Interior Ryan Zinke to review all national monument designations since 1996 that were greater than 100,000 acres.[200] In late August, right before Secretary Zinke's final recommendations were due, he announced that he was recommending that President Trump not abolish any monuments.[201] A few days later, Secretary Zinke concluded that President Trump should not make any changes to 6[202] out of the 22[203] national monuments under review.

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195. BANDELIER NATIONAL MONUMENT: GEOLOGIC RESOURCES INVENTORY REPORT, NAT'L PARK SERV. 2 (2015) (providing that 70% of the Monument's area was designated as wilderness). Act of Oct. 20, 1976, Pub. L. No. 94–567, 90 Stat. 2692; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

196. Bandolier National Monument Administrative Improvement and Watershed Protection Act of 1998, Pub. L. No. 105–376, 112 Stat. 3388.

197. Proclamation No. 3443, 3 C.F.R. 21, 21–23 (1963), *reprinted in* 77 Stat. 1441–43 (1962) [hereinafter Proclamation Updating Buck Island Reef National Monument].

198. Proclamation No. 4346, 3 C.F.R. 444, 444–45 (1975), *reprinted in* 89 Stat. 1231 (1977).

199. Proclamation No. 4359, 3 C.F.R. 461, 461 (1975), *reprinted in* 89 Stat. 1254 (1975).

200. Executive Order 13792, 82 Fed. Reg. 20,429, 20,429–30 (Apr. 26, 2017).

201. Josh Siegel, *Ryan Zinke Recommends Shrinking, Not Eliminating, Some National Monuments*, WASH. EXAM'R (Aug. 24, 2017), http://www.washingtonexaminer.com/ryan-zinke-recommends-shrinking-not-eliminating-some-national-monuments/article/2632453.

202. Sammy Roth, *One California Desert National Monument is Safe – But Another is Still in Jeopardy*, DESERT SUN (Aug. 16, 2017), http://www.desertsun.com/story/news/environment/2017/08/16/no-changes-sand-snow-national-monument-california-desert-ryan-zinke-says/573573001/. The six monuments Secretary Zinke removed from review included: Craters of the National Monument and Preserve in Idaho, Hanford Reach National Monument in Washington, Canyons of the Ancients National Monument in Colorado, Upper Missouri River Breaks National Monument in Montana, Grand Canyon-Parashant National Monument in Arizona, and Sand to Snow National Monument in California. *Id.*

After some initial delay—and an internal leak[204]—Secretary Zinke formally released his Final National Monument Report, outlining his findings and recommendations to President Trump.[205] In the Report, Secretary Zinke claims that previous presidents arbitrarily defined the objects protected in national monuments by listing broad geographic areas such as "viewsheds" and "ecosystems."[206] Moreover, the Report claims that it "circumvented the legislative process" when presidents designated monuments after Congress failed to pass legislation because only Congress can effectively balance the dueling interests of protecting public lands and making them available for economic development.[207] The Report also suggests that presidents have failed to comply with the requirement that monuments be "the smallest area compatible with the proper care and management of the objects" in the monument.[208] Finally, the Report claims that some monument designations were "likely politically motivated."[209]

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203. RYAN ZINKE, MEMORANDUM FOR THE PRESIDENT: FINAL REPORT SUMMARIZING FINDINGS OF THE REVIEW OF DESIGNATIONS UNDER THE ANTIQUITIES ACT 5–6 (2017); Roth, *supra* note 202.

204. On August 24, 2017, Secretary Zinke, in accordance with Executive Order 13792, sent his Final National Monument Report to President Trump. Press Release, U.S. Dep't of Interior, Sec'y Zinke Sends Monument Report to the White House (Aug. 24, 2017), https://www.doi.gov/pressreleases/secretary-zinke-sends-monument-report-white-house. While this Report was not publicly available, it was leaked to the Washington Post a few weeks later. John Siciliano, *10 National Monuments Could Be Scaled Back Under Draft Ryan Zinke Plan*, WASH. EXAM'R (Sept. 18, 2017), http://www.washingtonexaminer.com/10-national-monuments-could-be-scaled-back-under-draft-ryan-zinke-plan/article/2634725. On December 5, 2017, the Department of the Interior released Secretary Zinke's Final National Monument Report. Press Release, U.S. Dep't of Interior, Sec'y Zinke Recommends Keeping Fed. Lands in Fed. Ownership, Adding Three New Monuments (Dec. 5, 2017), https://www.doi.gov/pressreleases/secretary-zinke-recommends-keeping-federal-lands-federal-ownership-adding-three-new.

205. ZINKE, *supra* note 203, at 6–20.

206. *Id.* at 6–7.

207. *Id.* at 7.

208. *Id.* at 7, 9.

209. *Id.* at 2. Secretary Zinke's claims may be factually true, but they have no legal basis. Courts have been very deferential to a president's determination that an object qualifies for protection under the Antiquities Act. Cappaert v. United States, 426 U.S. 128, 142 (1976) (upholding President Truman's designation of Devil's Hole National Monument because "[t]he pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest'"); Cameron v. United States, 252 U.S. 450, 455 (1920) ("The act under which the President proceeded empowered him to establish reserves embracing 'objects of unusual scientific interest.' The Grand Canyon, as stated in his proclamation, 'is an object of historic or scientific interest.'"). Second, the claim that it is "unfortunate" when presidents designate monuments after Congress fails to pass legislation. Since Congress passed the Act, presidents have designated monuments when Congress fails to act. *See supra* Part I.A–Q (discussing the historical interaction between congressional attempts to designate areas as national parks and national monument designations). Third, courts are deferential to a president's determination of when a monument is the smallest area compatible. Roberto Iroala, *Proclamations*, *National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 159, 185–86 (2004) ("With respect to the second substantive requirement, that the designation of the national

Based on these conclusions, the Report recommends that President Trump use his "lawful exercise of . . . discretion granted by the Act" to amend or revise the boundaries of ten national monuments, including Grand Staircase and Bears Ears.[210]

To provide a basis for presidential authority to reduce national monuments, Secretary Zinke emphasized that previous presidents have reduced national monuments on numerous occasions:

> The Act has been used to designate or expand national monuments on Federal lands more than 150 times. It has also been used at least 18 times by Presidents to reduce the size of 16 national monuments, including 3 reductions of the Mount Olympus National Monument by Presidents Taft, Wilson, and Coolidge that cumulatively reduced the size of the 639,200-acre Monument by a total of approximately 314,080 acres, and a reduction of the Navajo National Monument by President Taft from its original 360 acres to 40 acres. President Franklin Roosevelt also modified the reservation of the Katmai National Monument to change management of the Monument.[211]

Following through on Secretary Zinke's recommendations, on December 4, 2017, President Trump issued two proclamations modifying Grand Staircase-Escalante and Bears Ears National Monuments.[212] While previous proclamations modifying national monuments were rather brief

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monument 'be confined to the smallest area compatible . . . [,]' courts generally accord to the President's factual determinations substantial judicial deference." (second alteration in original) (quoting 54 U.S.C. § 320301(b) (Supp. III 2016))). Last, courts have consistently refused to question the reasons underlying a president's decision to designate a national monument. Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1185 (D. Utah 2004) (declining to consider the reasons why President Clinton designated Grand Staircase because "[f]or the judiciary to probe the reasoning which underlies [the Grand Staircase] Proclamation would amount to a clear invasion of the legislative and executive domains" (quoting United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940))); Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) ("Neither can the Court take any judicial interest in the motives which may have inspired the [Jackson Hole] Proclamation described as an attempt to circumvent the Congressional intent and authority in connection with such lands.").

210. ZINKE, *supra* note 203, at 9–18. The other monuments that Secretary Zinke recommended changes to included: Gold Butte National Monument, Cascade-Siskiyou National Monument, Katahdin Woods and Waters National Monument, Northeast Canyons and Seamounts National Monument, Organ Mountains-Desert Peaks National Monument, Pacific Remote Islands National Monument, Rio Grande Del Norte National Monument, and Rose Atoll National Monument. *Id.*

211. *Id.* at 4.

212. Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,083 (Dec. 4, 2017); Proclamation Modifying Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089, 58,095 (Dec. 4, 2017).

and provided limited reasoning for the reductions,[213] President Trump thoroughly explained why he was reducing Grand Staircase-Escalante and Bears Ears National Monuments.[214]

1. Grand Staircase-Escalante National Monument

President Trump's reduction of Grand Staircase reignited controversy that has historically surrounded the region.[215] In 1995, Utah legislators introduced joint bills in the U.S. House and Senate that would have designated 1.8 million acres in the Grand Staircase area as wilderness.[216] The bills met staunch opposition from conservationists.[217] While the bill passed the House, environmental organizations and the Clinton Administration helped to defeat the bill in the Senate.[218] Later the same year, President Clinton spoke on the rim of the Grand Canyon in front of a crowd of 2,000 people: "Our parents and grandparents saved the Grand Canyon for us; today, we will save the grand Escalante Canyons . . . of Utah for our children."[219] Hopi elders shared President Clinton's sentiment about the future: "This is a time of healing . . . [t]he healing must begin."[220] And then "with a stroke of [a] pen,"[221] President Clinton designated the 1.7 million-acre Grand Staircase-Escalante National Monument[222]—the largest monument ever designated in the continental United States.[223]

President Clinton's designation faced a series of legal challenges, which were all unsuccessful: several courts held that the Antiquities Act gives the President broad, discretionary authority to designate national monuments.[224] President Clinton's actions also provoked responses from

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213. *See, e.g.*, Proclamation Reducing Petrified Forest National Monument, 37 Stat. 1716 (1911) (limiting rationale to a short preamble); *see also* Proclamation Reducing White Sands National Monument, 3 C.F.R. 46, 46 (1938) (limiting rationale to a short preamble).

214. *Id.*

215. CHRISTOPHER MCGRORY KLYZA & DAVID SOUSA, AMERICAN ENVIRONMENTAL POLICY, 1990–2006 114 (2008).

216. *Id.*

217. *Id.* at 115.

218. *Id.*

219. Paul Larmer, *A Bold Stroke: Clinton Takes A 1.7 Million-Acre Stand in Utah*, *in* GIVE AND TAKE: HOW THE CLINTON ADMINISTRATION'S PUBLIC LANDS OFFENSIVE TRANSFORMED THE AMERICAN WEST 4, 4 (Paul Larmer ed., 2004) [hereinafter Larmer, *Bold Stroke*].

220. *Id.*

221. *Id.* at 5.

222. Proclamation No. 6920, 3 C.F.R. 64, 64–68 (1997), *reprinted in* 110 Stat. 4561 (1997) [hereinafter Proclamation Establishing Grand Staircase-Escalante National Monument].

223. Eric C. Rusnak, *The Straw That Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 670 (2003).

224. Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1138 (D.C. Cir. 2002) ("Mountain States' contention that the Antiquities Act must be narrowly construed in accord with Mountain States'

several western lawmakers. Senator Orin Hatch exclaimed: "In all my 20 years in the U.S. Senate, I have never seen a clearer example of the arrogance of federal power."[225] Over 50 years after a Wyoming senator compared FDR's designation of Jackson Hole National Monument to Pearl Harbor,[226] Senator Frank Murkowski, Republican of Alaska, exclaimed that the designation "had the feel of Pearl Harbor."[227] Speaking more pragmatically, Senator Jim Hansen, Republican of Utah, vowed to cripple the Monument by withholding its funding[228] and also introduced legislation to abolish the Monument.[229] Lawmakers introduced a series of bills throughout that year to reform the Antiquities Act, all of which failed.[230] But in 1998, Congress passed two pieces of legislation that authorized land exchanges and increased the Monument by about 24,000 acres.[231]

On December 4, 2017—in response to Secretary Zinke's recommendations—President Trump issued his proclamation "modifying" the Monument.[232] The Proclamation explains that the Antiquities Act requires that monuments be confined to the "smallest area compatible with the proper care and management of the objects . . . to be protected."[233] The Proclamation then claims, without providing any support, that "[d]etermining the appropriate protective area involves examination of a number of factors, including the uniqueness and nature of the objects, the

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view of Congress's original intent . . . misses the mark."); Tulare County. v. Bush, 306 F.3d 1138, 1140 (D.C. Cir. 2002); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) ("When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.").

225. Paul Larmer, *The Mother of all Lands Grabs*, *in* GIVE AND TAKE: HOW THE CLINTON ADMINISTRATION'S PUBLIC LANDS OFFENSIVE TRANSFORMED THE AMERICAN WEST 17, 17–18 (Paul Larmer ed., 2004) [hereinafter Larmer, *Land Grabs*].

226. Molvar, *supra* note 5 (describing the designation of Jackson Hole National Monument as a "foul, sneaking Pearl Harbor blow").

227. KLYZA & SOUSA, *supra* note 215, at 117. Other lawmakers had similar remarks. Bob Bennett, Republican Senator from Utah, called the Monument "an outrageous, arrogant approach to public policy." *Id.* Helen Chenoweth, Republican Congresswoman of Idaho, called the Monument the "biggest land grab since the invasion of Poland." *Id.* Craig Peterson—former majority leader of the Utah State Senate—rather unfortunately, compared the Monument designation to sexual assault, suggesting that this is "what a woman must feel like when she has been raped." *Id.*

228. Larmer, *Bold Stroke*, *supra* note 219, at 6.

229. Mark Squillace, *The Antiquities Act and the Exercise of Presidential Power: The Clinton Monuments*, *in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 106, 122 (David Harmon et al. eds., 2006).

230. Rusnak, *supra* note 223, at 723–28.

231. *See infra* Part IV.B.1 (describing these pieces of legislation in the context of congressional ratification).

232. Proclamation Modifying Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017).

233. *Id.* at 58,089.

nature of the needed protection, and the protection provided by other laws."[234]

Applying this *test*, the Proclamation claims that portions of the Monument are not "unique or particularly scientifically significant" because similar geologic features and archeological objects are prevalent throughout the region.[235] The Proclamation also claims that many of the objects in the original Monument do not actually need to be protected because they are already adequately protected.[236] In light of this analysis, the Proclamation declares that Grand Staircase is not reserved to the smallest area compatible for the proper care and management of the Monument.[237] The Proclamation excludes 861,974 acres from Grand Staircase and divides it into three separate monuments: Grand Staircase, Kaiparowits, and Escalante Canyons.[238]

Several environmental groups—including the Wilderness Society and Grand Staircase Escalante Partners—filed complaints almost immediately.[239] The complaints allege that the Antiquities Act does not give the President the authority to modify or revoke monuments.[240] The groups also argue that President Trump cannot reduce Grand Staircase because Congress "ratif[ied]" the Monument through "legislative enactments."[241] On February 15, 2018, the District Court for the District of Columbia consolidated these two lawsuits.[242]

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234. *Id.*

235. *Id.* at 58,089–90.

236. *Id.* at 58,090.

237. *Id.* at 58,091.

238. *Id.* at 58,091, 58,093.

239. Complaint for Declaratory and Injunctive Relief ¶ 1, Grand Staircase Escalante Partners v. Trump, No. 1:17-CV-02591 (D.D.C. Dec. 4, 2017) [hereinafter Grand Staircase Escalante Partners Complaint]; Complaint for Injunctive and Declaratory Relief ¶ 1, Wilderness Soc'y v. Trump, No. 1:17-CV-02587 (D.D.C. Dec. 4, 2017) [hereinafter Wilderness Soc'y Grand Staircase Complaint].

240. *See* Grand Staircase Escalante Partners Complaint, *supra* note 239, ¶ 117 ("The Antiquities Act does not explicitly or implicitly grant authority to the President to subsequently decide that duly protected objects are no longer worthy of protection."); Wilderness Soc'y Grand Staircase Complaint, *supra* note 239, ¶ 164 ("The Trump Proclamation is based on considerations wholly outside the Antiquities Act and lacks legal or factual justification.").

241. *See* Grand Staircase Escalante Partners Complaint, *supra* note 239, ¶ 125 ("Congress has asserted its sole prerogative over the Monument by legislatively recognizing the protections and full boundaries of Grand Staircase-Escalante National Monument after its creation, ratifying its existence and dimensions."); Wilderness Soc'y Grand Staircase Complaint, *supra* note 239, ¶ 151 ("Congress has affirmed its sole jurisdiction to regulate the Monument through a series of legislative acts . . . .").

242. Order on Motion to Consolidate, Wilderness Soc'y v. Trump, No. 1:17-CV-02587 (D.D.C. Feb. 15, 2018).

2. Bears Ears National Monument

Located in southeastern Utah—almost bordering Grand Staircase—Bears Ears National Monument contains numerous historical artifacts that chronicle the history of human settlement in the region.[243] In the 1930s, tribal efforts to designate the area as a 4 million-acre national monument failed.[244] Eighty years later, local tribes, as part of a larger coalition, proposed the Bears Ears National Monument.[245] After extensive planning and negotiation, President Obama designated the Bears Ears National Monument.[246]

Eric Descheenie, a former leader of the group that proposed the Monument, responded that the designation "actually brought tears to my face . . . It's so significant."[247] On the other hand, Senator Orin Hatch criticized the designation as "an affront of epic proportions and an attack on an entire way of life."[248] San Juan County officials called the Monument the result of "outside special interest groups who used deception and collusion to drown out local voices" most affected by the decision.[249] In response to this criticism, in October 2017, President Trump called Senator Hatch to announce his plans to reduce Bears Ears.[250]

On December 4, 2017, the same day he "modified" Grand Staircase, President Trump issued a proclamation "modifying" Bears Ears.[251] The "modifying" proclamation reduces the Monument by almost 85%—from

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243. Proclamation No. 9558, 3 C.F.R. 402, 403–07 (2016) [hereinafter Proclamation Establishing Bears Ears National Monument].

244. Jonathon Thompson, *Bears Ears A Go – But Here's Where Obama Drew the Line*, HIGH COUNTRY NEWS (Dec. 29, 2016), http://www.hcn.org/articles/obama-designates-bears-ears-national-monument.

245. *Id.*

246. Proclamation Establishing Bears Ears National Monument, 3 C.F.R. at 407; Brian Maffly, *Jewell Defends Bears Ears Monument Process*, SALT LAKE TRIB. (Apr. 26, 2017), http://archive.sltrib.com/article.php?id=5216776&itype=CMSID.

247. Robinson Meyer, *Obama's Environmental Legacy, in Two Buttes*, ATLANTIC (Dec. 30, 2016), https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttes/511889/.

248. Amy Joi O'Donoghue, *Obama Settles Monumental Debate in Utah*, DESERT MORNING NEWS (Dec. 28, 2016), https://www.deseretnews.com/article/865670039/White-House-declares-New-Bears-Ears-monument-for-Utah.html.

249. *Id.*

250. Juliet Eilperin & Darryl Fears, *Trump Says He Will Shrink Bears Ears National Monument, a Sacred Tribal Site in Utah*, WASH. POST (Oct 27, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/10/27/trump-says-he-will-shrink-bears-ears-national-monument-a-sacred-tribal-site-in-utah/?utm_term=.131dcd05dc89.

251. Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,081 (Dec. 4, 2017).

1.35 million to 201,876 acres.[252] The Proclamation justifies this reduction by concluding that existing federal laws—like the Wilderness Act, the Federal Land Policy and Management Act of 1976 (FLPMA), and the National Forest Management Act—adequately protect many of the objects and areas identified in the original Monument.[253]

Several groups filed suit in response. First, the Native American tribes that proposed the Monument—including the Hopi Tribe, Ute Indian Tribe, Ute Mountain Indian Tribe, Zuni Tribe, and the Navajo Nation—sued President Trump and Secretary Zinke.[254] Several days later, another group—including Patagonia, the Access Fund, and Utah Diné Bikéyah—filed a complaint against the same defendants.[255] Lastly, nine environmental organizations brought suit.[256] All three complaints allege that the President lacks the authority to reduce or revoke national monuments.[257] The complaints argue that President Trump's proclamation essentially revoked Bears Ears and replaced it with two smaller monuments.[258] On February 15, 2018, the District Court for the District of Columbia consolidated all three of these lawsuits.[259]

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252. *Id.* at 58,083.

253. *Id.* at 58,085.

254. Complaint for Injunctive and Declaratory Relief ¶¶ 16–21, Hopi Tribe v. Trump, No. 1:17-CV-02590 (D.D.C. Dec. 4, 2017) [hereinafter Hopi Bears Ears Complaint].

255. Complaint for Declaratory and Injunctive Relief ¶¶ 8–76, Utah Diné Bikéyah v. Trump, No. 1:17-CV-02605 (D.D.C. Dec. 6, 2017) [hereinafter Utah Diné Bears Ears Complaint].

256. Complaint for Injunctive and Declaratory Relief ¶¶ 16–52, NRDC v. Trump, No. 1:17-CV-02606 (D.D.C. Dec. 7, 2017) [hereinafter NRDC Bears Ears Complaint].

257. NRDC Bears Ears Complaint, *supra* note 256, ¶ 189 ("Congress has not delegated to the President any authority to revoke or modify the monument designations of prior Presidents or of Congress."); Utah Diné Bears Ears Complaint, *supra* note 255, ¶ 194 ("Congress has not delegated to the President the power to revoke the designation of 'historic landmarks, historic and prehistoric structures' . . . once they have been lawfully proclaimed national monuments."); Hopi Bears Ears Complaint, *supra* note 254, ¶ 198 ("The Antiquities Act only empowers the President to declare national monuments. It does not delegate or authorize the power to revoke, replace, or diminish them once designated.").

258. NRDC Bears Ears Complaint, *supra* note 256, ¶ 126 ("On December 4, 2017, President Trump issued a Presidential Proclamation revoking monument status from eighty-five percent of the Bears Ears National Monument and replacing the monument with two smaller, non-contiguous units . . . ."); Utah Diné Bears Ears Complaint, *supra* note 255, ¶ 196 ("Defendants' attempt to revoke the designation of landmarks, structures, and objects comprising the Bears Ears National Monument is an *ultra vires* action . . . ."); Hopi Bears Ears Complaint, *supra* note 254, ¶ 199 ("[President Trump's Proclamation] in effect revokes the Bears Ears National Monument and replaces it with two different, smaller ones . . . .").

259. Order Regarding Consolidation, Hopi Tribe v. Trump, No. 17-CV-2606 (D.D.C. Feb. 15, 2018); *see also* Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. CIV. RTS. CIV. LIBERTIES L.R. 213, 213 (2018) (chronicling the creation of Bears Ears National Monument).

II. OVERVIEW OF EXISTING SCHOLARSHIP ON NATIONAL MONUMENTS

In 1906, Congress passed the Antiquities Act, delegating part of its plenary authority over public lands to the President.[260] The Antiquities Act provides that:

> The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[261]

In a series of challenges to monument designations over the past 100 years, courts have repeatedly held that the President's authority to designate monuments is broad and discretionary.[262]

The Antiquities Act is silent, however, on whether the President can abolish national monuments.[263] In 1938, FDR asked Attorney General Homer Cummings to consider whether he could abolish Castle Pinckney National Monument.[264] The Attorney General reasoned that since the Antiquities Act is silent on the President's ability to abolish monuments, "[i]f the President has such authority . . . it exists by implication."[265] Nevertheless, Attorney General Cummings found that the President does not have the authority to abolish national monuments because monument designations are equivalent to acts of Congress.[266] Furthermore, though

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260. Iroala, *supra* note 209, at 170–71; Udall, *supra* note 3, at 12.

261. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

262. Cappaert v. United States, 426 U.S. 128, 141–42 (1976); Cameron v. United States, 252 U.S. 450, 455 (1920) ("The act under which the President proceeded empowered him to establish reserves embracing 'objects of historic or scientific interest.' The Grand Canyon, as stated in his proclamation, 'is an object of unusual scientific interest.'"); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) ("When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion."); Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) ("Whenever a statute gives a discretionary power . . . it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts" (quoting Martin v. Mott, 25 U.S. 19, 31–32 (1827))).

263. *See* 54 U.S.C. § 320301(a)–(b) (allowing presidents to designate National Monuments).

264. Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL L. REV. 535, 554 (2001).

265. 39 Op. Att'y Gen. 185, 186 (1938).

266. *Id.* at 187–88.

Attorney General Cummings acknowledged that earlier presidents had reduced monuments,[267] he reasoned that these reductions do not give the President the authority to abolish monuments:

> While the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected,' it does not follow from his power so to confine that area that he has the power to abolish a monument entirely.[268]

Many scholars have provided additional reasons why the President lacks the authority to abolish monuments.[269] Professor Mark Squillace—who has written extensively on the Antiquities Act—compared the Antiquities Act to several other contemporaneous statutes that delegated authority to the President to withdraw lands from the public domain.[270] Notably, these contemporaneous statutes explicitly authorized the President to revoke his withdrawals, which suggests that—by providing no textual authority in the Antiquities Act—Congress did not delegate to the President the authority to abolish national monuments.[271] Instead, the Antiquities Act delegates the President "one-way" authority to designate monuments.[272]

Additionally, allowing the President to abolish national monuments would be an improper delegation of power to the President. Even though the Constitution grants legislative powers to Congress, the Supreme Court has recognized that Congress can delegate its authority to the President as long as the delegation contains an intelligible principle.[273] An intelligible principle provides "minimal standards" on how the delegated authority

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267. *Id.* at 188.

268. *Id.*

269. *See, e.g.*, Squillace, *Monumental*, *supra* note 41, at 552–54 (arguing that two other statutes authorize the President to make and revoke withdrawals, but only Congress has the authority to abolish monuments); *see also* Nicolas Bryner et. al., *National Monuments: Presidents Can Create Them, But Only Congress Can Undo Them*, CONVERSATION (Apr. 28, 2017), http://theconversation.com/national-monuments-presidents-can-create-them-but-only-congress-can-undo-them-76774 (explaining that presidents can create monuments, but only Congress can abolish them).

270. Squillace, *Monumental*, *supra* note 41, at 553.

271. *Id.*

272. *Id.*; Nicolas Bryner, *supra* note 269.

273. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 71–79 (Rachel E. Barkow et al. eds, 8th ed. 2017).

should be exercised.[274] Allowing the President to abolish national monuments would undermine any intelligible principle behind the Antiquities Act because it would result in a virtually limitless source of presidential authority that would have separation of powers implications.[275] For example, if presidents were to have the power to abolish national monuments, they could act in direct opposition to laws passed by Congress pursuant to a delegation from Congress.[276]

Although some dispute these conclusions[277]—and others affirmatively argue that the President has the authority to abolish national monuments[278]—this Note begins from the generally accepted, but legally untested, theory that the President lacks the authority to abolish national monuments.[279]

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274. Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (alteration in original) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928))).

275. Michael Margherita, *The Antiquities Act & National Monuments*, 30 TUL. ENVTL. L.J. 273, 288–89 (2017).

276. Congress has designated several dozen national monuments. *Antiquities Act 1906-2006: Frequently Asked Questions*, NAT'L PARK SERV., https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Nov. 25, 2018) [hereinafter *Antiquities Act, Frequently*]. Congress's authority to designate national monuments does not originate in the Antiquities Act, but from Congress's constitutional authority over public lands. U.S. CONST. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). If the President has the implied power to abolish national monuments, the President could abolish a congressionally designated national monument. Margherita, *supra* note 275, at 289 ("A delegation of this congressional power to the president, if implied would arguably grant the executive branch the authority to abolish national monuments designated by the legislative branch.").

277. Udall, *supra* note 3, at 14 (concluding that it is "[un]clear whether a President can use the authorities granted under the Act to completely eliminate a national monument created by a previous president"); Ranchod, *supra* note 264, at 554 ("The extent to which a national monument that was created by presidential proclamation can be changed by a subsequent president is unclear, since only expansions and small reductions of existing monuments have ever been attempted."); James Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 624–29 (2001) [hereinafter Rasband, *Future*] (considering whether the President has the authority to abolish national monuments established by earlier presidents).

278. *See, e.g.*, John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617, 639 (2018) ("A background principle of American law . . . is that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation."); Richard Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 584 (2018) ("The well-established existence of [the President's power to modify monuments] supports the President's power to abolish altogether a monument that the President determines was improperly established in the first place.").

279. Margherita, *supra* note 275, at 286 ("Although the issue is not addressed in the Antiquities Act or its associated caselaw, the evidence presented in this analysis suggests that an implied power to abolish monuments does not exist.").

III. ANALYZING PRESIDENTIAL POWER

Though the President lacks the authority to abolish national monuments, there are two potential legal claims that would allow the President to reduce national monuments based on historical practice.[280] First, the past practice of presidents reducing national monuments confirms that the Antiquities Act's smallest area compatible requirement gives the President the statutory authority to reduce national monuments.[281] Second, based on this history, Congress has acquiesced to presidents reducing national monuments.[282] Before discussing these claims further, each must be placed within the framework for analyzing presidential power.

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280. Another claim that some have proposed is also based on historical practice: the President has the power to reduce national monuments because past presidents have abused their authority under the Antiquities Act. Yoo & Gaziano, *supra* note 278, at 621 (arguing that a president's authority to change monument boundaries is "at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances"); Seamon, *supra* note 278, at 574 ("In light of the President's comparative advantages in abusing power . . . there is a strong argument that the appropriate remedy for one President's abuse of power under the Antiquities Act lies in the hands of the President's successor."). The claim that presidents have abused their powers under the Antiquities Act has long been a part of political discourse. Klein, *supra* note 13, at 1363 ("Overall, political criticism advances the notion that the presidents have created national monuments on a scale unintended by the 1906 Congress that passed the Antiquities Act."); Scott Y. Nishimoto, *President Clinton's Designation of the Grand Canyon-Parashant National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act*, 17 J. ENVTL. L. & LITIG. 51, 78 (2002) (highlighting Representative James Hansen's response to the designation of Grand Canyon-Parashant National Monument, who called the designation a "flagrant abuse" of the Antiquities Act). But there was usually an acknowledgment—in the legal commentary at least—that the President was acting within his authority, even if the Act itself is abusive. *See* Rusnak, *supra* note 223, at 715–16 ("Although the [Antiquities Act] cannot be abused, according to the courts, the Act, in and of itself, is an abusive power."); Mark C. Rutzick, *Modern Remedies for Antiquated Laws: Challenging National Monument Designations Under the 1906 Antiquities Act*, 11 J. FED. SOC'Y PRAC. GRPS. 29, 30–31 (2010) (noting the problems with the Antiquities Act, but acknowledging that statutory claims under the Antiquities Act would likely fail); *see also* Larmer, *Lands Grabs*, *supra* note 225, at 17 (responding to the designation of Grand Staircase-Escalante, Senator Hatch exclaimed, "[t]he President may have some statutory authority to take this action, but he certainly does not have the moral authority"). But the legal claim that presidential abuse creates the power to reduce monuments lacks any legal basis, as several courts have held: "When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion." Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1183–84 (D. Utah 2004).

281. *See, e.g.*, Yoo & Gaziano, *supra* note 278, at 659–60 (relying on the past practice of presidents reducing national monuments to conclude that the President can reduce national monuments based on the Antiquities Act's smallest area compatible requirement); Seamon, *supra* note 278, at 578–79 (concluding that the "President [has] broad power to modify monuments" based on the past practice of President's reducing national monuments using the Act's smallest area compatible requirement).

282. *E.g.*, Rasband, *Stroke*, *supra* note 81, at 21-25 ("[C]ongressional acquiescence in 18 Presidential reductions, and Congress's subsequent amendments to the Antiquities Act without restricting reductions in monument size . . . creates a strong presumption that Congress has consented to presidential reductions in monument size."); Seamon, *supra* note 278, at 582 ("The presidential practice

In the famous *Youngstown* steel seizure case, Justice Jackson laid out a tripartite framework for analyzing presidential power.[283] Justice Jackson's framework has become the test for considering the President's legal authority under the Constitution.[284] First, when the President is acting pursuant to statutory authorization, his constitutional power is at its maximum because it includes both inherent and statutory authority.[285] The only limitation to presidential authority in this circumstance is where the "Federal Government as an undivided whole lacks power."[286] Second, when the President acts in absence of either a congressional grant or denial of authority, his only authority comes from his Article II constitutional powers.[287] But Justice Jackson suggested that there may be a "zone of twilight" where the President has concurrent authority with Congress: "[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[288] Presidential authority in the second category depends upon the particular circumstances of the presidential action.[289]

Third, when the President acts in defiance of Congress his power is at its lowest extent.[290] In this circumstance, the President can only act when his power is exclusive.[291] Justice Jackson emphasized that presidential action in this category "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[292]

If the President has the authority to reduce national monuments, his power must be in the first or second categories of Justice Jackson's framework.[293] In Justice Jackson's third category, presidents lack the

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and congressional acceptance of that practice powerfully support the conclusion that the Antiquities Act authorizes the President to modify monuments . . . .").

283. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952).

284. Medellin v. Texas, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme [from *Youngstown*] provides the accepted framework for evaluating executive action in this area."); Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) ("[W]e have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful . . . ."); Michael J. Turner, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. 665, 677 (2009) ("[I]n *Dames & Moore*, the Supreme Court explicitly adopted Jackson's taxonomy . . . .").

285. *Youngstown*, 343 U.S. at 635.

286. *Id.* at 636–37.

287. *Id.* at 637.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*; *e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076, 2085 (2015) (invalidating a law that infringed upon the President's exclusive right of recognition).

292. *Youngstown*, 343 U.S. at 638.

293. *Id.* at 637.

authority to reduce national monuments because their authority to designate (or reduce) national monuments is not exclusive: the Constitution gives Congress plenary authority over public lands.[294]

Accordingly, each potential claim of presidential power to reduce national monuments based on historical practice corresponds to the first two categories of Justice Jackson's framework. The claim that historical practice confirms that the smallest area compatible requirement gives the President statutory authority to reduce national monuments places the President's authority to reduce national monuments in Justice Jackson's first category.[295] The congressional acquiescence claim places the President's authority to reduce national monuments in Justice Jackson's second category.[296] From this framework, claims of presidential power to reduce national monuments can be effectively considered.

IV. WHY THE PAST PRACTICE OF PRESIDENTS REDUCING NATIONAL MONUMENTS IS IRRELEVANT

While many presidents have reduced national monuments, there are two potential reasons why this past practice may be irrelevant. First, FLPMA may have clarified that presidents cannot reduce national monuments.[297] Second, congressional ratification of national monuments would prevent presidents from reducing national monuments.[298] In both of these contexts, presidents would be acting in opposition to the will of Congress—and in direct contravention of Congress's enumerated Property

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294. *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); *e.g.*, *Antiquities Act, Frequently*, *supra* note 276 (listing the various times that Congress has designated national monuments).

295. *Youngstown*, 343 U.S. at 635–36. Others have considered whether the President has the power to reduce or abolish national monuments based on other Article II powers, such as the President's obligation to make sure "that the Laws be faithfully executed." U.S. CONST. art. II, § 3. *Compare* Pamela Baldwin, *Presidential Authority to Modify or Revoke National Monuments*, SOC. SCI. RES. NETWORK, 17 (2017) [hereinafter Baldwin, *Presidential*], https://ssrn.com/abstract=3095744 (concluding that Article II's Take Care Clause does not provide the President with the authority to modify national monuments), *with* Yoo & Gaziano, *supra* note 278, at 655 (arguing that presidents can "void" national monuments they believe are "illegally large" based on their "constitutional authority to take care that the laws are faithfully executed"), *and* Seamon, *supra* note 278, at 584 ("[I]nterpreting the Act to authorize abolition enables the President to carry out the constitutional duty to take care that the Antiquities Act is faithfully executed.").

296. *Youngstown*, 343 U.S. at 637.

297. Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(4) (2012).

298. *See infra* notes 344–49 (explaining why the President lacks the authority to reduce monuments that Congress has ratified).

Clause authority—if they tried to reduce national monuments.[299] Based on Justice Jackson's framework, presidents would lack the authority to reduce national monuments in either of these situations.[300]

A. The Legislative History of the Federal Land Policy and Management Act Clarifies That the President Lacks the Authority to Reduce National Monuments.

In 1976, Congress passed FLPMA.[301] The Act dictates land management strategies for federal lands under the Bureau of Land Management (BLM) authority that lack any specific designation, such as a national park or national forest.[302] The passage of FLPMA marked the end of the disposal era of federal lands policy.[303] Prior to FLPMA, some of the original homesteading laws dispensing federal land to settlers in the American West were still on the books.[304] When Congress passed FLPMA, it repealed almost all of these statutes, recognizing that federal policy would now be to retain and effectively manage federal lands.[305] Accordingly, FLPMA repealed almost all presidential authority over public lands, including any implied powers.[306] However, it left the Antiquities Act largely untouched.[307]

While FLPMA left the Antiquities Act largely untouched,[308] § 204(j) of FLPMA provides that the Secretary of the Interior shall not modify or revoke any national monuments created under the Antiquities Act.[309] Given that the Secretary does not have any statutory authority to create national monuments, some have argued that § 204(j)'s reference to the Secretary is a

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299. *See infra* notes 344–49 (outlining the rationale that if the President could reduce national monuments, the President would be able to undermine congressional authority).

300. *See infra* notes 344–49 (discussing Justice Jackson's framework and its impact on the President's authority to reduce monuments).

301. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

302. Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. 55, 59 (2017) [hereinafter Squillace, *Presidents*].

303. *Id.*

304. Patrick Perry, *Law West of the Pecos: The Growth of the Wise-Use Movement & Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. REV. 275, 292 (1996).

305. Squillace, *Presidents*, *supra* note 302.

306. *Id.* at 59–60.

307. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2754.

308. Squillace, *Presidents*, *supra* note 302, at 60.

309. 90 Stat. at 2754(j) ("The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments . . . .").

drafting error.[310] According to this argument, the word "President" should be substituted for "Secretary" so the statute would read: "The [*President*] shall not . . . modify, or revoke any withdrawal . . . creating national monuments."[311] Under this reading, the President would clearly lack the authority to modify or reduce national monuments.[312]

The legislative history of FLPMA could be interpreted to support this reading.[313] The House Committee Report on FLPMA explicitly states that the bill would "specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."[314] The "anomalous" reference to the Secretary and the legislative history of FLPMA create a strong inference that Congress meant to clarify that the President lacks the authority to modify national monuments.[315] Assuming a court accepts this reasoning, the past practice of presidents reducing monuments would be irrelevant because they happened prior to the passage of FLPMA.[316] Further, the 1938 Attorney General Opinion acknowledging that presidents have reduced national monuments in the past would be irrelevant for the same reason.[317]

There is still the question of how to reconcile FLPMA with the language of the Antiquities Act, which requires national monuments to be the smallest area compatible for the proper care and management of the objects to be protected.[318] While some argue that this language gives the President broad authority to reduce national monuments,[319] FLPMA—

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310. *E.g.*, Squillace, *Presidents*, *supra* note 302, at 60 ("Because only the *President*, and not the Secretary of the Interior, has authority to proclaim national monuments, Congress's reference to the *Secretary's* authority under the Antiquities Act is anomalous and . . . may be the result of a drafting error."); Michael C. Blumm & Oliver Jamin, *The Trump Public Lands Revolution: Redefining "the Public" in Public Land Law*, 48 ENVTL. L. 311, 326–27 (2018) (explaining that the "legislative history makes quite clear that Congress intended to restrict presidential authority" and § 204(j)'s reference to the Secretary is a "drafting error").

311. 90 Stat. at 2754 (emphasis added).

312. *Id.*

313. *See* Squillace, *Presidents*, *supra* note 302, at 58–64 (arguing that FLPMA's legislative history clarifies that the reference to the Secretary in § 204(j) is a drafting error).

314. H.R. REP. NO. 94-1163, at 9 (1976).

315. Squillace, *Presidents*, *supra* note 302, at 58–64.

316. *Id.* at 65 (noting that all "[p]residential decision[s] to reduce the size" of national monuments happened prior to FLPMA); ARNOLD & PORTER KAYE SCHOLER, THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH OR MATERIALLY CHANGE A NATIONAL MONUMENT DESIGNATION UNDER THE ANTIQUITIES ACT OF 1906 14 (2017), https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments (noting that no president has reduced a monument since the passage of FLPMA).

317. Squillace, *Presidents*, *supra* note 302, at 58–61.

318. 54 U.S.C. § 320301(b) (Supp. III 2016).

319. *See infra* notes 417–19 (discussing the various views on the President's power to reduce monuments based on the Antiquities Act's smallest area compatible requirement).

assuming a court lets the legislative history overcome the plain text of § 204(j)—would again clarify that the President cannot do so.[320]

This analysis is premised, however, on the assumption that a court accepts the reasoning that FLPMA prevents the President from reducing national monuments. But a court may not accept this reasoning. When courts interpret a statute, they always being with its plain text.[321] The problem, then, is that the actual language of FLPMA does not explicitly limit the President's ability to modify national monuments.[322] Rather, FLPMA only provides that the Secretary of the Interior cannot modify national monuments.[323] Since the plain language is clear, a court may be reluctant to let the legislative history of FLMPA overcome its plain text.[324]

In similar circumstances, where parties have claimed that a statute's language is the result of a drafting error, courts have still been reluctant to overlook the plain text. For example, in *Lamie v. United States*, the Supreme Court was interpreting a section of the U.S. bankruptcy code that Congress had amended in 1994.[325] In the process of amending the statute, Congress—probably by accident—deleted five words from the section at issue, which resulted in a grammatically incorrect sentence.[326] The petitioner argued that "[t]here is no apparent reason, other than a drafting error, that Congress would have rewritten the statute to produce a grammatically incorrect provision" and argued that the legislative history clarified this mistake.[327]

Despite the drafting error, the Court found that the text was clear and refused to let this apparent "drafting error" overcome the plain language of the statute:[328] "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred

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320. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2754.

321. Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) ("The plain text of the [statute] begins and ends our analysis."); Leocal v. Ashcroft, 543 U.S. 1, 8 (2004) ("Our analysis begins with the language of the statute.").

322. 90 Stat. at 2754.

323. *Id.* at 2754(j) ("The *Secretary* shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments . . . ." (emphasis added)).

324. Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1186–87 n.8 (D. Utah 2004) ("There is no occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since a court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous.").

325. Lamie v. United States, 540 U.S. 526, 529–30 (2004).

326. *Id.* at 530–31.

327. *Id.* at 533 (alteration in original).

328. *Id.* at 530–34.

result."[329] The reasoning from *Lamie* suggests that even with an apparent drafting error, a court may not let legislative history overcome the plain language of a statute.[330] This one decision is by no means conclusive. In other circumstances, the Supreme Court has allowed context to overcome the plain language of a statute.[331]

But there are several other potential explanations for why FLPMA would revoke the Secretary of the Interior's authority to modify or revoke national monument designations, which could demonstrate the reference to the Secretary was not a drafting error. For example, in *Utah Ass'n of Counties*, one of the challenges to President Clinton's designation of Grand Staircase, the court addressed the impact of FLPMA on the Antiquities Act.[332] In that case, the plaintiffs argued that President Clinton's Grand Staircase designation was invalid because it violated Executive Order 10355.[333]

In 1952, President Harry Truman issued Executive Order 10355, which delegated the President's authority to withdraw, modify, or revoke reservations of the public domain to the Secretary of the Interior.[334] This delegation included the President's authority under the Antiquities Act.[335] The plaintiffs in *Utah Ass'n of Counties* argued that because President Truman delegated the President's authority to designate national monuments to the Secretary, President Clinton did not have the authority to designate Grand Staircase-Escalante National Monument, only the Secretary did.[336] Although the Court rejected this argument for numerous reasons, the Court noted that because FLPMA explicitly forbids the

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329. *Id.* at 542 (alteration in original) (quoting United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)).

330. *Id.* at 536 (explaining that the plain meaning of a statute is preferred to "avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history").

331. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) ("In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product."); *see also* King v. Burwell, 135 S. Ct. 2480, 2495 (2015) ("[T]he context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."); Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 360 (1999) (Stevens, J., dissenting) ("The plurality finds an omission in the legislative history of the 1976 enactment more probative of congressional intent than either the plain text of the statute itself or the pertinent comment in the Senate Report."); Thompson v. Thompson, 484 U.S. 174, 179 (1988) (suggesting that in some circumstances a court may correct "drafting errors" if "Congress simply forgot to codify its evident intention").

332. Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1195–1200 (D. Utah 2004).

333. *Id.*

334. Exec. Order No. 10355, 17 Fed. Reg. 4831, 4831 (May 28, 1952).

335. *Id.*

336. *Utah Ass'n of Ctys.*, 316 F. Supp. 2d at 1195.

Secretary from modifying national monuments, it repealed Executive Order 10355.[337] The court's analysis suggests that Congress's intent under FLPMA was simply to prevent the President from delegating his authority under the Antiquities Act to the Secretary of the Interior.[338]

Despite these potential explanations, the context and purpose of FLPMA, in coordination with its legislative history, suggest that the reference to the Secretary in § 204(j) was a drafting error.[339] In line with the broader context of FLPMA, others have provided a host of additional reasons why FLPMA should be read to prevent the President from modifying national monuments.[340] But a court may still hold, based on the plain text, that FLPMA only prevents the President from delegating his authority and does not explicitly limit the President's authority to reduce national monuments.[341] Based on that narrow reading, FLPMA does not render the past practice of presidents reducing national monuments irrelevant.[342]

B. Congressional Ratification Would Prevent Presidents from Modifying National Monuments, Even if Past Practice Demonstrates That Presidents Have Broad Authority to Reduce National Monuments.

Congressional ratification may also make the past practice of presidents reducing monuments irrelevant. When presidents designate national monuments, they are acting pursuant to a congressional delegation of power under the Antiquities Act.[343] According to Attorney General Cumming's 1938 Opinion, a President's monument designation is equivalent to an act of Congress.[344] Based on Justice Jackson's framework,

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337. *Id.* at 1195–1200.

338. *Id.*; *see also* Rasband, *Stroke*, *supra* note 81, at 21-25 (proving an alternative explanation for the reference to the Secretary in § 204(j) of FLPMA).

339. Squillace, *Presidents*, *supra* note 302, at 60.

340. *E.g.*, Baldwin, *Presidential*, *supra* note 295, at 16 ("The comprehensive reassertion in FLPMA of congressional control over withdrawals and management of the federal lands directly and indirectly affects interpretation of the current authority of the President."); Hope M. Babcock, *Rescission of a Previously Designated National Monument: A Bad Idea Whose Time Has Not Come*, 37 STAN. ENVTL. L.J. 4, 55 (2017) ("Congress could have thought that preventing the Secretary from affecting any previously designated national monument would, in effect, control a President from doing the same thing.").

341. Baldwin, *Presidential*, *supra* note 295, at 25.

342. *Utah Ass'n. of Ctys.*, 316 F. Supp. 2d at 1199.

343. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

344. 39 Op. Att'y Gen. 185, 187 (1938) ("To assert [a power to abolish] is to claim for the Executive the power to repeal or alter an act of Congress at will."); Margherita, *supra* note 275, at 291–92 ("[I]f monument designations are equivalent to acts of Congress the power to diminish, abolish, or otherwise undo that designation is reserved to the legislative branch."); Ranchod, *supra* note 264 ("[A]

the President lacks the authority to reduce national monuments if the monuments' designation is equivalent to an act of Congress.[345] But as discussed above, others dispute this conclusion.[346]

If Congress ratifies a monument, however, the monument becomes an explicit act of Congress.[347] Beginning in 1862, courts have found that Congress ratified presidential action, either expressly or impliedly.[348] Express ratification occurs when "there is deliberate congressional action . . . that expressly validates the official action," whereas implied ratification occurs "from a group of indirect congressional actions."[349]

Congressional ratification is usually relevant if it is unclear that the President has authority to act because ratification can "give the force of law to official action unauthorized when taken."[350] Courts have generally been reluctant to find ratification, requiring Congress to "recognize that the actions involved were unauthorized when taken and . . . expressly ratify those actions in clear and unequivocal language."[351] But ratification in the context of national monuments is slightly different because the President has the authority to designate monuments.[352] Grand Staircase-Escalante National Monument provides a useful lens to explore congressional ratification in the context of national monuments.

1. Grand Staircase-Escalante National Monument

Congress potentially ratified Grand Staircase in two ways: land exchanges and management. First, Congress passed two pieces of legislation authorizing land exchanges in Grand Staircase. The Utah School and Land Exchange Act authorized the federal government to transfer federal land outside the Monument for state-owned land inside the

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land withdrawal made under a statute delegating authority from Congress to the president is in effect an act by the Congress itself.").

345. *See supra* notes 276–79 (discussing why presidents cannot reduce national monuments if they are an act of Congress).

346. *See supra* notes 280–81 (recognizing that some dispute the conclusion that the President cannot abolish national monuments).

347. Utah Ass'n of Ctys. v. Clinton, No. 2:97-CV-479, 1999 U.S. Dist. LEXIS 15852, at *34–36 (D. Utah Aug. 12, 1999).

348. *Id.* at *34–37; Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. UN. L. REV. 1123, 1130–31 (2003); Kent F. Wisner, *The Aftermath of Chadha: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211, 1220 n.59 (1985).

349. *Utah Ass'n of Ctys.*, 1999 U.S. Dist. LEXIS 15852, at *37.

350. Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301–02 (1937).

351. EEOC v. CBS, Inc., 743 F.2d 969, 974 (2d Cir. 1984).

352. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

Monument.[353] The Act identifies the existence of 24,000 acres of mineral rights that would be potentially incompatible with the Monument if the state of Utah attempted to develop them.[354] The exchange of these mineral rights would "eliminate this potential incompatibility, and would enhance management of the Grand Staircase-Escalante National Monument."[355] The Automobile National Heritage Act corrected some minor errors in the Grand Staircase proclamation and added certain lands to the Monument.[356] The Act explicitly provides that "[t]he boundaries of the Grand Staircase–Escalante National Monument . . . are hereby modified."[357] Both of these acts indicate that Congress ratified the Monument.

But one district court has disagreed.[358] Towards the end of the Clinton Administration, several Utah Counties—concerned about the economic effects of President Clinton's designation of Grand Staircase—filed suit, arguing that President Clinton exceeded his authority when he designated Grand Staircase.[359] In response, the Clinton Administration filed a motion to dismiss, claiming that Congress ratified Grand Staircase when it passed the land exchange bills: "Congress must have intended to incorporate fully those provisions of Grand Staircase which it left undisturbed in Grand Staircase boundary adjustment legislation."[360] The court rejected this argument, finding that the land exchange bills "could just as logically be seen as an attempt to mitigate one of the many possible 'severe impacts' of the Monument rather than to validate its creation."[361]

The district court's reasoning is questionable. While acknowledging that the Supreme Court has not adopted a standard of proof for congressional ratification, after reviewing existing case law, the district court applied a standard requiring a "distinctively clear intent," which it placed above a preponderance of the evidence standard.[362] But the cases the district court cited were instances where it was unclear whether the President had legal authority to engage in the action, and the question was whether Congress ratified that otherwise illegal act.[363]

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353. Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139.

354. *Id.* at §§ 1, 3.

355. *Id.*

356. Automobile National Heritage Act, Pub. L. No. 105-355, 112 Stat. 3247, 3252–53 (1998).

357. *Id.* at 3252.

358. Utah Ass'n of Ctys. v. Clinton, No. 2:97-CV-479, 1999 U.S. Dist. LEXIS 15852, at *48 (D. Utah Aug. 12, 1999).

359. *Id.* at *4.

360. *Id.* at *48.

361. *Id.* at *49.

362. *Id.* at *45–46.

363. *Id.* at *38–45.

But the President clearly has legal authority to designate national monuments: a statute allows the President to do so,[364] and courts have upheld broad exercises of that authority.[365] Although the plaintiffs in *Utah Ass'n of Counties* argued that this particular exercise was beyond the President's authority,[366] before this particular litigation, courts had upheld similarly large designations under the Antiquities Act. For example, the Supreme Court upheld the 800,000-acre Grand Canyon designation.[367] And numerous presidents designated monuments on a similar scale as well.[368] Based on this context, there is a strong presumption that Congress was aware that the Grand Staircase designation was a lawful exercise of President Clinton's authority under the Antiquities Act when it passed these land exchange bills.[369] The district court erred by relying on previous case law dealing with ratification of illegal presidential acts to create the "distinctively clear intent" standard.[370] Under a regular preponderance of the evidence standard, Congress explicitly stating the Monument's boundaries should be sufficient to demonstrate ratification.[371]

Nevertheless, after the district court's decision, Congress expressed even clearer intent to ratify Grand Staircase. In 2009, Congress established the "National Landscape Conservation System" (NLCS), which requires the BLM to "conserve, protect, and restore nationally significant landscapes . . . for the benefit of current and future generations." [372] The NLCS specifically requires the BLM to manage national monuments in a way "that protects the values for which the components of the system were *designated*."[373] By specifically dictating that the BLM should manage the

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364. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

365. *See supra* note 209 (outlining the various instances that courts upheld national monument designations).

366. *Utah Ass'n of Ctys.*, 1999 U.S. Dist. LEXIS 15852, at *4.

367. Cameron v. United States, 252 U.S. 450, 456 (1920); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

368. In 1918, President Wilson designated the 1 million-acre Katmai National Monument. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48. Several years later, President Coolidge established the 1.16 million-acre Glacier Bay National Monument. *Id.* Finally, President Carter established 12 monuments that were over a million acres. *Id.*

369. Between 2002 and 2004, several courts explicitly held that Grand Staircase was a valid exercise of presidential authority. *See supra* note 209 (discussing the legal challenges to President Clinton's designation of Grand Staircase). After these decisions, it was clear that President Clinton had the authority to designate Grand Staircase.

370. *Utah Ass'n. of Ctys.*, 1999 U.S. Dist. LEXIS 15852, at *46.

371. *Id.*

372. Establishment of the National Landscape Conservation System, 16 U.S.C. § 7202(a) (2012).

373. *Id.* § 7202(1)(a), (c)(2) (emphasis added). Notice Congress's use of the word designated, rather than modified or reduced. *Id*. § 7202(a).

Monument in accordance with why it was designated, Congress expressly ratified Grand Staircase.[374] Under a regular preponderance of the evidence standard, the NLCS, in coordination with the land exchange bills, indicate that Congress ratified Grand Staircase-Escalante National Monument.[375]

In the current litigation surrounding President Trump's reduction of Grand Staircase, the plaintiffs argue that Congress ratified the Monument.[376] They specifically point to funding for the Monument, the land exchange bills, and the NLCS.[377] The Wilderness Society argues that Congress expressly ratified the Monument.[378] But the Grand Staircase-Escalante Partners don't explicitly say that Congress ratified the Monument.[379] Instead, they argue that Congress has expressed "its sole prerogative over the monument," and that the President cannot circumvent this statutory "superstructure."[380] Use of this phrase may be an attempt to distinguish between congressional ratification—which deals with circumstances where it is questionable that the President had the authority to act—and ratification of monuments—which deals with an area where the President already has lawful authority. Referring to Congress's "sole prerogative," instead of congressional ratification, distinguishes these two concepts.[381] Therefore, this phrase makes the "distinctively clear intent" standard inapplicable and potentially lowers the burden of proof required to prove congressional ratification.[382]

While Grand Staircase provides a useful example to illustrate the concept of congressional ratification, ratification could potentially apply to

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374. *Id.*

375. Baldwin, *Presidential*, *supra* note 295, at 25 ("[I]t appears that various congressional actions have ratified the current boundaries of the Grand Staircase-Escalante National Monument and the President is limited only to recommending changes to Congress with respect to it.").

376. Wilderness Soc'y Grand Staircase Complaint, *supra* note 239, ¶¶ 86–90; Grand Staircase Escalante Partners Complaint, *supra* note 239, ¶¶ 123–28.

377. Wilderness Soc'y Grand Staircase Complaint, *supra* note 239, ¶¶ 86–90 ("Congress thereby expressly ratified the Grand Staircase-Escalante National Monument as defined in the 1996 Proclamation.").

378. Grand Staircase Escalante Partners Complaint, *supra* note 239, ¶¶ 123–29.

379. *Id.* ¶¶ 126, 142–48.

380. *Id.* ¶¶ 126, 142 ("Congress has asserted its sole prerogative over the Monument by repeatedly adjusting the boundaries of Grand Staircase-Escalante National Monument through legislative enactments.").

381. *Id.* ¶¶ 123–28.

382. Utah Ass'n of Ctys. v. Clinton, No. 2:97-CV-479, 1999 U.S. Dist. LEXIS 15852, at *46 (D. Utah Aug. 12, 1999).

a large percentage of current national monuments. Congress has dictated management strategies for a considerable number of monuments.[383]

2. Management Strategies

Congress has passed two statutes dealing with management of national monuments. First, as discussed above, the NLCS requires the Secretary of the Interior to manage BLM national monuments in a "manner that protects the values for which the components of the system were *designated*."[384]

A corollary statute exists for monuments that the NPS manages.[385] In 1916, Congress passed the Organic Act of 1916.[386] The Organic Act created the NPS to manage the growing number of national parks throughout the U.S.[387] In 1978, Congress updated the Organic Act to include NPS-managed national monuments.[388] Congress specifically stated that the "administration of [national monuments] shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been *established*, *except as directly and specifically provided by Congress*."[389] Both of these statutes indicate that Congress ratified the monuments managed by the NPS and BLM.

The NPS and BLM manage 138 out of the 155 national monuments in the U.S.[390] Accordingly, even if the President has broad authority to reduce national monuments, these land management bills would prevent the President from reducing the vast majority of monuments in the U.S.

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383. *See infra* Part IV.B.2 (discussing how the Organic Act directs the NPS to manage national monuments); *see supra* text accompanying notes 372–75 (discussing how the NLCS requires BLM to manage national monuments).

384. Establishment of the Landscape Conservation System, 16 U.S.C. § 7202(c)(2) (2012) (emphasis added).

385. 54 U.S.C. § 100101 (Supp. II 2015).

386. John Copeland Nagle, *How National Park Law Really Works*, 86 UNIV. COLO. L. REV. 861, 871 (2015).

387. *Id.*

388. ARNOLD & PORTER KAYE SCHOLER, *supra* note 316, at 13.

389. 54 U.S.C. § 100101 (emphasis added).

390. *See generally Antiquities Act*, NAT'L PARK SERV., *supra* note 48 (listing all 155 national monuments and their names, land calculations, and proclamation dates). *Antiquities Act, Frequently*, *supra* note 276.

V. WHETHER PAST PRACTICE GIVES PRESIDENTS THE AUTHORITY TO SIGNIFICANTLY REDUCE NATIONAL MONUMENTS

Although congressional ratification may render any alleged presidential authority to reduce national monuments irrelevant in many situations, it probably does not render the question of presidential power to reduce national monuments categorically irrelevant.[391] If a court does not rely on FLPMA,[392] the question becomes whether past practice gives the President the authority to reduce national monuments. As discussed earlier, there are two potential legal claims as to why past practice gives the President the authority to reduce national monuments.[393]

A. Past Practice Does Not Confirm That the President Has the Statutory Authority to Significantly Reduce National Monuments

The first way historical practice may allow the President to reduce national monuments is by confirming that the smallest area compatible requirement gives the President broad statutory authority to reduce national monuments.[394] However, just because presidents have historically reduced national monuments does not mean that they actually have the legal authority to do so: past practice alone does not provide legal authority.[395] No one challenged any of these past reductions in court.[396] The history and context of the Antiquities Act also provide little support for presidential authority to reduce national monuments.[397]

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391. For one, a court may not accept the congressional ratification argument outlined in Part IV.B. Second, even if Congress did ratify all BLM and NPS managed monuments, that would still leave a dozen or so monuments that are managed by other agencies that presidents could potentially reduce. *Antiquities Act, Frequently*, *supra* note 276.

392. *See supra* Part IV.A (discussing why courts may not rely on FLPMA to hold that the President lacks the authority to reduce national monuments).

393. *See supra* Part III (describing the two legal claims that scholars and politicians have used to support the President's authority to reduce national monuments).

394. *See infra* notes 418–20 (outlining the argument that history confirms that the President has the statutory authority to reduce national monuments).

395. Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).

396. *E.g.*, Squillace, *Presidents*, *supra* note 302, at 65 ("[N]o Presidential decision to reduce the size of a national monument has ever been tested in court, and so no court has ever ruled on the legality of such an action."); *see also* Rasband, *Stroke*, *supra* note 81, at 21-3 (observing that while "[s]everal presidents have diminished the size of monuments," none of these decisions were ever challenged in court).

397. *E.g.*, Babcock, *supra* note 340, at 57–58 ("[W]hen Congress specifically gave affirmative authority to the President under the Antiquities Act . . . but withheld any power to do more, like revoke a previously designated monument or change its boundaries, courts and Presidents should treat that authority as exclusive."). In October 2017, Representative Bob Bishop, Republican of Utah, introduced H.R. 3990 in the House of Representatives. National Monument Creation and Protection Act, H.R.

However, a court—that does not accept the FLPMA argument—may not ignore the past practice of presidents reducing national monuments.[398] While it is true that "[p]ast practice does not, by itself, create power,"[399] courts often look to historical practice to determine the extent of presidential power.[400] For example, in *NLRB v. Canning*, the Court considered whether a presidential appointment was a valid use of the recess appointment clause—a constitutional provision allowing the President to make appointments of executive officers without the advice and consent of the Senate during congressional recesses.[401] In conducting its analysis, the Court focused on how presidents had historically used the recess clause to make appointments: "this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."[402] The Court emphasized that historical practice was important because it "must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached."[403] Importantly, the Court relied on historical practice in its analysis, but did not come to a conclusion completely consistent with historical practice.[404] Accordingly, the Court relied on historical practice to hold that the recess appointment clause applies to both inter- and intra-session appointments.[405] But the Court also held that an inter-session recess of 10 days was too short to trigger the clause despite a few historical examples of presidents doing so.[406]

3990, 115th Congress (2017). The Bill would expressly allow the President to modify national monuments, suggesting that the President currently lacks that authority. *Id.*

398. *See* NLRB v. Canning, 134 S. Ct. 2550, 2559 (2014) ("[I]n interpreting the Clause, [the Court puts] significant weight upon historical practice." (emphasis omitted)).

399. *Dames & Moore*, 453 U.S. at 686.

400. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015) ("To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question."); *see also* Fernandez-Vargas v. Gonzales, 548 U.S. 30, 48 (2006) (Stevens, J., dissenting) (dissenting because of the "historical practice supporting petitioner's reading"); Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior, 526 U.S. 86, 95–96 (1999) (concluding that historical practice was not clear enough to support the agency's position); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 597–98 (1980) (Brennan, J., concurring) ("[R]esolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice . . . .").

401. *NLRB*, 134 S. Ct. at 2556, 2560.

402. *Id.* at 2560.

403. *Id.*

404. *Id.* at 2559–60.

405. *Id.* at 2561.

406. *Id.* at 2567.

Although there is a difference between interpreting a provision of the Constitution and interpreting a statute, the underlying consideration in *Canning* is simple: historical practice may determine the extent of presidential practice.[407] Further, courts in previous Antiquities Act decisions have emphasized the same separation of powers that *Canning* cited to look to historical practice.[408] Accordingly, a court may rely on the history of presidents reducing monuments—again assuming they do not accept the FLPMA argument—to determine the meaning of the Antiquities Act's smallest area compatible requirement.[409] Past practice is not viewed as conclusive, but rather as a guide in determining the meaning of the smallest area compatible language.[410]

Before considering this past practice, the actual legal claim underlying the view that the smallest area compatible requirement gives the President broad authority to reduce national monuments should be further articulated. Textually, the Antiquities Act differentiates between designating monuments and the smallest area compatible requirement, suggesting that ensuring monuments are the smallest area compatible is a separate, continuing obligation or authority.[411] Presidents' past practice of reducing monuments based on this language supports this view.[412] The 1938 Attorney General Opinion also supports this view because it acknowledges that presidents have reduced monuments in the past.[413]

Most scholars agree—some implicitly—that the smallest area compatible requirement is a continuous obligation that gives the President some authority to modify monuments. For example, Professor Squillace has

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407. *Id.* at 2560.

408. Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) ("[I]f the Congress presumes to delegate its inherent authority to Executive Departments [i.e., the Antiquities Act] which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice . . . ."); *cf.* Alaska v. Carter, 462 F. Supp. 1155, 1165 (D. Alaska 1978) (declining to issue an injunction against President Carter that would prevent him from closing the comment period on a draft environmental supplement concerning land withdrawals in Alaska because "[t]he ultimate decision on public lands has been delegated to the Congress by Article I of the Constitution . . ."); *see also* Klein, *supra* note 13, at 1346 (highlighting that judicial decisions place the burden upon "Congress to correct executive excess" involving the Antiquities Act); Nishimoto, *supra* note 280, at 95 ("[J]udges will give broad deference to the President in his use of the Antiquities Act, and place much of the burdens of checks and balance on Congress. . . .").

409. *NLRB*, 134 S. Ct. at 2559–60.

410. *Id.*

411. Rasband, *Future*, *supra* note 277, at 627–28 ("The act explicitly separates the power to designate 'structures[] and other objects' from the power to 'reserve' the land necessary to protect the objects." (alteration in original)); Yoo & Gaziano, *supra* note 278, at 660 (arguing that there is no "temporal limit" to the smallest area compatible requirement).

412. *See infra* Part I (outlining the previous instances that presidents have reduced national monuments).

413. 39 Op. Att'y Gen. 185, 188 (1938).

consistently argued that the President cannot reduce national monuments.[414] He dismisses the notion that the smallest area compatible requirement allows the President to reduce national monuments, but acknowledges that it may allow the President to fix a mistake or to define boundaries that are indeterminate.[415] Professor Squillace thereby acknowledges that the smallest area compatible requirement is a continuing authority but concludes that the scope of the authority is very narrow.[416]

What is in dispute, therefore, is the scope of the authority. Generally, there are three separate views on the scope of the President's authority. Most narrowly, some argue that the smallest area compatible requirement only gives the President authority to correct mistakes in the original designation or to clarify indeterminate boundaries.[417] Second, some have argued that the smallest area compatible requirement allows the President to slightly adjust the boundaries of monuments, but not make major reductions.[418] Third, some argue the smallest area compatible requirement gives the President broad authority to reduce national monuments.[419]

Those that support the third view often argue that history supports this broad view of the smallest area compatible requirement.[420] The problem

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414. Squillace, *Presidents*, *supra* note 302, at 51–71; Squillace, *Monumental*, *supra* note 41, at 561.

415. Squillace, *Presidents*, *supra* note 302, at 57, 68–69.

416. *Id.*; *see also* ARNOLD & PORTER KATE SCHOLER, *supra* note 316, at 3, 14 (concluding that the President cannot *substantially alter* a monument, but conceding that "[i]t is unclear whether a President could make non-material adjustments to monument boundaries without congressional authorization"). *But see* Rasband, *Stroke*, *supra* note 81, at 21-18 ("[I]t is unclear whether the 'smallest area compatible' language creates a continuing, as opposed to a one-time, duty to consider whether less acreage would be sufficient to fulfill the Antiquities Act's protective purpose.").

417. Squillace, *Presidents*, *supra* note 302, at 69 ("It is conceivable, of course, that a revised proclamation might be needed to correct a mistake or to clarify a legal description in the original proclamation . . . ."); Squillace, *Monumental*, *supra* note 41, at 561 (explaining that smallest area compatible "language might support a President's decision to fix boundaries that are found to be indeterminate, or to correct a mistake that might have been made in an original proclamation").

418. Margherita, *supra* note 275, at 292 ("[T]here is at least a modicum of precedent for presidents to reduce the size of existing monuments and some evidence of discernable restrictions on the exercise of that power."); ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 5 (2016) ("[D]espite some potential ambiguity in the phrasing of the Antiquities Act, there is precedent for Presidents to reduce the size of national monuments by proclamation."); Udall, *supra* note 3, at 14 (highlighting that, "it seems fairly well established that presidents can modify existing national monuments" based on the "smallest area compatible" language).

419. Yoo & Gaziano, *supra* note 278, at 651 ("A presidential determination that an original designation was illegally or inappropriately large is a special case. It may provide a sound predicate for declaring a designation to be invalid or for significantly reducing the monument's size."); Seamon, *supra* note 278, at 584–85.

420. *See* ZINKE, *supra* note 203, at 2 ("Existing monuments have been modified by successive Presidents in the past, including 18 reductions in the size of monuments, and there is no doubt that [Presidents] have the authority to review and . . . modify . . . a monument."); Seamon, *supra* note 278, at

with this argument is that not all of this historical practice supports the third view. For example, some scholars cite instances in which presidents have slightly reduced monuments to support the third view.[421] But a President slightly reducing a monument would support the first view of the President's authority to modify monuments, rather than the third one.

Consistent with *Canning*, it is important to critically analyze the past practice of presidents reducing national monuments to determine what it demonstrates about the President's authority to modify national monuments based on the smallest area compatible requirement.[422] Presidents have reduced national monuments in a number of different ways based on a variety of circumstances. First, on two occasions, presidents modified monuments they initially designated or expanded. In 1912, President Taft reduced Navajo National Monument—which he established three years earlier—from 360 to 40 acres.[423] Additionally, in 1941, FDR reduced Wupatki National Monument by about 53 acres.[424] Several years earlier, however, FDR expanded the Monument by over 30,000 acres.[425] These reductions only suggest that the President who establishes or expands a national monument can slightly adjust boundaries on those same monuments.[426] Arguably, the President that designates a monument should have more authority to modify that monument. The Antiquities Act gives the President "one-way authority" to designate national monuments.[427]

576–80 (arguing that presidents have broad authority to reduce national monuments because "the many proclamations excluding lands from monuments reflect that a president can reduce the size of a monument established under the Antiquities Act").

421. For example, Richard Seamon argues that presidents have broad authority to reduce national monuments based on historical practice. Seamon, *supra* note 278, at 576–80. Although he does cite to some examples of presidents significantly reducing national monuments, *id.* at 579 n.118, he also cites instances in which presidents slightly reduced national monuments to support his view. *Id.* at 579 n.119; *see supra* Parts I.E–H (discussing the reductions of White Sands, Wupatki, and Craters of the Moon National Monuments). Similarly, Secretary Zinke concludes in his Final National Monument Report that there is "no doubt" that presidents can modify monuments established by their predecessors because presidents have reduced the size of 16 national monuments on 18 occasions. ZINKE, *supra* note 203, at 4. Secretary Zinke specifically cites to President Taft's reduction of Navajo National Monument to support this claim. *Id.* However, President Taft established Navajo National Monument. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48. Therefore, President Taft's reduction of Navajo National Monument only shows that presidents can modify monuments they created. *Id.* It does not suggest that the President can reduce national monuments established by previous presidents. *Id.*

422. NLRB v. Canning, 134 S. Ct. 2550, 2560 (2014).

423. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

424. Proclamation Reducing Wupatki National Monument, 3 C.F.R. 52, 52 (1941) (indicating that when President Taft established the Navajo National Monument it was 160 square miles, which is equivalent to 102,400 acres).

425. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

426. Squillace, *Monumental*, *supra* note 41, at 561.

427. *Id.* at 553.

When presidents modify monuments they created, they are exercising that same discretion.[428] But either way, these reductions provide no support for the claim that presidents can reduce monuments established by their predecessors.

Second, in 1956, Eisenhower eliminated 40 acres from Hovenweep National Monument, but added an undefined amount of acreage at the same time, resulting in a slight gain to the Monument.[429] This provides no support for the claim that the President can reduce national monuments; instead, it merely suggests that the President can slightly adjust the land contained within a monument.

Third, on two occasions, presidents excluded lands from national monuments that the Army was using for military purposes. In 1955, President Eisenhower eliminated 29,000 acres from Glacier Bay National Monument that the Army was using as an airfield after he determined that the land was no longer necessary for the Monument.[430] Additionally, President Truman eliminated approximately 4,700 acres from the Santa Rosa Island National Monument that the Army was also using for "military purposes."[431]

At the time these reductions occurred, the President had judicially recognized implied powers to create military reservations.[432] In *Midwest Oil*, the Supreme Court recognized that the President has implied power over federal lands because of congressional acquiescence.[433] Specifically, the Court recognized the longstanding practice of presidents designating military reservations without statutory authority.[434] That authority no longer exists because FLPMA repealed *Midwest Oil* and any implied executive authority to create military reservations.[435] Presidents Eisenhower and Truman's reductions essentially created military reservations and, therefore, fell within the implied presidential power to create military reservations that

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428. *Id.* at 555.

429. Proclamation Reducing Hovenweep National Monument, 3 C.F.R. 70, 70 (1956); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

430. Proclamation Reducing Glacier Bay, 3 C.F.R. 24, 36 (1955).

431. Proclamation Reducing Santa Rosa Island National Monument, 3 C.F.R. 35, 35 (1946); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

432. United States v. Midwest Oil Co., 236 U.S. 459, 483 (1915).

433. *Id.*

434. *Id.* at 470–71 ("There was no law for the establishment of these Military Reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement or to reserve them for any of the purposes indicated.").

435. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2792 ("Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress . . . [is] repealed.").

no longer exists.[436] Accordingly, these reductions do not support the claim that the Antiquities Act *alone* gives the President the authority to reduce monuments.

Fourth, on four occasions, presidents corrected mistakes in the original proclamation or updated survey information that described the monument's boundaries. In 1916, President Wilson updated the boundaries of Natural Bridges National Monument based on the most recent geologic survey.[437] In 1946, President Truman updated the boundaries of Great Sand Dunes National Monument for the same reason.[438] In 1962, President Kennedy also updated the boundaries of Timpanogas Cave National Monument based on geologic survey information.[439] Finally, in 1975, President Ford issued a proclamation fixing a typographical error in his proclamation expanding Buck Reef National Monument.[440] These instances suggest that presidents can correct mistakes or update survey information. They provide no support for the claim that presidents can significantly reduce monuments established by their predecessors.

Fifth, presidents have slightly reduced National Monuments on numerous occasions. Three of these reductions, however, are particularly interesting. FDR removed 87 acres from the White Sands National Monument that were on Route 70's right-of-way.[441] Similarly, FDR slightly reduced Craters of the Moon National Monument so Idaho State Highway No. 22 could be built.[442] Additionally, when President Eisenhower removed the military airfield from Glacier Bay National Monument, he also removed a certain undefined amount of private land that was suitable for agricultural use.[443]

First, these reductions only support the view that the smallest area compatible language gives the President the slight authority to adjust national monuments.[444] But on a more critical analysis, the reasoning

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436. *Id.*

437. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

438. Proclamation Updating Great Sand Dunes National Monument, 3 C.F.R. 55, 55 (1946).

439. Proclamation Updating Timpanogas Cave National Monument, 3 C.F.R. 39, 39 (1962), *reprinted in* 76 Stat. 1457 (1963).

440. Proclamation Updating Buck Island Reef National Monument, 3 C.F.R. 444, 444–45 (1975), *reprinted in* 89 Stat. 1231 (1977).

441. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48. FDR's reduction of White Sands could also fall into the category of reductions where presidents reduced monuments they expanded. In 1934, FDR increased White Sands by 158 acres. *Id.* Four years later, FDR removed 87 acres from the Monument. Proclamation Reducing White Sands National Monument, 3 C.F.R. 46, 46 (1938).

442. Proclamation Reducing Craters of the Moon National Monument, 3 C.F.R. 87, 87–88 (1941), *reprinted in* 55 Stat. 1660 (1942).

443. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. 24, 36 (1955).

444. 39 Op. Att'y Gen. 185, 188 (1938).

underlying these reductions is questionable. All national monument designations are subject to valid existing rights.[445] Private rights within national monument boundaries are largely unaffected.[446] When FDR and President Eisenhower reduced monuments they did so to accommodate private property interests.[447] FDR removed 87 acres because of a right-of-way.[448] While FDR's proclamation reducing Craters of the Moon for State Highway No. 22 does not say so,[449] State Highway No. 22 also had a right-of-way.[450] Since whoever was building these highways had a right-of-way, they had the legal right to build the road through the Monument whether or not FDR or President Eisenhower modified the boundaries.[451] Similarly, President Eisenhower removed private land from Glacier Bay that was suitable for agricultural use.[452]

All three of these reductions provide little support for the view that the President can significantly reduce federal land within monuments because they only deal with private land. But, even further, the actual effects of these reductions are slim: the landowners could have farmed and the highways could have been built regardless of whether the land was taken out of the Monuments.[453] These reductions suggest that presidents misunderstood the effects of monument designations.[454] This is a problem if these instances are supposed to demonstrate that previous presidents had a sound legal understanding that the Antiquities Act gave them the authority to reduce national monuments.

Additionally, one of the presidents may have lacked the authority to slightly reduce the monument for an entirely different reason than his alleged authority under the Antiquities Act. In 1960, President Eisenhower eliminated 470 acres from the 10,287-acre Black Canyon of the Gunnison

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445. Ranchod, *supra* note 264, at 572–73.

446. *Cf. id.* at 573 ("Valid existing rights must be respected, but can be regulated in order to protect the purposes of the monument.").

447. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

448. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

449. Proclamation Reducing Craters of the Moon National Monument, 3 C.F.R. 87, 87–88 (1941), *reprinted in* 55 Stat. 1660 (1942).

450. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

451. *Right of way*, BLACK'S LAW DICTIONARY (5th ed. 2016) ("The right to build and operate a railway line or a highway on land belonging to another, or the land so used.").

452. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36.

453. *Bear Ears National Monument Questions & Answers*, U.S. FOREST SERV. (Sept. 10, 2018), https://www.fs.fed.us/sites/default/files/bear-ears-fact-sheet.pdf ("The national monument designation does not alter or affect valid existing rights of any party . . . as long as they are consistent with [its] care and management . . . .").

454. *Id.*

National Monument.[455] President Eisenhower reduced the Monument in response to a congressionally authorized land exchange that eliminated all the private inholdings to make all the land inside the Monument federal.[456] Importantly, President Eisenhower eliminated 470 acres from the Monument *after* this land exchange.[457] While the standard a court would apply in determining whether Congress ratified a monument is not clear,[458] the land exchange would imply that Congress ratified Black Canyon.[459] In the case of congressional ratification, President Eisenhower would have lacked the authority to reduce the Monument.[460]

Presidents have slightly reduced national monuments on three other occasions. President Taft removed 160 acres from the 608,640-acre Mount Olympus National Monument.[461] President Eisenhower reduced the 13,883-acre Colorado National Monument by about 90 acres[462] and then reduced Arches National Monument by about 240 acres.[463] Again, these reductions only support the view that the smallest area compatible language gives the President the authority to slightly reduce the size of national monuments.

Last, on five occasions, presidents have significantly reduced national monuments established by earlier presidents.[464] This first occurred in 1911 when President Taft reduced Petrified Forest National Monument by about 50%.[465] Similarly, President Wilson reduced Mount Olympus National Monument by about 300,000 acres or in half.[466] FDR also reduced the Grand Canyon National Monument II by roughly 70,000 acres.[467] President Eisenhower reduced the Great Sand Dunes National Monument by about

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455. Proclamation Reducing Black Canyon National Monument, 3 C.F.R. 23, 23 (1960), *reprinted in* 74 Stat. c56 (1960); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

456. Act of May 1, 1958, Pub. L. No. 85-391, 72 Stat. 102.

457. Proclamation Reducing Black Canyon National Monument, 3 C.F.R. at 23.

458. *See supra* Part IV.B (arguing that the distinctively clear intent standard courts usually apply for congressional ratification is inappropriate in the context of national monuments).

459. 72 Stat. at 102.

460. *See supra* notes 343–67 (explaining why presidents lack the power to reduce national monuments in the case of congressional ratification).

461. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

462. Proclamation Reducing Colorado National Monument, 3 C.F.R. 56, 56–58 (1959), *reprinted in* 73 Stat. c69 (1959); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

463. Proclamation Reducing Arches National Monument, 3 C.F.R. 32, 32–33 (1960), *reprinted in* 74 Stat. c79 (1961).

464. The reductions of Glacier Bay and Santa Rosa Island National Monuments were also significant. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48. But, as discussed above, these reductions are not relevant for considering the President's authority under the Antiquities Act. *See supra* notes 430–36 (arguing that when presidents reduced Glacier Bay and Santa Rosa Island National Monuments, they had the implied power to create military reservations).

465. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

466. *Id.*

467. *Id.*

20% or 8,520 acres.[468] Finally, President Kennedy reduced Bandelier National Monument by about 1,000 acres.[469]

Although presidents have slightly reduced or clarified the boundaries of national monuments on several occasions, the practice of presidents significantly reducing national monuments established by their predecessors is uncommon. In the 100-year history of the Antiquities Act, presidents have significantly reduced monuments—using only the Antiquities Act—on five occasions.[470] Consistent with *Canning*, these five instances do not provide enough historical support to conclude that the President has the statutory authority to significantly reduce national monuments established by his predecessors.[471] The standard for when a reduction becomes significant is not clear, and determining whether a reduction is significant may present a difficult question. But President Trump's reductions of Grand Staircase and Bears Ears are clearly significant under any standard.[472]

Moreover, there are additional reasons why these historical reductions do not support a claim that the current President can significantly reduce national monuments. First, modern proclamations establishing national monuments explicitly state that the area reserved for the monument is the smallest area compatible for the preservation and management of the monument.[473] This practice of explicitly stating that monuments are the

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468. Proclamation Reducing Great Sand Dunes National Monument, 3 C.F.R. 23, 23–24 (1956), *reprinted in* 70 Stat. c31–32 (1957); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 70.

469. Proclamation Reducing Bandelier National Monument, 3 C.F.R. 62, 63–65 (1963), *reprinted in* 77 Stat. 1006 (1963); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

470. *See supra* notes 461–69 and accompanying text (discussing that presidents have only significantly reduced monuments on five occasions).

471. *Cf.* NLRB v. Canning, 134 S. Ct. 2550, 2567 (2014) (holding that an inter-session recess of less than ten days was too short to trigger the recess appointment clause, even though "[t]here are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days").

472. Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,085 (Dec. 4, 2017) (reducing Bears Ears by 1,150,860 acres); Proclamation Modifying Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017) (reducing Grand Staircase by 861,974 acres). In the litigation surrounding President Trump's reductions, a reviewing court may never even reach the question of whether a president can reduce monuments. If the court accepts the argument raised by some of the litigants that President Trump's actions were equivalent to the revocation of a national monument designation, the court would only have to determine whether the President can abolish national monuments. While legally untested, there are compelling reasons why the President lacks this power. *See supra* Part II (discussing why the President lacks the authority to abolish national monuments).

473. *E.g.*, Proclamation Establishing Bears Ears National Monument, 3 C.F.R. 402, 407 (2016) ("The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected."); Proclamation Establishing Grand Staircase-Escalante National Monument, 3 C.F.R. 64, 67 (1997), *reprinted in* 110 Stat. 4561 (1997)

smallest area compatible did not start until the Carter Administration.[474] Each time presidents have significantly reduced national monuments—with the exception of President Trump—the original proclamation did not limit the area reserved to the smallest area compatible for the management of the monument.[475]

Rather, on two occasions—Mount Olympus and Great Sand Dunes—the original proclamations made no reference to whether the monument was the smallest area compatible.[476] On the other three occasions, the proclamations reserved as much land "as is" or "may be necessary" for the management of the monument.[477] The question still remains whether a proclamation that does not declare that a monument is the smallest area compatible is illegal, and would therefore give a subsequent president the right to determine the smallest area compatible.[478] Claiming that the

("The Federal land and interests in land reserved consist of approximately 1.7 million acres, which is the smallest area compatible with the proper care and management of the objects to be protected.").

474. Squillace, *Monumental*, *supra* note 41, at 555.

475. *See infra* notes 476–77 (providing the text of the original proclamations).

476. Proclamation Establishing Great Sand Dunes National Monument, 47 Stat. 2506 (1932) ("[I]t appears that the public interest would be promoted by including the lands hereinafter described within a national monument for the preservation of the great sand dunes . . . ."); Proclamation Establishing Mount Olympus National Monument, 35 Stat. 2247 (1909) ("[T]he slopes of Mount Olympus . . . embrace certain objects of unusual scientific interest, including numerous glaciers, and the region which from time immemorial has formed the summer range and breeding grounds of the Olympic Elk . . . a species peculiar to these mountains and rapidly decreasing in numbers.").

477. Proclamation Establishing Grand Canyon National Monument II, 47 Stat. 2547 (1932) ("[I]t appears that the public interest would be promoted by reserving this portion of the Grand Canyon as a national monument, with such other land *as is necessary* for its proper protection . . . ." (emphasis added)); Proclamation Establishing Bandelier National Monument, 39 Stat. 1764 (1916) ("[I]t appears that the public interests would be promoted by reserving [the area] with as much land *as may be necessary* for the proper protection thereof, as a National Monument." (emphasis added)); Proclamation Establishing Petrified Forest National Monument, 34 Stat. 3266 (1906) ("[I]t appears that the public good would be promoted by reserving these deposits of fossilized wood as [Petrified Forest] National monument with as much land *as may be necessary* for the proper protection thereof . . . ." (emphasis added)). The reductions of Glacier Bay and Santa Rosa Island National Monuments were also significant reductions, but they are distinguishable from these other significant reductions because at the time they occurred the President had the implied power to create military reservations. *See supra* notes 430–36 (describing the reductions of Glacier Bay and Santa Rosa Island National Monuments). Nevertheless, even if these reductions are considered evidence of the President's authority under the Antiquities Act alone, the same considerations apply. Neither of the original proclamations establishing these Monuments stated that they were reserved to the smallest area compatible. Proclamation Establishing Santa Rosa Island National Monument, 3 C.F.R. 32, 33 (1939) ("Now, Therefore, I, Franklin D. Roosevelt . . . do proclaim that . . . the following-described lands in Florida are hereby reserved from all forms of appropriation under the public-land laws and set apart as the Santa Rosa Island National Monument."); Proclamation Establishing Glacier Bay National Monument, 43 Stat. 1989 (1925) ("Now, Therefore, I, Calvin Coolidge . . . do proclaim that there is hereby reserved from all forms of appropriation under the public land laws, subject to all prior valid claims, and set apart as the Glacier Bay National Monument, the [following] tract of land.").

478. Squillace, *Monumental*, *supra* note 41, at 555.

monument reserves as much land as "may be necessary" invites a similar question: does "may be necessary" imply that the reserved area should or could change?[479] But in the contemporary context, this issue is moot: designations over the last 20 years have explicitly stated they are reserved to the smallest area compatible.[480]

But to the critical point: no President has significantly reduced a national monument when the initial proclamation stated that the original designation was the smallest area compatible.[481] Given that courts have essentially held that a monument is the smallest area compatible when the President declares it to be, this is a critical distinction.[482] In the history of the Antiquities Act, no president has ever overruled an earlier President's discretionary judgment that a monument was the smallest area compatible by significantly reducing a national monument.[483]

Additionally, Congress responded when presidents significantly reduced monuments by protecting the land those presidents removed from national monuments.[484] This repeated response suggests that presidents should not have the authority to significantly reduce national monuments because it violates the protective purpose of the Antiquities Act.

1. Bandelier

In 1963, President Kennedy reduced Bandelier National Monument by about 1,000 acres.[485] After President Kennedy's reduction, Congress passed two pieces of legislation. First, in 1976, Congress designated 70% of the Monument as wilderness.[486] Second, in 1998, Congress passed the Bandelier National Monument Administrative Improvement and Watershed

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479. *Id.* ("[A]n original monument proclamation, by definition, represents the judgment of a president that the area protected *is* the 'smallest area compatible with the proper care and management' of the protected objects. Otherwise the proclamation would be invalid on its face.").

480. *Id.*

481. S*ee supra* text accompanying notes 470–75 (explaining that the five times presidents significantly reduced monuments, the original proclamations did not limit monument to the smallest area compatible).

482. *E.g.*, Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1186 (D. Utah 2004) ("The language of the Proclamation clearly indicates that the President considered the principles that Congress required him to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects.").

483. Squillace, *Monumental*, *supra* note 41, at 567.

484. *Id.* at 564.

485. Proclamation Reducing Bandelier National Monument, 3 C.F.R. 62, 63–65 (1963), *reprinted in* 77 Stat. 1006 (1963); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

486. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.

Protection Act.[487] The Act acknowledged that "[a]t various times since its establishment, the Congress and the President have adjusted the Monument's boundaries."[488] The Act noted that the Monument faced threats from "flooding, erosion, and water quality deterioration because of the mixed ownership of the upper watersheds."[489] To correct this problem, Congress acquired an additional 935 acres of land to enhance and protect the Monument.[490] In both of these acts, Congress responded to President Kennedy's reduction by significantly increasing the size of and further protecting the Monument.[491]

2. Mount Olympus

In 1915, President Wilson reduced Mount Olympus National Monument by nearly 300,000 acres.[492] Several years after President Wilson reduced Mount Olympus, Congress designated the Monument as a national park[493] and put most of the land that Wilson had removed from the Monument into the National Park.[494] In the Act designating Mount Olympus National Park, Congress specifically allowed the President to expand the park.[495] In 1988, Congress further protected the Park by designating 95% of it as a wilderness area.[496] Once again, Congress responded to a president reducing a national monument by protecting lands that the President took out of the Monument.[497]

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487. Bandelier National Monument Administrative Improvement and Watershed Protection Act of 1998, Pub. L. No. 105-376, 112 Stat. 3388.

488. *Id.*

489. *Id.* at 3389.

490. *Id.*

491. *Id.*

492. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

493. Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241.

494. Squillace, *Monumental*, *supra* note 41, at 564.

495. 52 Stat. at 1242.

496. Washington Park Wilderness Act of 1988, Pub. L. No. 100-668, 102 Stat. 3961–62; *Monument Profiles: Mount Olympus*, *supra* note 84.

497. *See* Squillace, *Monumental*, *supra* note 41, at 564 ("When the Mount Olympus National Monument was transformed into the Olympic National Park in 1938, much of the land that President Wilson took out of the monument was put back into the park, suggesting that this land did indeed encompass objects worthy of preservation.").

3. Great Sand Dunes

After President Eisenhower reduced Great Sand Dunes National Monument by about 20%,[498] Congress had a similar reaction. In 1976, Congress designated most of the Monument as wilderness[499] and then enlarged the Monument two years later.[500] In 2000, Congress designated Great Sand Dunes as a national park and a separate national preserve.[501] In 2014, the Park contained 107,000 acres and the Preserve contained 41,000 acres.[502] While President Eisenhower reduced the Monument by 9,480 acres, by 2004, Congress had protected over 140,000 acres in what was once the Great Sand Dunes National Monument.[503]

4. Petrified Forest

Finally, after President Taft reduced Petrified Forest National Monument by half,[504] Congress passed multiple pieces of legislation protecting the Monument by designating the Monument as a national park[505] and then significantly expanding the Park from 93,533 to 218,533 acres.[506]

In the vast majority of circumstances,[507] Congress expressed its disapproval of presidents interpreting the smallest area compatible language

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498. Proclamation Reducing Great Sand Dunes National Monument, 3 C.F.R. 23, 23–24 (1956), *reprinted in* 70 Stat. c31–32 (1957); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 7.

499. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.

500. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3474.

501. Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, 114 Stat. 2527, 2529.

502. Kerr, *supra* note 20, at 7.

503. Proclamation Reducing Great Sand Dunes National Monument, 3 C.F.R. at 23–24; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 7.

504. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

505. Act of Mar. 28, 1958, Pub. L. No. 85-358, 72 Stat. 69.

506. Petrified Forest National Park Expansion Act of 2004, Pub. L. No. 108-430, 118 Stat. 2606.

507. The only outlier is FDR's reduction of Grand Canyon National Monument II. Proclamation Reducing Grand Canyon National Monument II, 3 C.F.R. 32, 32 (1940), *reprinted in* 54 Stat. 2692 (1941). Though Congress expanded Grand Canyon National Park a few years after FDR's reduction, the new boundary of the Park mirrored the boundary FDR created when he reduced the Monument. Ingram, *supra* note 118. This would suggest that Congress supported FDR's decision. *But see* Squillace, *Monumental*, *supra* note 41, at 564–65 (arguing that FDR's decision to reduce Grand Canyon National Monument II "was a concession to political concerns, and was not made on the basis of an assessment that the reduced area was the 'smallest area compatible with the proper care and management of the objects to be protected.'" (quoting 16 U.S.C. § 431 (2000), *recodified at* 54 U.S.C. § 320301(b) (Supp. III 2016))). However, Congress responded to most instances that presidents significantly reduced monuments by protecting the land taken out of the monuments. This practice of Congress responding to

to significantly reduce national monuments by protecting land that presidents had taken out of those monuments.[508] This congressional response, in addition to the fact that presidents have only significantly reduced national monuments on five occasions, indicates that presidents do not have the authority to significantly reduce national monuments established by their predecessors.[509]

To recap, several general patterns emerge from the history of presidents using the smallest area compatible requirement to reduce national monuments. First, on two occasions, presidents reduced national monuments to exclude lands the army used for military purposes.[510] Given that presidents had the implied power to create military reservations at the time, these reductions do not support a claim that the President has authority under the Antiquities Act *alone* to reduce monuments.[511]

Second, on two occasions, presidents made slight adjustments to monuments they designated or expanded.[512] These reductions *at most* suggest that presidents can reduce monuments they established or expanded.[513] But no court has ever held that the President has the legal authority to make slight reductions.[514] Nevertheless, they provide no support for the claim that subsequent presidents can modify monuments established by their predecessors. Third, on one occasion, a president eliminated some land from a monument while adding other land, resulting in a net increase.[515] This reduction only suggests that the President can adjust the boundaries of monuments. Fourth, on four occasions, presidents

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reductions is even more compelling when considering every time that presidents have reduced monuments. Andy Kerr analyzes every instance that presidents have reduced national monuments and argues that "most" of the land taken out of national monuments "was reproclaimed by a later president or otherwise protected by an act of Congress." Kerr, *supra* note 20, at 3.

508. *See supra* Part V.A (documenting the congressional response to each instance that presidents significantly reduced national monuments).

509. *See supra* Part V.A.1 (discussing Congress's response to President Kennedy's reduction of Bandelier National Monument); *see also supra* Part V.A.2 (discussing Congress's response to President Wilson's reduction of Mount Olympus National Monument); *supra* Part V.A.3 (discussing Congress's response to President Eisenhower's reduction of Great Sand Dunes National Monument); *supra* Part V.A.4 (discussing Congress's response to President Taft's reduction of Petrified Forest National Monument).

510. *See supra* notes 430–36 (describing the reductions of Glacier Bay and Santa Rosa Island National Monuments).

511. *See supra* text accompanying notes 430–36 (describing presidential use of subsequently repealed implied powers to reduce national monuments for sake of military use of the excluded lands).

512. *See supra* notes 423–26 (describing the reductions of Navajo and Wupatki National Monuments).

513. Squillace, *Monumental*, *supra* note 41, at 555.

514. Squillace, *Presidents*, *supra* note 302, at 65.

515. *See supra* notes 160–62 (describing President Eisenhower's adjustment of Hovenweep National Monument).

updated the boundaries of national monuments based on survey information or to correct typographical mistakes.[516] These reductions only suggest that the President has the narrow authority to correct proclamations.

Fifth, a number of presidents have slightly reduced national monuments.[517] On three of these occasions, the reasoning presidents provided for their reduction was based on a mistaken understanding of monument designations.[518] On another one of those occasions, the President may have lacked the authority to reduce monuments because of congressional ratification.[519] Last, in five instances, presidents have significantly reduced monuments established by their predecessors.[520] Given the few times these reductions have occurred, and the subsequent congressional reactions, these instances do not support the claim that presidents have the legal authority to significantly reduce national monuments.

B. Congress Has Not Acquiesced to Presidents Significantly Reducing National Monuments

The other way that historical practice may allow the President to reduce national monuments is congressional acquiescence. Congressional acquiescence falls into the second category of Justice Jackson's framework: the "zone of twilight."[521] If the President lacks the authority to engage in an action, but claims the authority for long enough and Congress fails to respond, the President may nevertheless have the authority.[522] To prove congressional acquiescence, the President must show "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned."[523] Advocates of congressional acquiescence argue that presidents have reduced monuments on numerous

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516. *See supra* notes 437–40 (describing the modifications of Natural Bridges, Great Sand Dunes, Timpanogas Cave, and Buck Island Reef National Monuments).

517. *See supra* notes 441–63 (describing the reductions of White Sands, Craters of the Moon, Glacier Bay, Black Canyon of the Gunnison, Mount Olympus, Colorado, and Arches National Monuments).

518. *See supra* notes 444–54 and accompanying text (describing the flawed reasoning behind the reductions of White Sands, Craters of the Moon, and Glacier Bay National Monuments).

519. *See supra* notes 455–60 (describing the reasons why President Eisenhower may have lacked the authority to reduce Black Canyon of the Gunnison National Monument).

520. *See supra* notes 464–69 (describing the reductions of Petrified Forest, Grand Canyon II, Great Sand Dunes, Mount Olympus, and Bandelier National Monuments).

521. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

522. *Id.*

523. Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (citing *Youngstown*, 343 U.S. at 610–11).

occasions.[524] And while Congress has amended the Antiquities Act twice, it has failed to expressly declare that the President lacks the authority to reduce national monuments.[525]

First, this argument acknowledges that presidents lack the statutory authority to reduce monuments: if the President had the statutory authority to reduce monuments, Congress would not have to acquiesce to that authority.[526] Second, advocates again point to every example of presidents reducing national monuments to show that Congress has acquiesced, but in many of those reductions, presidents only slightly reduced monuments.[527] In *Medellin*, the Supreme Court addressed this issue.[528]

Medellin involved the question of whether the President, by issuing a memorandum, could turn a non-binding decision of the International Court of Justice (ICJ) into binding domestic law.[529] President Bush argued that presidents had historically used their constitutional authority to make treaties and resolve disputes with foreign nations to turn ICJ decisions into binding law.[530] Therefore, Congress had acquiesced to presidents acting in this manner.[531] In considering whether there had been congressional acquiescence, the Court looked for acquiescence to the particular kind of action in the present case: a presidential memorandum turning a non-binding ICJ decision into binding domestic law.[532] Applying that narrow standard, the Court held that there was no evidence of congressional acquiescence to that particular activity.[533] In the process, the Court rejected

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524. *E.g.*, Seamon, *supra* note 278, at 582 ("[P]residents have long exercised power to modify monuments established under the Antiquities Act. Congress has not disturbed that power, despite continuing close attention to presidential exercises of power under the Act.").

525. *E.g.*, Rasband, *Stroke*, *supra* note 81, at 21-25 ("[C]ongressional acquiescence in 18 presidential reductions, and Congress's subsequent amendments to the Antiquities Act without restricting reductions . . . creates a strong presumption that Congress has consented to presidential reductions in monument size."); *but see supra* Part IV.A (discussing the argument that Congress amended the Antiquities Act when it passed FLPMA).

526. *See supra* Part III (explaining that congressional acquiescence is only relevant when the Executive lacks the authority to act).

527. *See, e.g.*, Rasband, *supra* note 81, at 21-25 (arguing that Congress has acquiesced to "18 presidential reductions"); *see also supra* notes 510–519 (outlining the various instances that presidents have reduced national monuments).

528. Turner, *supra* note 284, at 685.

529. Medellin v. Texas, 552 U.S. 491, 491 (2008).

530. *Id.* at 525.

531. *Id.*

532. *Id.* at 532.

533. *Id.* ("Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts . . . .").

instances where Congress has acquiesced to other uses of the President's treaty and dispute resolution powers.[534]

Medellin suggests that courts will define any claim of congressional acquiescence in very narrow terms.[535] The President must show acquiescence to the action in the particular situation and not a generalized claim of congressional acquiescence in an entire field.[536] Consistent with *Medellin*, the question is whether Congress acquiesced to presidents significantly reducing national monuments, not merely modifying monuments in general.[537]

Although Congress may not have amended the Antiquities Act,[538] Congress has responded in other ways when presidents have significantly reduced national monuments. For example, after President Wilson reduced Mount Olympus National Monument,[539] Congress designated the area as a national park that included most of the land President Wilson had taken out of the Monument.[540] While the Monument was only 600,000 acres when President Roosevelt designated it,[541] by 2014 the Monument-turned-Park contained over 900,000 acres.[542] Since the standard for congressional acquiescence is whether the practice has never been questioned, one congressional response would defeat a claim of acquiescence.[543]

But Congress responded every time that presidents have significantly reduced monuments. After the reductions of Great Sand Dunes and Petrified Forest National Monuments, Congress designated both the Monuments as national parks.[544] After FDR reduced Grand Canyon National Monument II, Congress increased the size of Grand Canyon National Park.[545] Finally, after President Kennedy reduced Bandelier National Monument, Congress passed a bill that "enhanced [the] protection

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534. *Id.* ("The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum."); *see also* Turner, *supra* note 284, at 689 (explaining that the *Medellin* Court "insiste[d] that the specific actions taken by the President have a history of congressional acquiescence").

535. *Medellin*, 552 U.S. at 501.

536. *Id.* at 532.

537. *Id.*

538. *But see supra* Part IV.A (discussing the argument that Congress amended the Antiquities Act when it passed FLPMA).

539. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

540. Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241; Squillace, *Monumental*, *supra* note 41, at 564.

541. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

542. Kerr, *supra* note 20, at 8.

543. Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).

544. *See supra* Parts V.A.3–4 (discussing Congress's response to the reduction of Great Sand Dunes and Petrified Forest National Monuments).

545. Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975).

of the lands within the Monument's upper watershed."[546] These responses all demonstrate that Congress has not been indifferent or acquiesced.[547]

CONCLUSION

In 1903, President Roosevelt, standing on the rim of the Grand Canyon, famously stated, "the great loneliness and beauty of the Canyon. You can not improve it. The ages have been at work on it and man can only mar it."[548] But during the early 1900s, President Roosevelt was deeply concerned about development around the Grand Canyon.[549] The Atchinson, Topeka, and Santa Fe Railroad was planning on building a large hotel on the rim of the Grand Canyon.[550] Ralph Henry Cameron was seeking out mining claims and planning to build an electric railway for sightseeing tours on the rim of the canyon.[551] These concerns led Roosevelt to designate the Grand Canyon as a national monument in 1908.[552] While the Monument was controversial at its time, Grand Canyon National Park is now a beloved part of the American landscape.[553]

The designation of national monuments usually results in this typical chain of events. Designations create controversy that, more often than not, fades into widespread support.[554] The Antiquities Act serves the essential function of allowing the President to act quickly and protect parts of the American landscape until Congress decides to pass broader land-management legislation.[555]

President Trump's proclamations modifying Grand Staircase and Bears Ears reflect another, albeit questionable, pattern in presidents' use of the

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546. Bandelier National Monument Administrative Improvement and Watershed Protection Act of 1998, Pub. L. No. 105-376, 112 Stat. 3388.

547. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

548. ROTHMAN, PRESERVING, *supra* note 35, at 65.

549. *Id.*

550. *Id.*

551. *Id.* at 66.

552. Proclamation Establishing Grand Canyon National Monument, 35 Stat. 2175 (1908).

553. Tom Kenworthy, Opinion, *A Tribal Coalition Wins a Monument for Bears Ears*, DENVER POST (Dec. 31, 2016), https://www.denverpost.com/2016/12/31/a-tribal-coalition-wins-a-monument-for-bears-ears/; Udall, *supra* note 3, at 15 ("Grand Canyon and Grand Teton National Parks, both of which were controversial at the time of their creation, are now widely viewed as national treasures that define this country.").

554. VINCENT & BALDWIN, *supra* note 40, at 3–4 ("About half of the current national parks were first designated as national monuments.").

555. On January 1, 1908, President Roosevelt designated Pinnacles National Monument. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48. Over the course of the next 100 years, five presidents enlarged the Monument until Congress designated the Monument as a national park in 2013. Margherita, *supra* note 275, at 300.

Antiquities Act: presidents using the Act to reduce national monuments.[556] While several presidents have reduced national monuments, this Note argues that those reductions do not provide the President with the authority to significantly reduce national monuments. In light of FLPMA and congressional ratification, those past reductions may be irrelevant.[557] But even assuming a court takes past reductions into account, they do not support the claim that presidents can significantly reduce national monuments established by their predecessors.[558] More than 100 years after the passage of the Antiquities Act, a court may soon provide a concrete answer to this much debated and controversial question.[559]

—Noah Greenstein[*†]

556. *See supra* Part I (outlining the previous instances that presidents have reduced national monuments).

557. *See supra* Part IV (arguing that the past practice of presidents reducing monuments is irrelevant because of FLPMA and congressional ratification).

558. See *supra* Part V (concluding that presidents have only significantly reduced monuments on five occasions, and those five instances do not provide the President with the authority to significantly reduce monuments).

559. *See supra* notes 254–59 (describing the current litigation surrounding President Trump's "modification" of Bears Ears National Monument); *see also supra* notes 239–42 (outlining the litigation over President Trump's "modification" of Grand Staircase-Escalante National Monument).

* Juris Doctor Candidate 2018, Vermont Law School.

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