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KICK THE DUST OFF: A PRO-CATTLE AMENDMENT TO COLORADO'S DUST BLOWING ACT OF 1954

Katherine Potter*

* Katherine Potter earned her Juris Doctor from Vermont Law and Graduate School in 2024 and is a new member of the Utah Bar. She holds a Bachelor's of Arts degree from Fort Lewis College in Durango, Colorado where Katherine double-majored in environmental studies and political science with the honors minor. Public service and environmental stewardship drive Katherine's life. These passions, combined with her upbringing in Colorado, inspired Katherine's passion for this Article. Katherine wants to thank Dr. Keri Brandt Off for inspiring Katherine with the intriguing world of soil health, Professor Christine Ryan for her mentorship and support for this Article, and the *Vermont Law Review* staff for their contributions to the success of this Article. Katherine also wants to thank her family for their unending support and listening ears everytime Katherine needed to brainstorm. Katherine takes all responsibility for any errors or inaccuracies.

INTRODUCTION

In 1935, on the eastern plains of Colorado, children gleefully played tag on their family homestead. Farm dogs rolled around in the grass while barn cats basked in the sunshine. Meanwhile, anxious parents sat inside around the kitchen table, wishing for rain to save the land from the five-year-long drought ravaging the great plains of the United States.[1] The rain never came.

What came instead was a one-thousand-foot cloud of thick, black dust that some observers would later describe as a "black blizzard."[2] The dust swirled and lingered across parts of Colorado, New Mexico, Texas, Kansas, and Oklahoma, achieving the peak of its damage in 1935 through 1936.[3] This period, called the 1930s Dust Bowl,[4] significantly threatened animal and human health.[5] Human land management, harsh droughts, and poor soil conditions were the main causes.[6]

Concerned with the risks that dust posed to human welfare, the Colorado Legislature created the Dust Blowing Act of 1954 (Dust Act).[7] Unfortunately, the Dust Act undermines its own power by omitting important land management techniques—namely integration of livestock—from its required list of activities that prevent soil erosion. The Dust Act should impose a duty upon cattle-owners to integrate their cattle into their current land use in accordance with regenerative agricultural practices to prevent harmful topsoil erosion. This Article proposes amending the Dust Act to require landowners and occupiers who own cattle to integrate their cattle into their land management practices in accordance with regenerative agricultural principles. Requiring cattle integration will enhance the Dust Act's goal of protecting human welfare, while transforming the Act into environmentally protective legislation.

Part I discusses the role of agriculture in climate change. Part II considers misconceptions that cattle are inherently harmful animals, and Part III asserts that agriculture can be a climate change solution. Part IV

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1. *See* R. DOUGLAS HUNT, THE DUST BOWL: AN AGRICULTURAL AND SOCIAL HISTORY 1 (Nelson-Hall Chic. 1984 reprt.) (1981) (describing how dust replaced the rain that rural citizens hoped for in 1935).

2. *Id.* at 1–2.

3. *Id.* at 2–3.

4. *See generally id.* at 3, 84–86 (noting how dust storms occurred from 1930 until 1940).

5. *See id.* at 103–04 (describing the damage dust caused to pastures used to raise cattle); *see also* Jeffrey B. Basara et al., *Drought and Associated Impacts in the Great Plains of the United States—A Review*, 4 INT'L J. GEOSCIENCES 72, 76–77 (2013) (explaining the harmful impacts of the Dust Bowl on agricultural crops and human lungs).

6. *See* HUNT, *supra* note 1, at 17 ("[T]he composition of the soil, the severity of the climate, and the settlement of man were responsible for the creation of the Dust Bowl.").

7. *See infra* Part IV.A.

provides an overview of the Dust Act and interprets the relevant sections of the Act and its application in case law. Part V discusses the proposed amendment to the Act that requires cattle owners to integrate their cattle into the land to prevent soil erosion and the implications of this amendment.

I. AGRICULTURE AS A PROMISING CLIMATE CHANGE SOLUTION

Agriculture and climate change share a complex relationship. This Part evaluates this relationship and asserts that properly managing cattle through regenerative agriculture will draw carbon dioxide back into the ground, offsetting the effects of climate change. This Part also details the threats of climate change and how conventional agriculture enhances those threats.

Greenhouse gas (GHG) emissions are heating the Earth's atmosphere and damaging its ecosystems and resources.[8] Climate scientists contend that if humanity does not significantly reduce GHG emissions—namely carbon dioxide, methane, and nitrous oxide—catastrophe will ruin the planet.[9] After GHGs raise the earth's temperature by 1.5 degrees Celsius compared to pre-industrial temperature,[10] extreme drought, flooding, biodiversity loss, increased heat-related illness, more frequent spread of diseases, and greater risk of species extinction are likely.[11] Carbon dioxide exacerbates climate change, comprising 82% of the United States' domestic GHG emissions.[12] This domestic carbon dioxide creation constitutes 15% of human-caused carbon dioxide globally[13] and comprises most of the United States' contribution to global climate change.[14] Increasing amounts of carbon dioxide in the atmosphere is the greatest cause of climate change.[15]

8. Alexia Brunet Marks, *(Carbon) Farming Our Way Out of Climate Change*, 97 DENV. L. REV. 497, 499–500 (2020) (stating that damage from climate change includes a reduction in arable land that decreases how much food farmers can produce; weakened land, water, and soil quality; increased price instability; more frequent political conflicts; and significant threats to human health—like extending allergy season).

9. *Id.*

10. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5 C vii (Valérie Masson-Delmotte et al. eds., 2018) (noting that the pre-industrial time period is 1850–1900).

11. *Id.* at 177–81.

12. NICOLETTE HAHN NIMAN, DEFENDING BEEF: THE ECOLOGICAL AND NUTRITIONAL CASE FOR MEAT 9 (Benjamin Watson & Laura Jorstad eds., 2021).

13. *Id.*

14. *Id.* ("[Carbon dioxide's] warming effect, lasts hundreds of thousands of years. Essentially, CO_2's warming effect lasts forever.").

15. *Id.* at 10.

Agriculture within the United States emits GHGs, including harmful carbon dioxide.[16] In the United States, agriculture is the most common type of land use,[17] constituting 9% of domestic GHG emissions and 25% of global GHG emissions.[18] Combined, this means limiting GHG emissions from farms is essential for limiting the impacts of climate change. Conventional agricultural practices specifically create GHG emissions because its defining practices, such as plowing and stationary grazing, erode soil and release GHGs.[19] Furthermore, conventional agricultural practices strip soil of its important organic carbon content, reducing the ability of soil to function, and releasing that carbon into the atmosphere.[20] Unhealthy soils create carbon; healthy soils store carbon.[21]

Because good agricultural practices have the ability to sequester a significant amount of atmospheric carbon dioxide, agriculture is an optimal sector to combat climate change within.[22] The carbon cycle demonstrates agriculture's potential to sequester carbon from the atmosphere and into the soil.[23] The well-known concept of photosynthesis, where plants use sunshine to grow, is a cornerstone of the carbon cycle.[24] For plants to photosynthesize

16. *Id.* at 9, 12, 20 (describing that 14% of domestic agricultural GHG emissions are carbon dioxide, 40% of domestic agricultural GHG emissions are methane, and that nitrous oxide composes 5% of United States GHG emissions with 73% of that nitrous oxide attributed to agriculture).

17. DANIEL P. BIGELOW & ALLISON BORCHERS, U.S. DEP'T OF AGRIC., MAJOR USES OF LAND IN THE UNITED STATES, 2012, (2017) (stating that grassland pasture and rangeland constitute nearly one third of total United States land use, followed closely by forest land use).

18. Marks, *supra* note 8, at 501.

19. Moises Velasquez-Manoff, *Can Dirt Save the Earth?*, N.Y. TIMES MAG. (Apr. 18, 2018), https://www.nytimes.com/2018/04/18/magazine/dirt-save-earth-carbon-farming-climate-change.html.

20. JOHN A. STANTURF ET AL., SOILS ARE FUNDAMENTAL TO LANDSCAPE RESTORATION, SOILS AND LANDSCAPE RESTORATION 22–24 (John A. Stanturf & Mac A. Callaham Jr. eds., 2020).

21. *See* NIMAN, *supra* note 12, at 34–39. Fungi underneath the soil create a sticky carbon-based protein called glomalin. Glomalin attaches to the roots of plants and provides nutrients to the plants from the soil, while providing the carbon from the plants to the soil. Clumps of soil held together by glomalin stabilize the carbon within the soil and so the carbon stays in the soil for a long time. The soil clumps of glomalin help filter water, retain water, and feed carbon to important organisms within the soil. *Id.*

22. *See, e.g.*, *id.* at 36 (stating that "the greatest opportunities for carbon sequestration lie in grazing areas"); JUDITH D. SCHWARTZ, COWS SAVE THE PLANET AND OTHER IMPROBABLE WAYS OF RESTORING SOIL HEALTH TO HEAL THE EARTH 16 (Laura Jorstad ed., 2013) (explaining the importance of changing agricultural practices to sequester carbon dioxide and quoting a colleague stating "[w]orldwide, if the organic matter—which is about 58 percent carbon—in all the land that we currently farm and graze were increased 1.6 percent to a foot in depth, atmospheric CO_2 levels would be at pre-industrial levels."); *see also* Velasquez-Manoff, *supra* note 19 (describing how reducing emissions alone is insufficient to mitigate climate change, and rather that people must address land use and soil health).

23. SCHWARTZ, *supra* note 22, at 22 ("When we look at the carbon cycle in the context of soil, this is what we see: . . . we've got more carbon in the soil, we've got fertile ground for plants, more photosynthesis, and a *positive* feedback loop that takes carbon dioxide out of the air . . . .").

24. *Id.* at 11 (quoting soil ecologist Christine Jones saying "[t]he process that actually removes CO_2 from atmospheric circulation is photosynthesis").

something, those plants combine absorbed solar energy with carbon dioxide and water to create material such as food, biomass, and fuel.[25] In other words, plants draw down atmospheric carbon dioxide into the soil. Healthy soils contain more carbon, which facilitates plant growth, increases photosynthesis, and sequesters more carbon dioxide.[26] It follows that land use impacts the carbon cycle's ability to sequester carbon. Agriculture already dominates land use in the United States, so shifting conventional agriculture to prioritize soil health and capitalize on the carbon cycle has enormous potential.

Without changing conventional agricultural practices, two outcomes are likely. First, tilling, deforestation, improper livestock management, pesticide use, and other conventional practices will degrade soil.[27] This means that carbon escapes from the ground and continues polluting the atmosphere.[28] Second, unhealthy soils are more erodible than healthy soils.[29] Harmful agricultural practices make soil loose and sandy, allowing water to wash and wind to blow the soil away.[30] Instead, soil should contain carbon to balance its texture, retain water, and prevent wind erosion.[31]

As the harms of conventional agriculture on GHG emissions worsen, efforts are shifting towards expanding better land-management regimes to draw atmospheric GHGs, specifically carbon, back into the soil.[32] Scientists call the process of drawing carbon down into the soil "carbon sequestration" and are dedicating attention to preserving the relationship between soil and the atmosphere.[33] Carbon is the key component of soil health.[34] Specifically, "[c]arbon is what lends fertility to soil and sustains plant and microbial life."[35] This means that carbon sequestration that occurs through better land

25. *Id.* at 22.

26. *Id.*

27. Marks, *supra* note 8, at 501, 507.

28. *Id.* at 503.

29. Shannon Avery Hughes, *Global Sustainable Farming and the "SoCo" Soil Conservation Project*, 45 DENV. J. INT'L L. & POL'Y 431, 439–40 (2017) ("[S]oil is subject to a series of degradation processes linked to agriculture such as: erosion due to water, wind, and tillage; compaction; declining organic carbon and biodiversity; salinization; and contamination by heavy metals and pesticides, or excess nitrates and phosphates.").

30. *Id.*

31. STANTURF ET AL., *supra* note 20, at 8.

32. Velasquez-Manoff, *supra* note 19.

33. *Id.*

34. *See generally* SCHWARTZ, *supra* note 22, at 11–13, 15–16 (describing how carbon that is stored within soil helps that soil to retain water, distribute nutrients, survive dangerous weather events, and reduce the effects of global climate change).

35. *Id.* at 11.

management significantly benefits soil health.[36] Soil can take carbon out of the atmosphere by bringing that carbon back into the soil where it belongs.[37]

Agriculture is a powerful climate change solution because "[s]oils are the second largest reservoir of carbon."[38] Carbon sequestration is the most impactful contribution agriculture can make to combatting climate change.[39] Increasing the carbon content of soil accounts for "89% of [GHG] mitigation potential."[40] Agriculture has created GHG emissions and caused environmental damage throughout time.[41] It is time to capitalize on agriculture's equally undeniable capacity for regeneration.

II. "IT'S NOT THE COW, IT'S THE HOW"

This Part explores three public misconceptions of cattle. First, people perceive cattle as one of the main sources of methane emissions—one of the three major greenhouse gases (GHGs).[42] Second, people think cattle constitute the largest amount of GHG emissions from the entire agricultural sector.[43] Third, people assert that cattle cause overgrazing.[44] This Part explains why these three ideas are incorrect while debunking the narrative that cattle are inherently harmful to the environment and concludes by explaining how cattle are environmentally beneficial and critical to soil health and carbon sequestration.

Over time, cattle have had a significant role in human lives and history. Data suggest that humans first domesticated cattle in 5800 B.C., with some evidence suggesting that cattle domestication occurred even 500 years before.[45] Today, cattle feed billions of people and generate substantial

36. *Id.*

37. *Id.* at 11–13.

38. Marks, *supra* note 8, at 503 (quoting Charlotte Streck & Austina Gay, *The Role of Soils in International Climate Change Policy*, INT'L. Y.B. SOIL L. & POL'Y, 105, 105–107 (2016); Harald Ginzky et al. eds., 2016 (noting that oceans are the largest carbon reservoir)).

39. NIMAN, *supra* note 12, at 30–31.

40. *Id.* at 31.

41. *See* Velasquez-Manoff, *supra* note 19 (describing how tilling causes erosion and clear-cutting causes emissions); *see also* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L. Q. 263, 277–78 (2000) (explaining how transforming natural landscapes into agricultural landscapes causes soil erosion).

42. NIMAN, *supra* note 12, at 12–13.

43. Marks, *supra* note 8, at 501–02.

44. NIMAN, *supra* note 12, at 108–09.

45. Dexter Perkins, Jr., *Fauna of Çatal Hüyük: Evidence for Early Cattle Domestication in Anatolia*, 164 SCI. 177, 177 (1969).

economic movement annually.[46] Despite the prominent impact of cattle on human existence, the public often perceives cattle in a negative light.[47]

A. Myth: Cattle Burps Create Methane and Warm the Planet

The first misconception, that cattle are the lead cause of methane emissions, is based on the notion that cattle burps release methane and pollute the planet.[48] Specifically, people believe that cattle's unique digestive process inherently causes cattle to emit more methane than all modes of transportation in the world combined.[49] This common incorrect thought is harmful and must be debunked.

Beginning with cattle digestion, cattle process carbon dioxide in tandem with the carbon cycle itself because of their unique digestive systems.[50] Plants photosynthesize which create carbohydrates that only cattle are capable of consuming by fermenting the material in one chamber of their four-chambered stomachs, called the rumen.[51] Cattle break down these carbohydrates and emit methane which is then converted into carbon dioxide through other complex scientific processes.[52] This carbon is old; it is "the same carbon that was in the air prior to being consumed by an animal. It is recycled carbon."[53] The important takeaway is that cattle are not creating new emissions but instead move emissions through ecosystems in the same circular fashion as the carbon cycle.[54] As a result, these methane emissions

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46. *See generally*, *Cattle & Beef Statistics & Info.*, USDA: ECON. RES. SERV., https://www.ers.usda.gov/topics/animal-products/cattle-beef/statistics-information (last updated Jan. 8, 2025) (reporting that the U.S. produced 27.9 billion pounds of beef which equals 51.9 billion dollars of production value in 2021).

47. *See generally*, Debra L. Donahue, *Livestock Production, Climate Change, and Human Health: Closing the Awareness Gap*, 45 ENV'T L. REP. 11112, 11113 (2015) (calling for the removal of all cattle from public lands); Todd M. Olinger, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Council*s, 69 U. COLO. L. REV. 633, 641 (1998) (arguing that cattle cause overgrazing which "harms bio-diversity, competes with wildlife, erodes soils, degrades riparian areas, and reduces water quality").

48. *See* NIMAN, *supra* note 12, at 18 ("As a by-product of this unique digestive process [of cattle], methane is burped (mostly), breathed out (somewhat), and farted (a little) . . . .").

49. Marks, *supra* note 8, at 502.

50. *See* NIMAN, *supra* note 12, at 16–18 (explaining how other elements of nature circulate carbon through ecosystems, so cattle-related methane emissions do not "actually [add] carbon to the earth's ecosystem").

51. *Id.* at 18 ("The digestive process involves fermentation in a chamber called a *rumen*, which is why cattle are called *ruminants* . . . . This capacity transforms the globe's vast grasslands into an invaluable component of the human food system.").

52. *Id.* at 17.

53. *Id.*

54. DIANA RODGERS & ROBB WOLF, SACRED COW: THE CASE FOR (BETTER) MEAT 135 (Claire Schulz ed., 2020) (explaining the role of cattle in the carbon cycle, stating "the methane emitted

from cattle are not harmful.[55] The idea that cow burps warm the planet is incorrect.

B. Myth: Cattle Create the Most GHGs in the Agricultural Sector

The second misconception about cattle is that methane emissions from cattle's digestive processes are the largest contributor to GHG emissions from agriculture.[56] This idea is also incorrect. Rather, this exaggerated impact of cattle on GHG creation comes from an incorrect statement that cattle emit so much methane that it constitutes more methane than the world's transportation.[57] People derive this misconception from a 2006 report by the Food and Agriculture Organization of the United Nations (FAO).[58] Scientists created this report, called "Livestock's Long Shadow," and analyzed the environmental impacts of animal agriculture, specifically cattle.[59] The report, however, contained significant research flaws and scientists have since reduced the report's projected impacts of GHG emissions from cattle.[60] The scientists responsible for the report have even admitted that their methods of assessment were unfair and they exaggerated the results.[61] The FAO report and statements derived from it are not dependable because of the report's "striking methodological error."[62]

Contrary to the FAO's erroneous conclusion, transportation, alongside the energy sector, actually does constitute the United States' largest source of GHG emissions, not cattle digestion.[63] Indeed, the Environmental Protection Agency (EPA) proclaimed that cattle used for beef comprise of merely 2% of the GHG emissions.[64] Another FAO report written alongside the International Atomic Energy Agency, entitled "Belching Ruminants, a Minor Player in Atmospheric Methane," supports the EPA's assertion.[65] That

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from cattle are part of the natural, or 'biogenic,' carbon cycle, whereas fossil fuels are not. Fossil fuels come from 'ancient' carbon that has been locked underground for millions of years, and when it is extracted, it's adding new carbon to the atmosphere . . .").

55. *Id.*

56. Marks, *supra* note 8, at 501–02.

57. *See* RODGERS & WOLF, *supra* note 54, at 139–42 (demonstrating how methane outputs from cattle are exaggerated using visual aids).

58. *Id.* at 139.

59. FOOD & AGRIC. ORG. OF U.N. & LIVESTOCK, ENV'T AND DEV. INITIATIVE, LIVESTOCK'S LONG SHADOW 4–5, 15 (2006).

60. RODGERS & WOLF, *supra* note 54, at 139.

61. *Id.*

62. *Id.* ("There's a lot more going on here than cow burps.").

63. *Id.* at 141 ("The largest source of GHG emissions in the US comes from energy and transportation.").

64. *Id.*

65. *Id.* at 136.

report explained how other sources of methane besides cattle contribute significantly to global methane emissions, and "the role of [cattle] in greenhouse gases may be less significant than originally thought."[66] Cattle do not create the most agricultural GHGs.

C. Myth: Cattle Cause Overgrazing

The third misconception about cattle is that cattle cause overgrazing.[67] This misconception supposes that cattle inherently overgraze the land which causes desertification and loss of soil to erosion.[68] Likewise, people think that cattle degrade ecosystems in the Western United States and other areas with ample rangeland.[69] Livestock's impact on land is currently so overblown that people sometimes call for the removal of all animals from the land.[70]

Cattle grazing receives an unfair and incorrect blame for overgrazing.[71] Cattle grazing is important because around 40% of the earth's land is grassland, which constitutes 70% of land used for agriculture in the world.[72] Cattle have unique digestive systems which make them one of the only animals that can eat these grasses.[73] The ability of cattle to graze grassland makes grass "the base layer of the global food system."[74] Cattle can turn a common resource that humans cannot consume into nutrient-dense meat that humans can eat.[75]

Grazing cattle also impose significant benefits upon the environment—more than modern plows ever could.[76] Cattle's hooves break up and shove seeds deep into the soil, functioning as natural plows.[77] Unlike a plow, cattle grazing also prompts soil regeneration because when cattle graze, the grasses move through their digestive tract and are excreted back onto the land as

66. *Id.* at 137.

67. NIMAN, *supra* note 12, at 108.

68. *Id.*

69. *See* Robert H. Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control*, 4 BUFF. ENV'T. L. J. 45, 58–59 (1996) (stating, erroneously, that cattle graze in areas where desertification is the most severe).

70. Donahue, *supra* note 47, at 11125 (arguing for the removal of livestock from public lands).

71. NIMAN, *supra* note 12, at 109 (noting that crop cultivation is the biggest culprit of human-caused degradation).

72. *Id.* at 59.

73. *Id.*

74. *Id.* at 60.

75. *Id.* (describing that cattle change grasses and shrubs into food for humans, otherwise humans could not use those resources).

76. *Id.* at 61.

77. *Id.* at 62.

nutrient-dense fertilizer, which prompts more grass growth.[78] Healthy grassland ecosystems require the presence of cattle.[79]

Overall, cattle must graze to survive; however, the conventional methods of cattle grazing cause environmental damage—not the cattle inherently.[80] When completed properly, cattle grazing restores grassland and other ecosystems.[81] Without cattle grazing, "grass just grows, oxidizes . . . , and eventually dies."[82] Part III describes how to optimize cattle grazing and environmental protection.

III. REGENERATIVE AGRICULTURE: THE PRO-CATTLE APPROACH TO CLIMATE CHANGE

Regenerative agriculture[83] is an agricultural framework that prioritizes soil health.[84] While regenerative agriculture lacks a universal definition, it is directed by principles including strengthening bonds between humans and ecosystems, reducing synthetic additives like pesticides, and nourishing communities.[85] The guiding philosophy of regenerative agriculture is "farming and ranching in a style that nourishes people and the earth, with specific practices varying from grower to grower and from region to region."[86]

78. *Id.*

79. *See* RODGERS & WOLF, *supra* note 54, at 120–21 (explaining how cattle grazing is essential for providing nutrients to soils and helping those soils retain water).

80. NIMAN, *supra* note 12, at 110 (quoting Professor David Montgomery, stating "[g]ood management can improve agricultural soils just as surely as bad management can destroy them[.]").

81. *See* Velasquez-Manoff, *supra* note 19 ("If done right . . . grazing could be restorative.").

82. RODGERS & WOLF, *supra* note 54, at 119.

83. *Regenerative Agriculture 101*, NAT. RES. DEF. COUNCIL (Nov. 29, 2021), https://www.nrdc.org/stories/regenerative-agriculture-101. This Article acknowledges that while regenerative agriculture may be a new buzzword, Native Americans and Indigenous peoples have been farming in harmony with the land for millennia. Indigenous peoples are some of the earth's first stewards and regenerative agriculture reflects the "dawning realization among more people that an Indigenous approach to agriculture can help restore ecologies, fight climate change, rebuild relationships, spark economic development, and bring joy." *Id.*

84. Joe Fassler, *Regenerative Agriculture Needs a Reckoning*, COUNTER (May 3, 2021, 6:25 AM), https://thecounter.org/regenerative-agriculture-racial-equity-climate-change-carbon-farming-environmental-issues/ (arguing that regenerative agriculture should expand its focus beyond soil health).

85. *See Regenerative Agriculture 101*, *supra* note 83 ("There's no strict rule book, but the holistic principles behind the dynamic system of regenerative agriculture are meant to restore soil and ecosystem health, address inequity, and leave our land, waters, and climate in better shape for future generations.").

86. *Id.*

Certain practices and goals also constitute regenerative agriculture.[87] A literature review of definitions of regenerative agriculture revealed that experts often defined regenerative agricultures' practices as minimizing tillage and synthetic inputs, cover cropping, increasing plant biodiversity, composting, and integrating livestock into the land.[88] Common goals of regenerative agriculture include improving the health of ecosystems, increasing biodiversity, expanding profitability of farming, sequestering more atmospheric carbon, and enhancing soil health.[89] Overall, regenerative agriculture typically involves improving the health of soils and integrating livestock into the land.[90]

Cattle are a fundamental component of regenerative agriculture, making proper cattle management part of the climate change solution.[91] Integrating cattle into the land improves the capacity of that soil to sequester atmospheric carbon.[92] Cattle benefit the land by pushing beneficial materials into complex grassland root systems with their hooves,[93] transporting nutrients with their feces, and increasing soil biodiversity which makes land more resilient to climate change.[94] Integrating cattle into the land contains immense potential for combatting climate change because "[g]rasslands need [cattle] to be healthy."[95]

Traditional agricultural practices relating to cattle cause environmental harms.[96] Soil restoration is needed to reduce harmful GHG emissions, specifically carbon.[97] Because conventional agriculture harms soil and creates harmful GHG emissions, the agriculture industry should further

87. *See* Peter Newton et al., *What Is Regenerative Agriculture? A Review of Scholar and Practitioner Definitions Based on Processes and Outcomes*, 4 FRONTIERS IN SUSTAINABLE FOOD SYS. 1, 5 (2020) (describing the "processes" and "outcomes" experts frequently used to define regenerative agriculture).

88. *Id.*

89. *Id.*

90. Fassler, *supra* note 84.

91. *See generally* Velasquez-Manoff, *supra* note 19 (stating that proper cattle management makes cattle grazing "restorative").

92. Marks, *supra* note 8, at 509.

93. *Id.*

94. *See* RODGERS & WOLF, *supra* note 54, at 119 (explaining how cattle spread nutrients and increase biodiversity throughout soil).

95. *Id.*

96. *See* Ruhl, *supra* note 41, at 274 (noting how farming causes "(1) habitat loss and degradation; (2) soil erosion; (3) water resources depletion; (4) soil salinization; (5) chemical releases; (6) animal waste disposal; (7) water pollution; and (8) air pollution.").

97. *See* Marks, *supra* note 8, at 501 ("Soil erosion caused by agriculture management practices continue to threaten the Earth").

efforts to restore and stabilize soil.[98] Focusing on soil to remedy agriculture's environmental impact provides a realistic method of combatting climate change.

IV. COLORADO'S DUST BLOWING ACT OF 1954

The 1954 Dust Act (Dust Act) is an existing piece of legislation that requires property owners in Colorado to conduct certain actions in compliance with an enumerated list to prevent soil erosion.[99] The list of required activities is specific and omits any agricultural or livestock requirements.[100] Because livestock, namely cattle, constitute a significant amount of Colorado's land use, property owners have the opportunity to use their livestock to prevent soil erosion.[101] To comply with the Act's purpose, property owners possessing cattle should use their cattle in accordance with regenerative agriculture to prevent blowing dust. The Colorado legislature should amend the Dust Act to place a duty on property owners to integrate their cattle into the land and manage the cattle how regenerative agriculture suggests one should.

This Part interprets two components of the Dust Act's statutory language. Subpart A analyzes the Dust Act's legislative declaration and concludes that the Colorado Legislature intended for the Dust Act to protect the health of Coloradans, not the environment. Subpart B examines the Dust Act's duties section and discusses the list of activities it currently requires property owners and occupiers to complete to prevent soil erosion. Subpart C discusses the few instances where Colorado courts interpreted and applied the Dust Act, focusing on two Colorado decisions.

A. The Legislative Declaration Demonstrates that the Dust Act Is a Human Welfare Law, Not an Environmental Law

Despite the Colorado Legislature intending for the Act to control statewide erosion,[102] the Act has no teeth. This Part interprets the statutory

98. *See* SCHWARTZ, *supra* note 22, at 7 (explaining how essential soil restoration is for slowing climate change).

99. *See generally* COLO. REV. STAT. § 35-72-102(1) (2023).

100. *Id.*

101. Colo. Cattlemen's Ass'n, *The Colorado Beef Industry*, https://docs.google.com/document/d/1dKp9b-OBlv1K6uLYNsFotAnVp_bSxY0uVNXUmYgcBNo/edit (last visited Apr. 21, 2025). Colorado raises roughly 2.85 million cattle annually and earns $5.14 billion for Colorado's economy from general livestock production. *Id.*

102. *See* COLO. REV. STAT. § 35-72-101 (2023). The Act states:

language of the Act, to understand the Act's aims and how it fails to maximize its potential to protect soil.

This analysis begins by honoring the "cardinal rule" of statutory interpretation—analyzing the plain language of the statute.[103] The Act's plain meaning is clear, baring several scientific terms that are discernable in context. Because the Act's language is understandable, consulting extrinsic sources is not necessary; however, this Part explores the relevant historical context of the Act anyway.

Legislative declarations are a component of many statutory schemes that help reveal the "intent of the [legislative body] and the problems it was attempting to address."[104] Combined with the historical context surrounding the statute's enactment, legislative declarations highlight a legislature's intentions and goals.[105] The Dust Act's legislative declaration creates the base for understanding its goals.[106] In relevant part, the legislative declaration proclaims that eroding soil and its resulting damage to property and natural resources are "a menace to the safety of the citizens of the state."[107] To remediate the harm of soil erosion, the legislative declaration asserts that it is in "the interest of the people of this state to allow recovery of damages for such negligent conduct."[108] The legislative declaration raises three relevant points: (1) the Act's local and human focus; (2) the Act's available cause of action; and (3) the Act's concern with Coloradan welfare. This Article now addresses these points in order.

First, the Colorado Legislature narrowed the Dust Act's scope to human welfare in Colorado. Under the guidance of the Dust Act's plain language, the word "state" refers specifically and exclusively to the state of Colorado. Therefore, any of the Dust Act's intentions are geographically restricted to Colorado. Further, the legislative declaration also refers to the "safety of the *citizens*" of Colorado.[109] By specifying "citizens," the Colorado Legislature

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To deter actions which are harmful to property and natural resources and to further the ability of persons injured by negligent conduct associated with blowing soil to have legal recourse, it is determined to be in the interest of the people of this state to allow recovery of damages. . . .
Id.

103. *See* Cowen v. People, 431 P.3d 215, 218 (Colo. 2018) (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

104. Hotsenpiller v. Morris, 488 P.3d 219, 224 (Colo. App. 2017).

105. *Id.* ("Indeed, '[o]ften the best guides to legislative intent are the context in which the statutory provisions appear and any accompanying statements of legislative policy, such as a legislative declaration.'") (quoting St. Vrain Valley Sch. Dist. RE-1J v. A.R.L., 325 P.3d 1014, 1019 (Colo. 2014)).

106. § 35-72-101.

107. *Id.*

108. *Id.*

109. *Id.* (emphasis added).

explicitly prioritizes people and implicitly excludes the environment from its purview. The Dust Act, therefore, is geographically and topically limited to human citizens of Colorado.

Second, the Dust Act creates a civil cause of action in negligence. Other subsections of the Dust Act elaborate on procedure and qualifications for the cause of action,[110] but the legislative declaration notifies Colorado residents that the cause of action exists. The legislative declaration pronounces that people who experience damage in violation of the Dust Act can sue the party causing the damage for negligence.[111] The plain language stating how the cause of action is in "the interest of the people of this state" reiterates the Dust Act's human-centered focus.[112] Referencing the interest of the *people* of Colorado also emphasizes the intended goal of the Dust Act—to protect human safety in Colorado through soil management. The cause of action, therefore, becomes the mechanism through which the Dust Act aims to enforce this goal.

Third, and most importantly, unwavering concern about human safety drives the Dust Act. The legislative declaration acknowledges the harm dust causes to property and natural resources, calling it "injurious," but describes dust as a "*menace* to the safety" of Coloradans.[113] The shift in tone from the measured description of the threat dust poses to property and natural resources to the bold use of "menace" to describe the threat to human safety reveals greater emphasis on protecting human welfare. Further, the plain meaning of "menace" is rarely lighthearted or tempered; it is aggressive, strong, and matter-of-fact. Differentiating the risk to humans as a "menace" begs readers to give more attention and care to the risk to humans. The Dust Act, therefore, is inherently more human-focused.

Overall, the historical context in which the Colorado Legislature created the Dust Act reiterates its human-centered focus. Two events are notable—the Dust Bowl and Colorado's creation of conservation districts.[114] The Dust Bowl occurred throughout the 1930s, exacerbating widespread drought, soil erosion, and causing many families to abandon their farms.[115] The Dust Bowl

110. *See* COLO. REV. STAT. § 35-72-102(4)–(5) (2023).

111. Raleigh v. Performance Plumbing & Heating, Inc., 130 P.3d 1011, 1015 (Colo. 2006) (explaining that to sue for negligence, a plaintiff must show: (1) that the defendant owed a legal duty to the plaintiff; (2) that the defendant breached their duty; (3) that the plaintiff experienced harm; and (4) that the defendant's conduct caused the plaintiff's harm).

112. § 35-72-101.

113. *Id.*

114. *76 Colorado Conservative Districts: Conservative Districts in Colorado*, COLO. ASS'N OF CONSERVATION DISTS., https://www.coloradoacd.org/conservation-districts-fact-sheets.html (last visited Apr. 21, 2025).

115. *See supra*, notes 1–7 and accompanying text.

inflicted environmental damage, caused human health problems, and was a source of trauma for many individuals residing in the midwestern United States at the time.[116] Dust defined the 1930s for many midwestern states, including Colorado.[117] Conversely, in 1937, Colorado began creating conservation districts, local jurisdictions aimed at targeting regional environmental topics in direct response to the Dust Bowl.[118] The conservation districts target and address local environmental concerns, including soil erosion.[119] The historical context leading up to the Dust Act demonstrates that the Colorado Legislature's primary concerns were to rehabilitate and protect human welfare.

B. The Duties Section Demonstrates that the Dust Act Requires Small-Scale Land Management to Prevent Soil Erosion, Not Bold Action

The second component of statutory interpretation examines the duties the Dust Act imposes upon Colorado landowners and occupiers.[120] The "Duty of landowner – liability for damage" section (*duties section*) of the Dust Act specifically requires landowners and occupiers to mitigate soil erosion:

> [B]y planting perennial grasses, shrubs, or trees or annual or biennial crops and by treatment consisting of listing, chiseling, and similar practices at such times and in such manner as will prevent or minimize erosion of the soil and soil blowing . . . [and] leaving stubble residue on top of the soil.[121]

Conversely, the Dust Act creates a cause of action for property owners and occupiers who experience property damage to their "crops, grasslands, fences, fencerows, irrigation canals, ditches, or livestock, proximately caused by the failure of any owner or occupier of other land to discharge his duty to prevent soil blowing from land he owns or occupies . . . ."[122] These duties

116. *Id.*

117. Warigia M. Bowman, *Dustbowl Waters: Doctrinal and Legislative Solutions to Save the Ogallala Aquifer Before Both Time and Water Run Out*, 91 U.COLO.L.REV. 1081, 1084 (2020) (noting how the "epicenter of the 1930s Dust Bowl" occurred in states placed on top of the Ogallala Aquifer).

118. *Conservation Districts Fact Sheet supra* note 114.

119. *Id.*

120. *See* COLO. REV. STAT. § 35-72-102 (2023) (listing the activities and tasks Colorado landowners and occupiers must complete to comply with the Dust Act).

121. *Id.*§ 35-72-102(1).

122. *Id.* § 35-72-102(2).

create the substance of the Dust Act because it makes the statute operative by creating liability for landowners and occupiers.

The Dust Act's duties section raises two important ideas: (1) the enumerated list of duties is human-centered and reasonably achievable; and (2) people may sue for damage to livestock but are not required to manage their livestock to prevent soil erosion.[123] Beginning with the first idea, the duties focus on fast and easy-to-do human activities—like planting trees. Furthermore, the listed activities reflect the agrarian perspectives common among western lawmakers in the 1950s because of its focus on agricultural and rangeland actions.[124] The listed activities are also reasonably achievable because most people can plant grass or cover open land with little financial burden and with relative ease. Therefore, the focus of the duties section is on human action that average people can reasonably achieve.

The second notable feature of the duties section is its use for people to sue if their livestock are damaged while not requiring people to properly manage those livestock to help prevent soil erosion.[125] Property owners and occupiers can sue others for damaging their livestock but do not have an affirmative duty to manage their own livestock to prevent soil erosion, which weakens the Dust Act's effectiveness.[126] Further, omitting livestock management from the list of tasks people must take to prevent soil erosion is ironic because mismanaged livestock cause disruptive soil erosion.[127] This discrepancy creates a large hole in the effectiveness of the Dust Act as a human-centered Act because it fails to address a significant contributor to soil erosion. Consequently, the Dust Act only partially addresses soil erosion and amending the Dust Act can increase its efficacy.

C. Application of Colorado's Dust Blowing Act

Colorado courts have applied the Dust Act in two notable instances. First, the Colorado Supreme Court decided *Oberst v. Mays* in 1961.[128] In this case, the court applied the legislative declaration section to a farmer who received an "Order to Perform Soil Treatment to Prevent Soil Erosion" from his county clerk.[129] The county clerk issued the order against the farmer

123. *See id* § 35-72-102.

124. *Id.*

125. *See supra* note 123.

126. *Id.*

127. *See* RODGERS & WOLF, *supra* note 54, at 119–20 (explaining how grasslands die without cattle on the land, or when cattle graze too intensely).

128. *See generally* 148 Colo. 285 (1961).

129. *Id.* at 287.

because of excessive dust blowing from the farmer's property.[130] The county clerk then issued a certificate of purchase for the property.[131] A property rights dispute followed.[132] The court ultimately issued a summary abatement on the farmer's property with the express goal to protect the "health and well-being of the citizens of the state."[133]

While the Dust Act functioned as an auxiliary topic in *Oberst*, the case further informs the purpose and intention behind the Dust Act. The court explained that "an emergency existed" regarding the farmer's soil erosion problem.[134] To make the point that the farmer's land caused enough concern to warrant the order, the court cited the Dust Act's legislative declaration to call soil erosion a "menace."[135] Because the court articulated the threat soil erosion poses to Colorado's citizens and reaffirmed the summary abatement in response, the court confirmed the Dust Act's focus on protecting humans rather than operating as environmental legislation. Additionally, *Oberst* demonstrates the power the Dust Act holds when it is enforced. The court decided that violating the Dust Act is significant enough to skip a trial and rapidly address the problem.[136]

Next, nearly two decades later in *Haas v. Lavin*, farmer Haas sued farmer Lavin under the Dust Act when Lavin caused dust to enter Haas's property because of his negligent farm management.[137] Specifically, Lavin's tilling caused eroded soil to blow onto Haas's property.[138] The 10th Circuit Court of Appeals affirmed a Colorado court's jury verdict granting Haas damages for Lavin's mismanagement of his farm.[139]

Haas is a particularly notable application of the Dust Act because of the facts prompting the court to hold that Lavin's farm management violated the Dust Act. The court considered evidence including: that more dust blew from Lavin's property than neighboring properties; that Lavin planted cover crops too late into the season; that too many weeds littered Lavin's land and reduced water retention; and that Lavin tilled the land too excessively.[140] The court determined that Lavin's land use damaged Haas's land in violation of

130. *Id.*
131. *Id.*
132. *Id.* at 288.
133. *Id.* at 290–91 (quoting COLO. REV. STAT. § 35-72-101 (2023)).
134. *Id.* at 290.
135. *Id.*
136. *Id.* at 291.
137. 625 F.2d 1384, 1385 (10th Cir.1980).
138. *Id.*
139. *Id.* at 1391.
140. *Id.* at 1387–88.

the Dust Act, making Lavin liable for negligence.[141] Ultimately, *Haas* is significant because it illustrates some factors and the severity necessary for soil erosion to violate the Dust Act.[142]

Both *Oberst* and *Haas* demonstrate the current scope of the Dust Act because each case highlights a different component of the Act. *Oberst* reiterates the threat soil erosion poses to human welfare because the court issued a summary abatement in response to the threat of soil erosion.[143] *Haas* indicates how severe soil erosion must be to trigger the Dust Act's cause of action, demonstrating that Colorado courts consider factors, such as excessive tilling—sufficient to trigger the Dust Act.[144]

V. A PRO-CATTLE AMENDMENT TO THE DUST ACT

When the Colorado Legislature created the Dust Blowing Act of 1954 (Dust Act) it focused on remedying human health during the aftermath of the 1930s Dust Bowl.[145] Driven by fear of another Dust-Bowl-type event, the legislature focused on short-term, easily achievable, and immediately effective steps to prevent soil erosion.[146] Notably, most advanced soil science did not exist until several decades later, so the legislature had a more limited perspective.[147] Today, the soil instability continues, placing Colorado in a precarious environmental position—much like the 1930s Dust Bowl.[148] As Colorado potentially approaches another Dust-Bowl-type event,[149] one key difference places Colorado in a stronger position this time around: knowledge.

The Colorado Legislature can now access a wealth of scientific knowledge describing relevant topics such as the carbon cycle, photosynthesis, and carbon sequestration. Based on this knowledge, the Dust Act is evidently no longer sufficient to protect human health. The Colorado

141. *Id.* at 1388–89 (explaining how Lavin violated his duty to "prevent or minimize erosion of the soil and dust blowing").

142. *See id.* at 1387–88 (describing the evidence the jury considered in concluding that Lavin violated his duty to prevent soil erosion on his land).

143. Oberst v. Mays, 148 Colo. 285, 291 (1961).

144. Haas v. Lavin, 625 F.2d 1384, 1385, 1387–88 (10th Cir. 1980).

145. *See supra* Part IV.A.

146. *See supra* Part IV.B.

147. Eric C. Brevik et al., *Selected Highlights in American Soil Science History from the 1980s to the Mid-2010s*, 146 CATENA 128, 134–141 (2016) (describing the expansion of soil science technology and renewed interest in soil science across the 2010s).

148. Joseph Romm, *The Next Dust Bowl*, 478 NATURE 450, 451 (2011) (explaining that dust bowl conditions will likely span across the Midwest and Western United States, including Colorado).

149. *See id.* at 450 (predicting "[a]ridity comparable to the 1930s Dust Bowl" to soon occur within the United States as a consequence of climate change).

Legislature should amend the Dust Act to require property owners and occupiers who possess livestock—specifically cattle—to manage those cattle in accordance with regenerative agricultural principles.

The remainder of this Article explains the necessary changes to the Dust Act to shift the current livestock management practices in Colorado while achieving stronger soil erosion prevention. Subpart A presents and describes three changes that comprise an amendment to the Dust Act. Subpart B explains how these three changes help the Dust Act optimize its environmental protection and achieve its purpose of protecting human welfare.

A. Proposed Amendment to the Dust Act

To help the Dust Act prevent soil erosion and strengthen its capacity for environmental protection, the Colorado Legislature should amend the Dust Act in three ways. First, the Colorado Legislature should add a clause to its duties section requiring livestock management that comports with regenerative agriculture. Second, the Colorado Legislature should also define regenerative agriculture in its definitions section.[150] Third, the Colorado Legislature should issue an "effective date" for when property owners and occupiers must comply with the amendment.[151]

1. Strengthening the Duties Section

The Dust Act's duties section provides a list of actions that landowners and occupiers in Colorado must complete to prevent dust from blowing.[152] Because proper cattle management can prevent soil erosion and benefit the environment, the Dust Act's duties section undermines its own efficacy by omitting cattle management.[153] The Dust Act can accomplish better erosion control and environmental protection by adding one crucial clause at the end: "*and managing livestock in accordance with regenerative agriculture principles*."[154]

150. COLO. REV. STAT. § 35-1-102 (2023).

151. *Effective Date*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining effective date as "[t]he date on which a statute, contract, insurance policy, or other such instrument becomes enforceable or otherwise takes effect").

152. *See supra* Part IV.B.

153. *See* Marks, *supra* note 8, at 509 (explaining how integrating cattle into natural landscapes improves the health of the land); RODGERS & WOLF, *supra* note 54, at 119. (emphasizing how important cattle are for grassland ecosystems).

154. With this amendment, the statutory language requires "planting perennial grasses, shrubs, or trees or annual or biennial crops and by treatment consisting of listing, chiseling, and similar practices at

The Colorado Legislature should require owners and occupiers to use livestock according to regenerative agriculture. Regenerative agriculture incorporates cattle into the land, mirroring the restorative relationship that grasslands and grazing animals should share.[155] When cattle ranchers properly raise cattle within their natural landscape, those cattle restore grasslands and significantly reduce soil erosion.[156] Cattle are "[a]t the heart of this regenerative [agriculture] system . . . ."[157] Instances of successful cattle integration in Colorado have already restored the land.[158] The Colorado Legislature should capitalize off this momentum and reap the erosion-control benefits of requiring cattle management guided by regenerative agriculture.

2. Defining Regenerative Agriculture

No universal definition of regenerative agriculture exists.[159] Without uniformity, inconsistent definitions of regenerative agriculture confuse people, undermine the term's value, and create an obstacle for researchers, policymakers, and farmers trying to make it more widespread.[160] Using a definition that is still broad enough to permit regional changes and specialization will maximize the benefits of regenerative agriculture.[161] The Colorado Legislature should define regenerative agriculture in the Dust Act's definitions section[162] as:

> *Regionally specific*[163] *holistic farming and ranching aimed at restoring ecosystems and human relationships with the land.*[164]

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such times and in such manner as will prevent or minimize erosion of the soil and soil blowing . . . leaving stubble residue on top of the soil *and managing livestock in accordance with regenerative agriculture principles*." *See supra* note 121.

155. Velasquez-Manoff, *supra* note 19.

156. *See generally* Loretta Sorenson, *Colorado Cattle Stomp Shows The Benefit Of Healing Hooves*, BEEF (May 7, 2014), https://www.beefmagazine.com/pasture-range/colorado-cattle-stomp-shows-benefit-healing-hooves (providing a case study of successful cattle integration into a natural landscape).

157. NIMAN, *supra* note 12, at 246.

158. Sorenson, *supra* note 156 (describing a successful research experiment that demonstrates the restorative benefits of integrating cattle into a damaged rangeland in Colorado's Crystal River Valley).

159. *See supra* Part III.

160. Newton et al., *supra* note 87 at 2.

161. Alexandra Spring, *Big Ag, Antitrust & Climate Change: The Environmental Impacts of Constrained Economic Choice*, 23 VT. J. ENV'T. L. 266, 270–72 (2022) (explaining that farming practices must differ between Zimbabwe and North Dakota because both regions have different climates).

162. COLO. REV. STAT. § 35-1-102 (2023).

163. *See* Spring, *supra* note 161, at 272 (explaining how regenerative agriculture tailors agricultural practices to the specific needs of that regional environment).

164. *Regenerative Agriculture 101*, *supra* note 83 (describing regenerative agriculture as "farming and ranching in a style that nourishes people and the earth, with specific practices varying from

> *Four principles comprise regenerative agriculture: (1) increasing soil health to draw carbon from the atmosphere; (2) managing grazing animals to strengthen ecosystem health; (3) rotating and using crop varieties to increase biodiversity; and (4) reducing mechanized tilling and chemical inputs to help plant roots and prevent soil erosion.*[165] *Regenerative agriculture requires farmers and ranchers to integrate practices from all four principles into their land management.*

The definitions section should also provide non-exhaustive lists of land management practices that comply with each principle of regenerative agriculture. Lists of examples will guide landowners and occupiers as they change their land management because people can reference those lists. The Colorado Legislature should consult experts, such as the Colorado Department of Agriculture, to create and modify the list of practices. For now, because the second principle of managing grazing animals to strengthen ecosystem health is this Article's priority, it should be defined as:

> *(2) managing grazing animals to strengthen ecosystem health: grazing animals, including cattle, shall be integrated into one's land rather than retained inside feedlots or indoor spaces. Relevant practices include rotationally grazing the animals,*[166] *using grazing animals to break the ground and cut vegetation,*[167] *converting cropland into grassland wherever possible,*[168] *and feeding livestock using grass-based diets.*[169] *Grazing animals must reside within a landowner or occupier's natural landscape*.

The Colorado Legislature should maintain its discretion regarding which practices it lists as examples of each principle. Agency and expert opinions

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grower to grower and from region to region . . . the holistic principles behind the dynamic system of regenerative agriculture are meant to restore soil and ecosystem health").

165. REGENERATIVE AGRICULTURE INITIATIVE & THE CARBON UNDERGROUND, WHAT IS REGENERATIVE AGRICULTURE? 2 (2017) (explaining how minimizing tilling is common in regenerative agriculture).

166. NIMAN, *supra* note 12, at 39 (describing Dr. Christine Jones's research finding that rotationally grazing animals, meaning those using "short pulses of grazing with high densities of animals" create healthy topsoil that defends against soil erosion).

167. *Id.* at 61 (stating "grazing animals have a far more potent effect on plants and soils than a lawn mower ever could").

168. *Id.* at 63–64 (noting how cropland erodes more easily than grassland and that cattle encourage plant growth and biodiversity when they graze grassland vegetation).

169. *Id.* at 30–31. Greater cultivation of grasslands stabilizes soil and mitigate soil erosion. The U.K. Soil Association noted that "[g]rass-fed livestock has a critical role to play in minimizing carbon emissions from farming . . . ." *Id.*

should guide the Colorado Legislature as it amends the Dust Act's definitions section. Critically, legislators should remember that integrating grazing animals into the land—especially incorporating cattle into grasslands—restores soil and substantially mitigates soil erosion.[170] The definition of regenerative agriculture that this Article provides allows for regional specialization, which will maximize the Amendment's capacity to mitigate soil erosion.

3. Stating an Effective Date

To optimize the Dust Act's ability to mitigate soil erosion and its capacity for environmental protection, the Colorado Legislature should add an effective date to the statute. Effective dates provide a specified time for when compliance with an amendment is required. Effective dates are important because meaningful changes often cannot occur rapidly. In this case, landowners and occupiers should change how they manage their land—specifically how they manage their cattle. To maximize the Dust Act's potential benefit, the amendments should require compliance from all landowners and occupiers in Colorado by a reasonable and measurable date. While the environmental benefits of proper cattle management will occur quickly,[171] the steps required to achieve those benefits may not.

Because the effective date should provide enough time for landowners and occupiers to enact the required changes, the Colorado Legislature should provide Colorado citizens with five years to change their cattle management. Other Colorado statutes provide an outline for how the Colorado Legislature should structure the Dust Act's effective date provision.[172] Combining this structure with the five-year effective date, the effective date clause should state:

> *The effective date is January 1, 2028, and marks the date that Colorado landowners and occupiers must be in compliance with the 2023 amendments.*

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170. *Id.* at 62.

171. *Id.* at 51 (explaining that proper cattle management, specifically cattle integration and grazing within the natural landscape, can sequester one third of global atmospheric carbon and reduce the effects of climate change).

172. COLO. REV. STAT. § 14-10-133 (2024) (providing the effective date for a provision under the Uniform Dissolution of Marriage Act). The effective date marks the day the provision becomes applicable and states "[t]his article shall take effect January 1, 1972, and shall apply only to actions affected by this article which are commenced on or after such date; all such actions commenced prior to said date shall be governed by the laws then in effect." *Id.*

The 2028 effective date provides sufficient time for Colorado landowners and occupiers who own cattle to independently integrate those cattle into their landscapes and implement other regenerative agriculture practices because Colorado provides helpful resources. Notably, Colorado is championing multiple soil restoration and conservation projects that make a five-year effective date feasible.[173] For example, the Colorado Department of Agriculture's "Saving Tomorrow's Agricultural Resources" (STAR) program rates farmers and ranchers to help discern how healthy their soils are and encourages practices that align with regenerative agriculture.[174] The STAR program explicitly declares "livestock integration" and grazing lands as one of its five principles of healthy soil.[175] Colorado's burgeoning soil programs demonstrate statewide commitment to soil health. The soil programs indicate statewide eagerness to achieve the benefits of the Dust Act's amendment and to help landowners and occupiers comply with the required changes.

B. The Amendment Makes the Dust Act Environmentally Protective Rather than Environmentally Neutral

When the Colorado Legislature created the Dust Act in 1954, it prioritized human welfare over environmental protection.[176] Amending the Dust Act to require regenerative-agricultural livestock management enhances its ability to achieve human welfare alongside accomplishing new and important environmental protections.

Requiring regenerative-agricultural livestock management alongside the other activities listed in the duties section strengthens the Dust Act's protection of human welfare because it continues to prevent dust from blowing.[177] Proper livestock management maximizes rangeland health, increases water retention and the strength of soils, and continues mitigating soil erosion. Shifting livestock management from a paradigm that creates soil erosion to a regenerative paradigm that prevents soil erosion keeps more dust

173. *See generally Colorado Soil Health Program*, COLO. DEP'T. OF AGRIC., https://ag.colorado.gov/soil-health (last visited Apr. 21, 2025) (describing the Colorado Department of Agriculture's Saving Tomorrow's Agricultural Resources (STAR) and Star Plus programs, its Soil Health Advisory Committee, and its Conservation District program).

174. *National STAR Program*, COLO. DEP'T. OF AGRIC., https://ag.colorado.gov/conservation/soil-health-program/national-star-program (last visited Apr. 21, 2025).

175. *Id.*

176. *See supra* Part IV.A.

177. *See id.*

in the ground and out of the air.[178] Dust that is not in the air is less likely to enter human lungs.[179] Because regenerative-agricultural livestock management keeps dust out of human lungs, the Amendment achieves the Dust Act's primary goal of preventing the "menace" to society:[180] blowing dust.

Despite the Colorado Legislature's lack of emphasis on environmental protection when it created the Dust Act, the Amendment makes the Dust Act more environmentally protective because its cattle integration enhances land restoration. Regenerative-agricultural livestock management mitigates soil erosion—the Dust Act's explicit goal—while restoring soils and increasing soil's capacity to sequester carbon and prevent climate change.[181] The amendment's potential environmental benefits are especially important because livestock management comprises roughly 70% of global agricultural activity.[182] In states like Colorado, where land with livestock is common,[183] requiring owners to manage livestock properly will reduce soil erosion and regenerate the land.[184] Amending the Dust Act to require regenerative-agricultural livestock management will add environmental protection to the Act's list of accomplishments.

CONCLUSION

The 1930s Dust Bowl wreaked havoc on Colorado and its neighboring states.[185] To protect its constituents, the Colorado Legislature created the Dust Blowing Act of 1954 (Dust Act) to prevent soil erosion.[186] Soil erosion contines because the Dust Act does not address the harm of conventional agricultural practices. To protect its citizens, restore the planet, and prevent another Dust-Bowl-type event, the Colorado Legislature should amend the

178. *See supra* Part I.

179. *See* Alexander Yang et al., *Global Premature Mortality by Dust and Pollution $PM_{2.5}$ Estimated from Aerosol Reanalysis of Modern-era Retrospective Analysis for Research and Applications, Version 2*, 10 FRONTIERS IN ENV'T SCI. 1, 2 (2022) (explaining how particulate matter, including dust occurring in dust storms, can cause significant respiratory issues such as lung cancer).

180. *See supra* note 102.

181. *See supra* Part IV.

182. Hannah H. E. Van Zanten et al., D*efining a Land Boundary for Sustainable Livestock Consumption*, GLOB. CHANGE BIOL., Apr. 2018, at 4186.

183. Nat. Dep't. of Statistics Serv., *2022 Census of Agriculture State Profile Colorado*, U.S. DEP'T. OF AGRIC. (2022), https://www.nass.usda.gov/Publications/AgCensus/2022/Online_Resources/County_Profiles/Colorado/cp99008.pdf (explaining that Colorado contains 2,658,012 head of cattle and calves alone).

184. *See* RODGERS & WOLF, *supra* note 54, at 119–21 (reiterating the benefits of proper cattle management).

185. *See supra*, notes 1–7 and accompanying text.

186. *See supra* Part IV.A.

Dust Act. The amendment would impose a duty upon cattle owners to integrate their cattle into their current land use in accordance with regenerative agricultural practices to prevent harmful topsoil erosion.

To create this essential duty, the Colorado Legislature should amend the Dust Act in three ways. The Colorado Legislature should add a clause into the Dust Act's existing duties section and require Colorado cattle owners to integrate their cattle into the land in alignment with regenerative agriculture.[187] Despite the expansiveness of the term, the Dust Act should also provide a clear definition of regenerative agriculture to achieve uniformity and maximize the Dust Act's benefits.[188] Finally, this amendment should become effective in 2028, providing Coloradans with ample time to make required changes.[189] This will help kick the dust off, or rather, kick the dust into the ground, once and for all.

187. *See supra* Part V.A.1.
188. *See supra* Part V.A.2.
189. *See supra* Part V.A.3.

VERMONT'S QUESTIONABLE ATTEMPT TO TACKLE BIG OIL AND GAS: A CALL TO REPLACE VERMONT'S CLIMATE SUPERFUND ACT

Cole Thomas*

* Coleman (Cole) Thomas received his J.D. ('24) and LLM in Energy Law ('25) from Vermont Law and Graduate School. Cole has a BA in Business, Organizations, and Society (BOS) with a concentration in international cultural ethics from Franklin & Marshall College. Cole would like to thank his family, John, Deborah, and Katherine, for their unwavering support throughout his academic career, and always being in "his corner" when life comes knocking.

INTRODUCTION

First, it was "inadvertent climate modification."[1] Then, it was "global warming."[2] Now, it is "climate change."[3] It started with concerns focused on CO_2 emissions; now, it has evolved into concerns regarding loss of biodiversity and methane emissions.[4] Since the 1980s, terms amounting to the same notion—greenhouse gas (GHG) emissions causing the Earth's climate, environment, and natural ecosystems to change—have bounced around the halls of Congress and been focal points in presidential platforms, in swanky charity fundraisers, and of hundreds of millions of dollars of federal allocations.[5] As time has progressed, these concerns about environmental degradation, air quality, water quality, and public health have grown. In recent years, the American public has drastically changed how it views the energy industry, specifically the fossil fuels sector.[6] In 2022, President Biden signed the Inflation Reduction Act (IRA) into law as an attempt to begin the United States' transition toward clean energy, and hopefully, net-zero emissions.[7]

In addition to federal action, the immense pressure growing from the American public has caused state governments to roll up their sleeves and get involved in addressing climate change issues. For example, California has recently passed SB 1137, which "prohibits the issuance of well permits and the construction and operation of new production facilities within a

1. NASA, *Whats in a Name? Global Warming vs. Climate Change*, GODDARD SPACE FLIGHT CTR., https://gpm.nasa.gov/education/articles/whats-name-global-warming-vs-climate-change (last visited May 2, 2025).

2. *Words Matter: How the Language of Climate Change Has Changed*, CLIMATE HUBS U.S. DEP'T OF AGRIC. (Apr. 10, 2023), https://www.climatehubs.usda.gov/hubs/northeast/news/words-matter-how-language-climate-change-has-changed.

3. *Id.*; *see also What Is Climate Change?* NASA, (Oct. 21, 2024), https://science.nasa.gov/climate-change/what-is-climate-change/.

4. Nicholas Cunningham, *New Study Finds Overwhelming Evidence of Harms from Fracking*, GAS OUTLOOK (Oct. 11, 2023), https://gasoutlook.com/analysis/new-study-finds-overwhelming-evidence-of-harms-from-fracking/; *see also* ADAM VANN, CONG. RSCH. SERV., LSB10882, THE DEBATE OVER VENTING AND FLARING ON FEDERAL LANDS 1 (2022); *see also* Paul Tolmé, *The U.S. Biodiversity Crisis*, NAT'L WILDLIFE FED'N (Jan. 30, 2017), https://www.nwf.org/Magazines/National-Wildlife/2017/Feb-March/Conservation/Biodiversity.

5. S. 2891, 99th Cong. (1986).

6. Chris McGreal, *Revealed: 60% of Americans Say Oil Firms Are to Blame for the Climate Crisis*, GUARDIAN (Oct. 26, 2021), https://www.theguardian.com/environment/2021/oct/26/climate-change-poll-oil-gas-companies-environment.

7. *Inflation Reduction Act*, U.S. DEP'T OF THE TREASURY, https://web.archive.org/web/20241006043917/https://home.treasury.gov/policy-issues/inflation-reduction-act (last visited Apr. 8, 2025); H.R. 5376, 117th Cong. (2022) (enacted).

health protection zone (or HPZ) of 3,200 feet from a sensitive receptor."[8] Similarly, the Vermont legislature focused its crosshairs on the oil and gas industries by passing S.259 (Climate Superfund Act or Act) in May 2024.[9] Vermont's Climate Superfund Act attempts to hold oil and gas companies responsible for environmental damages by implementing a liability scheme and damages payment on companies whose actions have caused GHG emissions exceeding the specified threshold established in the Act.[10]

This is not a story about the Dirty Democrats or Radical Republicans bickering about the environment. No—this is an apolitical commentary analyzing the legality of Vermont's Climate Superfund Act holding oil and gas companies accountable for environmental damages.[11] Part I will discuss the background of the "climate change" debate and the steps some states have recently taken to address the new aggressive emissions standards established by the Biden Administration. Part II will raise issues with Vermont's attempt—the Climate Superfund Act—to comply with the new emissions standards established by the Biden Administration and ultimately conclude that Vermont's Climate Superfund Act is illegal and should be set aside.[12] Part III will propose a legal way forward in place of Vermont's Climate Superfund Act.[13]

I. BACKGROUND AND THE ADOPTION OF VERMONT'S CLIMATE SUPERFUND ACT

A. History of the "Climate Change" Debate in Politics

The environment is an essential component of human life. The environment provides us with air to breathe, water to drink, food to eat, shelter to keep us warm and safe, resources to satisfy our needs, compounds to fight infections, and many other things to sustain life. Early humans recognized the importance of the environment surrounding them and the

8. *Understanding California's Oil and Gas Safety Zones: Senate Bill 1137*, CAL. DEP'T OF CONSERVATION, https://www.conservation.ca.gov/calgem/Pages/SB1137.aspx (last visited Apr. 8, 2025); S.B. 1137, 2022 Reg. Sess. (Cal. 2022).

9. VT. STAT. ANN. tit. 122, § 259 (2024).

10. *Vermont Senate Judiciary Committee Advances S.259, the Climate Superfund Act*, VT. NAT. RES. COUNCIL (Mar. 18, 2024), https://vnrc.org/vermont-senate-judiciary-committee-advances-s-259-the-climate-superfund-act/; *see also* VT. STAT. ANN. tit. 10, §§ 596–599c (2024) (highlighting total impact of the Act on responsible parties).

11. *See* VT. STAT. ANN. tit. 10, §§ 596–599c (2024).

12. *See id.*

13. *See id.*

benefits a healthy environment provided, as evidenced by various cultures' reverence and respect for nature.[14]

However, time, capitalism, comfort, convenience, and selfishness have caused us to lose sight of the importance of the environment in our lives. Despite the invaluable environmental benefits, human beings have yet to hold up their end of the bargain. Rather, we have produced waste, degraded the environment, destroyed habitats, and polluted the air and water. After John D. Rockefeller monopolized the oil industry, we put the environment's priorities on the back burner and put capitalism on the front burner.[15] Care for environmental conservation slithered into the shadows. "Zoinks!"[16] Don't even mention how fast environmental concerns flew out the window with the advent of the automobile and Ford's Model T.[17] "Fuhgeddaboudit!"[18] It was game over for environmental concerns.

It wasn't until 1972 that concerns about environmental harms came to the spotlight for the first time on the international stage via the United Nations Conference on the Human Environment in Stockholm, Sweden.[19] Still, despite the growing concern in the international community regarding environmental degradation and pollution, the United States lagged behind. It wasn't until 1992 that the United States finally started taking environmental concerns seriously when the U.S. Senate ratified the United

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14. Carlos Cruz, *Ancient Civilizations and Their Relationship with Nature*, MEDIUM (Jan. 9, 2024), https://medium.com/@blogcarloscruz/ancient-civilizations-and-their-relationship-with-nature-b7eac6ed5acb ("Ancient civilizations across the globe shared a common thread of deep respect and interdependence with the natural world. Their cultures, beliefs, and daily practices were shaped by their relationship with nature, reflecting an awareness of the environment's importance.").

15. *See John D. Rockefeller*, HIST. (Dec. 19, 2023), https://www.history.com/topics/ early-20th-century-us/john-d-rockefeller.

16. *See* SpaceHunterM, *Every "Zoinks!" in What's New, Scooby-Doo?*, YOUTUBE (Oct. 25, 2018), https://www.youtube.com/watch?v=T9fEKXAqo3k (demonstrating that, in What's New, Scooby-Doo?, "zoinks" is used to show fear, surprise, or shock toward a particular situation).

17. Early criticisms of automobiles included automobiles being expensive and unreliable as they were prone to breaking down and flat tires. *See* Martin V. Melosi, *The Automobile and the Environment in American History*, AUTO. IN AM. LIFE AND SOC'Y, http://www.autolife.umd.umich.edu/Environment/E_Overview/E_Overview1.htm (last visited Apr. 8, 2025) (demonstrating that early automobiles were viewed as "a rich man's plaything" and environmental concerns were nowhere to be found in the early days of the automobile industry); *see also The Early Automobile*, IOWA PBS, https://www.iowapbs.org/iowapathways/mypath/2603/early-automobile (last visited Apr. 8, 2025) (demonstrating how the early criticisms of automobiles centered around price and reliability, not environmental concerns).

18. *Want a New York Accent? Fuhgeddaboudit!*, MONCEAU, https://www.monceau-langues.fr/blog/want-a-new-york-accent-fuhgeddaboudit (last visited Apr. 8, 2025) (demonstrating how Brooklynites say, "Forget about it!").

19. *United Nations Conference on the Human Environment, 5–16 June 1972, Stockholm*, UNITED NATIONS, https://www.un.org/en/conferences/environment/stockholm1972 (last visited Apr. 8, 2025).

Nations Framework Convention on Climate Change—marking the first major piece of legislation regarding climate change in effect in the United States.[20] Then, it was off to the races.

"Climate change" quickly became a hot topic in Washington, D.C., and the focal point of many charities, fundraisers, scientific studies, and even presidential campaigns.[21] As a result, federal and state agencies were tasked with addressing growing environmental concerns regarding water quality, air quality, and habitat destruction.[22] Some of the notable federal agencies tasked with addressing these issues are the Environmental Protection Agency (EPA), the Bureau of Land Management (BLM), and the Bureau of Ocean Energy Management (BOEM).[23] These federal agencies enforce several environmental statutes that the federal government enacted, such as the Clean Air Act (CAA), the National Environmental Policy Act (NEPA), and the Clean Water Act (CWA).[24] Furthermore, Vice President Dick Cheney and President George W. Bush won an election by focusing part of their campaign on global warming and making a promise to reduce greenhouse gas (GHG) emissions by 18%.[25] President Obama followed suit and continued his predecessors' environmental promises by passing the Clean Power Plan in 2015.[26]

As a result of back-to-back administrations placing a high value on environmental concerns, a large number of scientific studies were

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20. *Congress Climate History*, CTR. FOR CLIMATE AND ENERGY SOLS., https://www.c2es.org/content/congress-climate-history (last visited Apr. 8, 2025).

21. *See infra* note 25; *see also Record of Accomplishments*, ACADIA CTR., https://acadiacenter.org/record-of-accomplishments (last visited Apr. 8, 2025); *see also AAAS Reaffirms Statements on Climate Change and Integrity*, AAAS (Dec. 4, 2009), https://www.aaas.org/news/aaas-reaffirms-statements-climate-change-and-integrity (demonstrating an example of an organization, The American Association for the Advancement of Science (AAAS), that conducts scientific studies and research on climate change).

22. *See infra* note 23.

23. *Our Mission and What We Do*, EPA, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last updated Feb. 28, 2025); *see also Our Mission*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/about/our-mission (last visited Apr. 8, 2025); *see also* VANN, *supra* note 4; *see also About BOEM*, U.S. DEP'T OF THE INTERIOR BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/about-boem (last visited Apr. 8, 2025).

24. *See, e.g.*, *Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act (last updated July 31, 2024); *see also What Is the National Environmental Policy Act?*, EPA, https://www.epa.gov/nepa/what-national-environmental-policy-act (last updated Sept. 4, 2024); *see also Summary of the Clean Water Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-water-act (last updated June 12, 2024).

25. *See Clean Energy and Climate Change*, THE WHITE HOUSE, https://georgewbush-whitehouse.archives.gov/ceq/clean-energy.html (last visited Apr. 8, 2025).

26. *See Climate Change and President Obama's Action Plan*, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/president-obama-climate-action-plan (last visited Apr. 8, 2025).

conducted.[27] Since 2000, over 2,500 new studies have shown a causal connection between GHG emissions from oil and natural gas production and development and negative environmental impacts.[28] Over 2,100 of these studies have occured since 2014, demonstrating a growing interest since the Obama Administration in the connection between the oil and gas industries and GHG emissions.[29] As a result of the growth in scientific studies demonstrating a causal connection between oil and gas production and development and negative environmental impacts, in 2022, President Biden signed the Inflation Reduction Act (IRA) into law.[30]

The IRA is an attempt to begin the United States' transition toward clean energy and, hopefully, net-zero emissions.[31] It "offers a variety of strategies to support renewable energy, such as tax credits for utility-scale renewable energy, federal investment in rural electricity co-ops, and rebates for consumers who install energy-efficient heat pumps, windows[,] or rooftop solar panels."[32] The Department of Energy stated that the IRA is the single largest "'investment in climate and energy in American history,' and it's expected to cut our greenhouse gas emissions by around 40 percent by 2030 compared with 2005 levels."[33] As a result, states have begun proposing new laws to accomplish the IRA's goal of cutting GHG emissions.[34] These new proposals hold oil and gas producers and developers liable for environmental and public health harms resulting from their GHG emissions—in hopes that this will change their behavior and lower GHG emissions.[35]

27. Cunningham, *supra* note 4 (demonstrating that over 2,100 studies have been conducted since 2014, showing a causal connection between GHG emissions from oil and gas production and development and negative environmental impacts).

28. *Id.* ("The latest version, the 9th edition [of the compendium], released in October [2023], has nearly 2,500 studies showing evidence of harm from fracking.").

29. *Id.*

30. H.R. 5376, 117th Cong. (2022) (enacted).

31. *Id.*

32. Naomi Oreskes, *The Gas Industry Is Gaslighting the Public About Climate Change*, SCI. AM. (June 25, 2024), https://www.scientificamerican.com/article/the-gas-industry-is-gaslighting-the-public-about-climate-change/.

33. *Id.*

34. *See* discussion *infra* Part I.B.

35. *Id.*

B. Recent State Responses to Comply with the Biden Administration's Inflation Reduction Act

In 2024, multiple states proposed Climate Change Superfund Bills, attempting to meet the goals—reducing GHG emissions—of the IRA.[36] These states include Vermont, New York, California, Massachusetts, and Maryland.[37] Vermont and New York actually passed Climate Change Superfund Acts this past year.[38] All of these states' proposals attempt to hold fossil fuel producers and developers liable for environmental damages caused by the GHG emissions resulting from their actions.[39] New York's proposal covers actions that occurred between January 1, 2000, and December 31, 2018.[40] California's proposal covers actions that occurred from 2000 to 2020.[41] Massachusetts's proposal covers actions that occurred from 2000 to 2018.[42] Maryland's proposal covers actions that occurred from 2000 to 2020.[43]

Vermont's act is titled "Climate Superfund Act" or S.259.[44] The effective date for Vermont's Climate Superfund Act is July 1, 2024.[45] Vermont's Climate Superfund Act shares the same purpose as the previously mentioned states' proposals—holding fossil fuel and oil producers and developers liable for environmental damages caused by the GHG emissions resulting from their actions.[46] Vermont's Climate

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36. Gregory S. Berlin & Jeffrey Dintzer, *Emerging Climate Liability: Understanding State Climate Change Superfund Bills*, ALSTON & BIRD (July 11, 2024), https://www.alston.com/en/insights/publications/2024/07/understanding-state-climate-change-superfund-bills; *see also* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 2048 (2022).

37. Berlin, *supra* note 36.

38. *See generally* VT. STAT. ANN. tit. 10, §§ 596–599c (2024); *see also* N.Y. ENV'T CONSERV. LAW § 76-0103 (Consol. 2024).

39. *See* VT. STAT. ANN. tit. 10, § 596(22) (2024); *see* N.Y. ENV'T CONSERV. LAW § 76-0103 (Consol. 2024); *see* S.B. 1497, 2024 Leg., Reg. Sess. (Cal. 2024); *see* Polluters Pay Climate Change Adaptation Cost Recovery Act of 2024, S.B. 481, 193rd Gen. Ct., Reg. Sess. (Mass. 2023); *see* Responding to Emergency Needs From Extreme Weather (RENEW) Act of 2024, S.B. 958, 2024 Leg., Reg. Sess. (Md. 2024).

40. N.Y. ENV'T CONSERV. LAW § 76-0103 (Consol. 2024).

41. Polluters Pay Climate Cost Recovery Act of 2024, S.B. 1497, 2024 Leg., Reg. Sess. (Cal. 2024).

42. Climate Change Adaptation Cost Recovery Act, S.B. 481, 193rd Gen. Ct., Reg. Sess. (Mass. 2023).

43. Responding to Emergency Needs From Extreme Weather (RENEW) Act of 2024, S.B. 958, 2024 Leg., Reg. Sess. (Md. 2024).

44. Climate Superfund Act, VT. STAT. ANN. tit. 122, § 1 (2024).

45. *Id.* at § 7.

46. VT. STAT. ANN. tit. 10, § 596(22) (2024).

Superfund Act holds parties liable if their actions occurred between January 1, 1995, and December 31, 2024.[47] A liable party is:

> [A]ny entity or a successor in interest to an entity that during any part of the covered period was engaged in the trade or business of extracting fossil fuel or refining crude oil and is determined by the Agency attributable to for more than one billion metric tons of covered greenhouse gas emissions during the covered period.[48]

Furthermore, a liable party "does not include any person who lacks sufficient connection with the State to satisfy the nexus requirements of the U.S. Constitution."[49] Once a party is found liable, costs to the party are:

> [E]qual to an amount that bears the same ratio to the cost to the State of Vermont and its residents, as calculated by the State Treasurer pursuant to section 599c of this title, from the emission of covered greenhouse gases during the covered period as the responsible party's applicable share of covered greenhouse gas emissions bears to the aggregate applicable shares of covered greenhouse gas emissions resulting from the use of fossil fuels extracted or refined during the covered period.[50]

Regarding Vermont's State Treasurer's Report on the Cost to Vermont of Covered Greenhouse Gas Emissions, Section 599c states:

> On or before January 15, 2026, the State Treasurer, after consultation with the Interagency Advisory Board to the Climate Action Office, and with any other person or entity whom the State Treasurer decides to consult for the purpose of obtaining and utilizing credible data or methodologies that the State Treasurer determines may aid the State Treasurer in making the assessments and estimates required by this section, shall submit to the Senate Committees on Appropriations, on Finance, on Agriculture, and on Natural Resources and Energy and the House Committees on Appropriations; on Ways and Means; on Agriculture, Food Resiliency, and Forestry; and on Environment and Energy an assessment of the cost to the State of Vermont and its residents of the emission of covered greenhouse gases for the

47. *Id.* § 596(8).
48. *Id.* § 596(22).
49. *Id.*
50. *Id.* § 598(b).

> period that began on January 1, 1995 and ended on December 31, 2024.[51]

Section 599c goes on to state that:

> The assessment shall include: (1) a summary of the various cost-driving effects of covered greenhouse gas emissions on the State of Vermont, including effects on public health, natural resources, biodiversity, agriculture, economic development, flood preparedness and safety, housing, and any other effect that the State Treasurer, in consultation with the Climate Action Office, determines is relevant; (2) a categorized calculation of the costs that have been incurred and are projected to be incurred in the future within the State of Vermont of each of the effects identified under subdivision (1) of this section; and (3) a categorized calculation of the costs that have been incurred and are projected to be incurred in the future within the State of Vermont to abate the effects of covered greenhouse gas emissions from between January 1, 1995[,] and December 31, 2024[,] on the State of Vermont and its residents.[52]

The money received from liable parties is to be placed in a Climate Superfund Cost Recovery Program Fund.[53] The Fund is to pay for "[c]limate change adaptation project[s] . . . ."[54] "Climate change adaptation project[s]" are projects "designed to respond to, avoid, moderate, repair, or adapt to negative impacts caused by climate change and to assist human and natural communities, households, and businesses in preparing for future climate-change-driven disruptions."[55]

The liability structure established in Vermont's Climate Superfund Act is a strict liability structure. In a strict liability structure, "[a]ll that is necessary is to prove the crime or tort occurred" and that a particular party committed that crime or tort.[56] The defendant's intent has no influence on this determination.[57] "It also does not matter if a defendant acted negligently or carelessly . . . ."[58] Vermont's Climate Superfund Act's strict

51. *Id.* § 599c.
52. *Id.* § 599c(1)–(3).
53. *Id.* § 599.
54. *Id.* § 596(2).
55. *Id.*
56. Christy Bieber, *Strict Liability: Legal Definition & Examples*, FORBES: LEGAL, https://www.forbes.com/advisor/legal/personal-injury/strict-liability (last updated July 25, 2024).
57. *Id.*
58. *Id.*

liability structure is modeled after the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[59]

CERCLA was enacted to "clean up uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment."[60] CERCLA created a "tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment."[61] CERCLA also "provided for liability of persons responsible for releases of hazardous wastes" at specific sites.[62] Specifically, CERCLA's liability extends to any owners or operators of vessels or facilities responsible for releasing hazardous wastes while disposing of or transporting those hazardous wastes.[63] CERLCA liability also applies to any person who arranged for the disposal, treatment, or transport of hazardous substances.[64] Those owners or operators are liable under CERCLA if "there has been (1) an actual or threatened release (2) of a hazardous substance (not a pollutant or contaminant) that (3) causes the incurrence of response costs."[65] Under CERCLA, vessel owners or operators may be liable for damages between "$300 per gross ton [of hazardous substance released], or $5,000,000, whichever is greater."[66] Under CERCLA, facility owners or operators may be liable for damages between $5,000,000 and $50,000,000.[67]

59. *See generally* 42 U.S.C. §§ 9601–9675.

60. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, EPA, https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act (last updated July 31, 2024).

61. *Superfund: CERCLA Overview*, EPA, https://www.epa.gov/superfund/superfund-cercla-overview (last updated Oct. 8, 2024).

62. *Id.*

63. *See* 42 U.S.C. § 9607(a).

64. *Id*. § 9607(a)(3).

65. KATE R. BOWERS, CONG. RSCH. SERV., IF11790, LIABILITY UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) 1 (2021).

66. 42 U.S.C. § 9607(c)(1)(A)–(B).

67. *Id*. § 9607(c)(1)(C).

II. ISSUES WITH VERMONT'S CLIMATE SUPERFUND ACT FROM THE OIL & NATURAL GAS INDUSTRIES' PERSPECTIVE

A. Laws Cannot Impose Retroactive Liability and Punish for Past Actions that Were Legal at the Time Those Actions Occurred

The first argument against the legality of Vermont's Climate Superfund Act is that it is an ex post facto law.[68] Vermont's Climate Superfund Act imposes retroactive liability and punishes oil and gas companies for their actions that were legal at the time those acts were committed.[69] The Fourteenth Amendment's Due Process Clause "prevents states from retroactively imposing civil liability for previously permitted activities unless the responsible party 'could have reasonably expected that it would be subject to regulation.'"[70] In *Landgraf v. USI Film Products*, the Court held that "without clear evidence or expression of intent, federal statutes shall not [apply] retroactively."[71] When there is "no clear evidence of congressional intent for retroactive application of a statute[,]" there is a "presumption in favor of non-retroactivity."[72] The same should apply to state statutes.

Here, there is no way oil and fossil fuel companies could have "reasonably expected" that they'd be liable and have to pay monetary damages for their behavior 20 years later.[73] The Due Process Clause forbids the government from holding an individual or corporation liable for violating a law that did not exist at the time of the alleged violation.[74] The fundamental problem with retroactive lawmaking is "a lack of notice; regulated persons are unable to conform their conduct to the law because they do not know what the law is at the time of the relevant action, only

68. *See Ex Post Facto Law*, BRITANNICA, https://www.britannica.com/topic/ex-post-facto-law (last visited Apr. 11, 2025) (explaining that an ex post facto law "retroactively makes criminal conduct that was not criminal when performed, increases the punishment for crimes already committed, or changes the rules of procedure in force at the time an alleged crime was committed in a way substantially disadvantageous to the accused").

69. *See id.*; *see also* VT. STAT. ANN tit. 10, § 596(22) (2024).

70. Martin Lockman & Emma Shumway, *State "Climate Superfund" Bills: What You Need to Know*, SABIN CENTER FOR CLIMATE CHANGE LAW: CLIMATE LAW – A SABIN CENTER BLOG (Mar. 14, 2024), https://blogs.law.columbia.edu/climatechange/2024/03/14/state-climate-superfund-bills-what-you-need-to-know.

71. Nicole M. McGinnis, *Reconsidering CERCLA Retroactivity After* Landgraf v. USI Film Products, 1997 U. OF CHI. LEGAL F. 507, 513 (1997) (citing Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994)).

72. *Id.* at 512.

73. Lockman & Shumway, *supra* note 70.

74. U.S. CONST. amend. XIV, § 1.

learning what the rules are (or were) when it is too late to comply with them."[75] Furthermore, the void-for-vagueness doctrine "holds that a law that fails to provide those subject to it meaningful notice of what is required or forbidden is unconstitutional."[76] Basically, the state cannot invent a law today to punish actions that were legal at the time when they were committed in 1995, which is precisely what Vermont's Climate Superfund Act does.[77] Vermont's Climate Superfund Act attempts to hold fossil fuel developers and producers liable for environmental damages for their actions that took place from 1995 to 2024.[78]

Another term for this retroactive law is an ex post facto law. It is widely accepted that "[r]etroactive statutes are disfavored in the United States, as evidenced by constitutional provisions such as the Due Process Clause, the Takings Clause, and the prohibition of ex post facto laws."[79] The U.S. Constitution explicitly prohibits ex post facto laws. Specifically, Article 1, § 9, Clause 3 of the U.S. Constitution prohibits Congress from passing ex post facto laws.[80] Furthermore, Article 1, § 10, Clause 1 of the U.S. Constitution prohibits states from passing ex post facto laws.[81] Industry leaders, such as the American Petroleum Institute, state that Vermont's Climate Superfund Act "'retroactively imposes costs and liability on prior activities that were legal'" at the time they were committed.[82] To make matters worse, Vermont's Climate Superfund Act explicitly states that it "shall apply retroactively to the covered period beginning January 1, 1995."[83]

Now, the environmentalists aren't going to take these arguments lying down. "No, [they] ain't gonna take it . . . !"[84] They are going to battle back

75. STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 432 (Rachel E. Barkow et al. eds., 9th ed. 2022); *see also* Richard E. Lotz, *Liability Issues Under CERCLA*, 23 A.F. L. REV. 370, 400 (1982–1983).

76. BREYER ET AL., *supra* note 75.

77. VT. STAT. ANN. tit. 10, § 596(8) (2024).

78. *Id.*

79. McGinnis, *supra* note 71, at 508.

80. U.S. CONST. art. I, § 9, cl. 3.

81. *Id.* § 10, cl. 1.

82. Dharna Noor, *'Game-changing': Vermont Becomes First State to Require Big Oil to Pay for Climate Damages*, GUARDIAN (May 31, 2024), https://www.theguardian.com/us-news/article/2024/may/31/vermont-oil-companies-climate-superfund-act; *see also* AM. PETROLEUM INST., Comment Letter on Vermont's Proposed Rule S.259 (Apr. 11, 2024), https://legislature.vermont.gov/Documents/2024/WorkGroups/House%20Judiciary/Bills/S.259/Witness%20Testimony/S.259~Michael%20Giaimo~American%20Petroleum%20Institute%20-%20Written%20Testimony~4-11-2024.pdf.

83. VT. STAT. ANN. tit. 10, § 596(8) (2024).

84. TWISTED SISTER, *We're Not Gonna Take It*, *on* STAY HUNGRY, at 00:11 (Atlantic Records 1984).

and pose their own arguments. Regarding retroactivity, environmentalists will point to established precedent such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). CERCLA is the federal Superfund created to "clean up uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment."[85] Like Vermont's Climate Superfund Act, CERCLA also imposes retroactive liability.[86] Using CERCLA as precedent to justify imposing retroactive liability is a strong argument for the environmentalists.[87] However, precedent is not always correct, and courts are free to overturn precedent when circumstances warrant such an act.[88] If precedent were never overturned, our judicial system and country would have remained stagnant.[89] It's a good thing the courts possess the power to overturn precedent; otherwise, we'd still have segregation in schools and a lack of *Miranda* rights.[90] Furthermore, it is well established that CERCLA was not intended to operate as a "punitive deterrent."[91] Still, the state legislature intended Vermont's Climate Superfund Act to operate as a "punitive deterrent."[92] This is evidenced by it's imposing retroactive liability in hopes of changing oil and gas companies' behavior—lowering their greenhouse gas (GHG) emissions.[93] Therefore, CERCLA's retroactive liability scheme is a dangerous precedent that must be overturned and has no bearing on Vermont's Climate Superfund Act because Vermont's Climate Superfund Act operates as a "punitive deterrent."[94]

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85. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act (last updated July 31, 2024).

86. *Superfund Liability*, EPA, https://www.epa.gov/enforcement/superfund-liability (last updated Apr. 10, 2025).

87. *Id.*

88. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (overturning Bowers v. Hardwick, 478 U.S. 186 (1986)). In *Lawrence*, the Supreme Court invalidated a Texas law that made it a crime for two persons of the same sex to engage in sexual conduct. *See Lawrenc*e, 539 U.S. at 578–79.

89. *See* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 263–66 (2022) (discussing stare decisis and how the impact of overturning previous precedents has shaped this country); s*ee also* Mateo Aboy, *Part 2 – Traditional Judicial Understanding of Precedent*, PROF. MATEO ABOY RESH. & PERS. SITE (2012), https://www.mateoaboy.com/f6/blog_files/335d1660effe226149e16958b075a096-86.html.

90. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding segregation in schools unconstitutional); *see also* Miranda v. Arizona, 384 U.S. 436 (1966).

91. Yarik Kryvoi & Shaun Matos, *Non-Retroactivity as a General Principle of Law*, 17 UTRECHT L. REV. 46, 55–56 (2021).

92. *See id.*

93. *See* discussion *infra* Part II.D.

94. Kryvoi & Matos, *supra* note 91; *see also* discussion *infra* Part II.D.

Also, environmentalists may argue that oil and gas companies knew about the undesirable consequences of their business long before current damages manifested and therefore could have reasonably expected future liability.[95] However, this argument lacks credibility. Since 2000, over 2,500 new studies have shown a causal connection between GHG emissions from oil and natural gas production and development and negative environmental impacts.[96] Over 2,100 studies have been published since 2014.[97] How could oil and fossil fuel companies have known about the undesirable consequences of their actions in 1995 when a majority of the studies demonstrating a causal connection were not published until 2014?[98] They couldn't have. Because most of the studies were performed post-2014, there is no way oil and gas companies could have "reasonably expected" subsequent harm or future liability for their actions in 1995.[99]

Therefore, Vermont's Climate Superfund Act imposes civil liability for previously legal actions, therefore, it is an ex post fact law and prohibited by the U.S. Constitution.

B. Vermont Lacks the Authority to Enact Vermont's Climate Superfund Act Because Precedent Has Established that Vermont's Climate Superfund Act Is Preempted by Federal Law

Another argument that fossil fuel companies could raise in opposition to Vermont's Climate Superfund Act is that it is preempted by federal law.[100] The Supremacy Clause of the U.S. Constitution establishes that federal law preempts state law when the two are conflicting.[101]

In a 2021 appellate decision, *City of New York v. Chevron Corporation*, the Second Circuit held that the City of New York could not sue global fossil fuel producers under state tort law for damages caused by fossil fuel emissions outside its borders.[102] The Second Circuit held that

95. E-mail from Eduardo Otero Bakai, Faculty, Inst. for Energy and the Env't, to Coleman O. Thomas, J.D., LLM student at Vt. L. and Graduate Sch. (Nov. 22, 2024, 15:51 EST) (on file with author). Eduardo Otero Bakai is an international energy scholar from Havana, Cuba, a colleague, and a faculty member of the Institute for Energy and the Environment at Vermont Law and Graduate School.

96. Cunningham, *supra* note 4 ("The latest version, the 9th edition [of the compendium], released in October [2023], has nearly 2,500 studies showing evidence of harm from fracking.").

97. *Id.*

98. *Id.*

99. *Id.*; *see also* Lockman & Shumway, *supra* note 70.

100. *See generally* VT. STAT. ANN. tit. 10, §§ 596–599c (2024); *see infra* note 123.

101. U.S. CONST. art. 6, cl. 2.

102. 993 F.3d 81, 85 (2d Cir. 2021).

federal common law preempted these state common law claims.[103] Ultimately, the Clean Air Act displaced the federal common law in *Chevron*.[104]

Here, Vermont's Climate Superfund Act is a state law.[105] The Clean Air Act is a federal law.[106] Both Vermont's Climate Superfund Act and the Clean Air Act quantify GHG emissions and apportion associated liability to parties.[107] Vermont's Climate Superfund Act requires fossil fuel producers and developers to pay for environmental damages resulting from their GHG emissions.[108] The Clean Air Act requires the Environmental Proctection Agency (EPA) to set "minimum national standards for air quality."[109] On the surface, these two statutes do not seem to conflict—their purposes and goals are different. However, Vermont's Climate Superfund Act and the Clean Air Act conflict about how to quantify and apportion liability for GHG emissions, specifically who determines liability within each structure.[110] In Vermont's Climate Superfund Act, the Vermont State Treasurer decides which companies are liable and for how much.[111] In the Clean Air Act, the EPA decides which companies are liable and for how much.[112] Furthermore, Vermont's Climate Superfund Act and the Clean Air Act may both find a company liable, but may differ on the amount of emissions measured and damages that the company must pay. This is a clear issue of conflict preemption because Vermont's Climate Superfund Act, a state law, and the Clean Air Act, a federal law, may impose different requirements on a party—the damages the party must pay.[113] Equally as problematic, Vermont's Climate Superfund Act and the Clean Air Act both quantify GHG emissions but differ in their methods of doing so.[114]

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103. *Id.* at 85–86.

104. *Id.*; *but see* City and County of Honolulu v. Sunoco LP, 153 Haw. 326 (Haw. 2023) (holding the opposite of *Chevron*), *cert. denied*, 143 S. Ct. 1795 (2023).

105. Leah Sarnoff, *Vermont Officially Becomes 1st State to Charge Big Oil for Climate Change Damage*, ABC NEWS (May 30, 2024), https://abcnews.go.com/US/vermont-bill-charge-big-oil-climate-change-damage/story?id=110148158.

106. *See* Clean Air Act, 42 U.S.C. §§ 7401–7671.

107. *Id.*; *see also* VT. STAT. ANN. tit.10, §§ 596–599c (2024).

108. *Id.* § 596(22).

109. RICHARD K. LATTANZIO, CONG. RSCH. SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 1 (2022).

110. VT. STAT. ANN. tit. 10, § 596(22) (2024); *see also* LATTANZIO, *supra* note 109.

111. VT. STAT. ANN. tit. 10, § 599c (2024).

112. LATTANZIO, *supra* note 109.

113. *When Does Federal Law Preempt State Law?*, BONALAW (Jan. 10, 2020), https://www.bonalaw.com/insights/legal-resources/when-does-federal-law-preempt-state-law [hereinafter BONALAW].

114. VT. STAT. ANN. tit. 10, § 599c (2024); *see also* LATTANZIO, *supra* note 109; *see also* Clean Air Act, 42 U.S.C. §§ 7401–7671.

Also, all claims arising under Vermont's Climate Superfund Act will be tort claims because it has a tort liability structure.[115] Vermont's Climate Superfund Act attempts to hold oil and gas producers and developers liable for environmental and public health harms to Vermont.[116] *Chevron* held that states cannot sue oil and fossil fuel producers and developers under tort claims for damages caused by fossil fuel emissions outside its borders because these claims are preempted by federal law.[117] That is precisely the situation we have here.

In response, environmentalists will challenge this preemption argument by citing a recently decided case by the Supreme Court of Hawaii. In *City and County of Honolulu v. Sunoco LP*, the Hawaii Supreme Court held the opposite of *Chevron*—that the Clean Air Act does not preempt these types of claims and that fossil fuel producers may be sued under state tort law for damages caused by fossil fuel emissions outside its borders.[118]

While this is a strong argument for environmentalists, it will be up to future courts whether to uphold the *Sunoco* decision.[119] It will be up to future courts whether to value following precedent by following the outcome in *Sunoco* or to value the Supremacy Clause by holding that the Clean Air Act preempts Vermont's Climate Superfund Act.[120] If a future court favors *Sunoco*, then the environmentalists will win this argument.[121] If a future court favors the Supremacy Clause, then the fossil fuel industry will win this argument because Vermont's Climate Superfund Act and the Clean Air Act are conflicting about how to quantify GHG emissions, how to apportion liability, and impose different requirements on a party.[122] A potentially deciding factor may be the outcome of the recently filed federal lawsuit against the state of Vermont by the U.S. Chamber of Commerce and the American Petroleum Institute regarding Vermont's Climate Superfund Act.[123]

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115. VT. STAT. ANN. tit. 10, § 597(1) (2024).

116. *Id.* § 596(22).

117. City of New York v. Chevron Corp., 993 F.3d 81, 85–86 (2d Cir. 2021).

118. 153 Haw. 326, 359–60 (Haw. 2023) *cert. denied*, 143 S. Ct. 1795 (2023).

119. *Id.*

120. *Id.*; *see also* U.S. CONST. art. 6, cl. 2; *see also* Clean Air Act, 42 U.S.C. §§ 7401–7671; *see also* VT. STAT. ANN. tit. 10, §§ 596–599c (2024).

121. 153 Haw. 326, 359–60 (Haw. 2023) *cert. denied*, 143 S. Ct. 1795 (2023).

122. *See* U.S. CONST. art. 6, cl. 2; *see also* VT. STAT. ANN. tit. 10, § 599c (2024); *see also* Clean Air Act, 42 U.S.C. §§ 7401–7671; *see also* BONALAW, *supra* note 113.

123. Michael Casey & Lisa Rathke, *US Chamber, Oil Industry Sue Vermont over Law Requiring Companies to Pay for Climate Change Damage*, AP NEWS (Jan. 3, 2025), https://apnews.com/article/vermont-climate-change-superfund-oil-companies-8509341725ec00d26cf74d56588178ab (demonstrating plaintiffs' arguments that Vermont's Climate Superfund Act is precluded by the U.S. Constitution, is preempted by the Clean Air Act, violates the

C. Vermont Lacks the Authority to Regulate Emissions Because the Due Process Clause of the Fourteenth Amendment and the Commerce Clause Prevent Vermont from Establishing Laws Regulating GHG Emissions

The underlying power of state governments to make and enforce such broad laws may face two constitutional barriers to imposing liability on these companies: Due Process and Commerce Clause arguments.[124]

First, the Due Process Clause of the Fourteenth Amendment and personal jurisdiction rules prevent states from imposing liability on parties that have not established sufficient "minimum contacts" with the state such that the state can exercise authority over them.[125] Personal jurisdiction can be established in a variety of ways. Under general personal jurisdiction, the defendant can be located within the state, or the defendant can be served with process within the state.[126] Under personal or specific jurisdiction, the "minimum contacts" test measures the amount of contact a defendant had with a state.[127] Under personal or specific jurisdiction, a state has jurisdiction if there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducted activities within the forum state, thus invoking the benefits and protection of its laws."[128]

Here, under personal jurisdiction, the only companies that can be held liable for GHG emissions by the state of Vermont are those companies that satisfy the minimum "contacts" test.[129] Of all of the personal jurisdiction tests, the only test that has a remote chance of success is the general personal jurisdiction test.[130] Still, a company satisfying personal jurisdiction must be served process within the state—fat chance—or its principal place of business must be located within the state.[131] As of now, there are no fossil fuel, oil, or gas companies located in the state of Vermont, which

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Commerce Clause, and lacks a methodology to "accurately and fairly" measure the "impact of emissions from a particular entity in a particular location over decades").

124. Lockman & Shumway, *supra* note 70; *see also* Casey & Rathke, *supra* note 123.

125. U.S. CONST. amend. XIV, § 1; *see also Tests for Personal Jurisdiction*, USLEGAL, https://civilprocedure.uslegal.com/jurisdiction/personal-jurisdiction/tests-for-personal-jurisdiction (last visited Apr. 9, 2025). Jurisdiction can also be established by the Stream of Commerce test; however, this test only applies to product liability cases. *Id.*

126. USLEGAL, *supra* note 125.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

means no company will satisfy the general personal jurisdiction test.[132] Unless you're my girl Mikaela Shiffrin, good luck trying to serve process on an oil executive while he is shredding down Killington's Peace Park at breakneck speeds on a winter family vacation.[133]

Second, the Commerce Clause limits the authority of states to take actions that affect national and international commerce.[134] The Commerce Clause "gives the federal government the authority to regulate business practices that cross state lines."[135] For example, "[t]he EPA's air pollution authority, enshrined in the Clean Air Act[,] provides a specific mechanism for controlling cross-state air pollution."[136] In the context of taxes, the Supreme Court held in *South Dakota v. Wayfair, Inc.* that the Commerce Clause only allows states to levy a tax if it "(1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides."[137]

Here, the strongest argument that Vermont's Climate Superfund Act violates the Commerce Clause stems from the second prong of the *South Dakota* analysis.[138] Vermont's Climate Superfund Act is not fairly apportioned.[139] Vermont's Climate Superfund Act holds fossil fuel producers and developers liable for environmental damages caused by their GHG emissions within the designated time period, but not consumers.[140] Vermont is holding the fossil fuel producers and developers liable while turning a blind eye to consumers who use these same products and cause even more emissions, but more on this in the next Part.[141]

Therefore, the Due Process and Commerce Clauses prevent Vermont from establishing laws allowing the state to recover damages from fossil fuel companies related to climate harm. The Due Process Clause prevents Vermont from establishing such a law because Vermont lacks personal

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132. *Oil and Gas*, AGENCY OF NAT. RES., DEP'T OF ENV'T CONSERVATION, https://dec.vermont.gov/geological-survey/resources-energy/oil-gas (last visited Apr. 11, 2025); USLEGAL, *supra* note 125.

133. *Athlete Bio*, TEAM USA, https://www.teamusa.com/profiles/mikaela-shiffrin-865708 (last visited Apr. 29, 2025).

134. U.S. CONST. art. I, § 8, cl. 3.

135. Steven Cohen, *The Regulation of Air Pollution That Crosses State Borders*, COLUM. CLIMATE SCH. (Jan. 2, 2024), https://news.climate.columbia.edu/2024/01/02/the-regulation-of-air-pollution-that-crosses-state-borders/.

136. *Id.*

137. 585 U.S. 162, 174 (2018).

138. *Id.*

139. *See* discussion *infra* Part II.D.

140. *See* VT. STAT. ANN. tit. 10, §§ 596–599c (2024).

141. *See* discussion *infra* Part II.D.

jurisdiction over these fossil fuel companies.[142] The Commerce Clause prevents Vermont from establishing such a law because it is not fairly apportioned.[143]

D. Vermont's Climate Superfund Act's Focus, Liability Strategies, and Approach Violates the Fifth Amendment's "Takings Clause" and Lacks Rational Basis Under the Due Process Clause of the Fourteenth Amendment

Another argument that opponents to Vermont's Climate Superfund Act could raise is a simple lack of fairness and rational basis argument. First, regarding Vermont's Climate Superfund Act's focus, it is unfair to focus solely on fossil fuel companies and charge them the total bill for climate change related to GHG emissions when they are not the only contributors.[144] The Fifth Amendment's "Takings Clause" "prevents the government from forcing some people[,] or businesses alone[,] to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[145] That is precisely the situation at hand. Vermont's Climate Superfund Act attempts to force "businesses alone to bear public burdens" such as GHG emissions and environmental damages.[146] Fossil fuel companies are not even the sole users of their products.[147] Vermont's Climate Superfund Act makes no attempt to hold the public accountable for the consequences of their actions, namely the end use of these products.[148] It is a well-known fact that the largest source of GHG emissions comes from the end use of fossil fuels—specifically, "burning fossil fuels for electricity, heat, and transportation[,]" not the production of fossil fuels.[149] Vermont's Climate Superfund Act completely ignores GHG emissions from:

> [O]ther major sources[,] . . . impose[s] no liability on actors like the power plants or drivers who ultimately burned those fuels,

142. U.S. CONST. amend. XIV, § 1.

143. *Id.* art. I, § 8, cl. 3.

144. Oreskes, *supra* note 32.

145. AM. PETROLEUM INST., *supra* note 82.

146. *Id.*; *see also* VT. STAT. ANN. tit. 10, § 596(22) (2024).

147. *See* COLO. OIL & GAS ASS'N *infra* note 192 (demonstrating petrochemicals derived from oil and gas are used as ingredients to produce over 6,000 products consumers use daily).

148. *See* VT. STAT. ANN. tit. 10, § 596(22) (2024) (distinguishing which parties are liable under the Act).

149. *Sources of Greenhouse Gas Emissions*, EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last updated Apr. 11, 2025).

> and make[s] no concession to the fact that the U.S. government encouraged the historical practices of Super-emitters through a range of policies that subsidized and supported fossil fuel production.[150]

Instead, Vermont's Climate Superfund Act cherry-picks by only charging oil and gas producers and developers.[151] It is unfair that this law solely focuses on fossil fuel companies, and not the consumers who used the products and energy these companies provided.[152]

Second, Vermont's Climate Superfund Act's liability strategies are questionable at best. The Due Process Clause of the Fourteenth Amendment provides "both procedural and substantive protections against arbitrary or unfair punishments."[153] Vermont's Climate Superfund Act is unreliable in linking liability to specific companies for specific damages within the state of Vermont: "the fact that GHG emissions cause global warming does not equate to evidence that the emissions of a specific company from 1995 through 2024 caused any particular damages in the state of Vermont."[154] Instead, these determinations are arbitrary and decided by Vermont's State Treasurer.[155] This is evidenced by the statute making little effort to "link any particular emissions to any particular damages."[156]

Regarding Vermont's Climate Superfund Act's approach, the "payments seem much more like a tax than a damages payment."[157] The payments seem like a tax because the statute "impose[s] 'damages' on companies based on the amount of fossil fuels that the [company] extracted from 1995 through 2024."[158] However, Vermont's Climate Superfund Act fails to accomplish the one benefit of a tax—changing consumer behavior. For example, a carbon tax "would actually lead people to reduce their

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150. Lockman & Shumway, *supra* note 70.

151. *See* VT. STAT. ANN tit. 10, § 596(22).

152. Noor, *supra* note 82 (discussing the American Petroleum Institute's argument that Vermont's S.259 "violates equal protection and due process rights by holding companies responsible for the actions of society at large"); *see also* AM. PETROLEUM INST., *supra* note 82; *see also* Oreskes, *supra* note 32; *see also* Rebecca Leber, *ExxonMobil Wants You to Feel Responsible for Climate Change so It Doesn't Have To*, VOX, https://www.vox.com/22429551/climate-change-crisis-exxonmobil-harvard-study (last updated May 13, 2021).

153. Lockman & Shumway, *supra* note 70.

154. Seth D. Jaffe, *Vermont Enacts a "Climate Superfund Act" – Uh-Oh!*, FOLEYHOAG (June 4, 2024), https://foleyhoag.com/news-and-insights/blogs/law-and-the-environment/2024/june/vermont-enacts-a-climate-superfund-act-uh-oh/.

155. VT. STAT. ANN. tit. 10, § 599c (2024).

156. Jaffe, *supra* note 154.

157. *Id.*

158. *Id.*

carbon footprint."[159] Further, disincentives could work to change consumer's behavior too: "[p]utting a tax on the future consumption of fossil fuels raises their price and decreases consumption."[160] However, Vermont's Climate Superfund Act taxes production that has already occurred. Therefore, it fails to send the price signal necessary to decrease fossil fuel consumption because it is retroactive and "does not give consumers any incentive to change their behavior to reduce GHG emissions."[161]

In response, environmentalists argue that the public, the end-users of these products, has no choice or alternative to consuming oil-and gas-derived products.[162] Environmentalists argue that the oil and gas industries actively fought against alternative energy sources because these alternatives jeopardized their revenues.[163] However, this argument lacks credibility as well. Companies actively fighting against their competitors is simply the nature of capitalism. Every company tries to get consumers to buy and use their products, as opposed to those of their competitors. This is the whole basis of the American economy—competition and the consumer's freedom of choice.[164] It is undoubtedly true that many products are derived from oil and fossil fuels;[165] however, the oil and fossil fuel companies did not hold a gun to consumers' heads and force them to buy or use their products. Consumers chose to purchase and use these products. Consumers could have chosen not to purchase or use these products, but they did not. There should be consequences for those choices. Those choices are not the oil and gas companies' fault. The elementary lesson my mother has successfully beaten into my head should hold true here too—there's consequences for your actions and you will always "pay the piper."[166]

Therefore, Vermont's Climate Superfund Act violates the Takings Clause of the Fifth Amendment and the Due Process Clause of the

159. *Id.*

160. Seth D. Jaffee, *One More Problem with the Climate Superfund Act*, FOLEYHOAG (Jan. 30, 2024), https://foleyhoag.com/news-and-insights/blogs/law-and-the-environment/2024/january/one-more-problem-with-the-climate-superfund-act.

161. Jaffe, *supra* note 154.

162. E-mail from Eduardo Otero Bakai, *supra* note 95.

163. *Id.*

164. Brian Dolan, *Main Characteristics of Capitalist Economies*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/102914/main-characteristics-capitalist-economies.asp (last updated Nov. 22, 2024); *see also* Richard M. Ebeling, *Capitalism and Competition*, MISES INST., (Nov. 14, 2017) https://mises.org/mises-wire/capitalism-and-competition.

165. *See* COLO. OIL & GAS ASS'N *infra* note 192 (demonstrating over 6,000 products used daily by consumers use petrochemical ingredients derived from oil and natural gas).

166. *pay the piper*, COLLINS, https://www.collinsdictionary.com/us/dictionary/english/pay-the-piper-and-call-the-tune (last visited Apr. 29, 2025)

Fourteenth Amendment because its focus, liability strategies, and approach lack fairness and rational basis.

E. Vermont's Climate Superfund Act Fails a "Hard Look" Review by Allowing Arbitrary Determinations and Contains Reliability Concerns Stemming from the Overall Issues with the Formulas Used to Calculate GHG Emissions

Lastly, the oil and gas industries could argue that the process in Vermont's Climate Superfund Act for apportioning liability, and subsequent costs, to specific companies is arbitrary. Vermont's Climate Superfund Act does not give an explicit formula for how GHG emissions are to be calculated, how to trace GHG emissions to specific companies, or how liability is to be apportioned to each respective company.[167] Instead, all Vermont's Climate Superfund Act says is "the State Treasurer, after consultation with the Interagency Advisory Board to the Climate Action Office, and with any other person or entity whom the State Treasurer decides to consult," gets to make the ultimate decision about these metrics.[168] Beyond that, the specifics regarding these calculations are unclear, which is troublesome, to say the least.[169]

While I have your attention, there is one other interesting consideration I wouldn't necessarily argue in court because it is easily rebuttable; however, it's a good thing this Article is not a legal brief. It is a well-established principle that the Administrative Procedure Act (APA) does not apply to state agencies or legislations; however, numerous states have enacted their own forms of the APA.[170] Let's suppose that the APA does, in fact, apply to state legislation and apply the APA by analogy to Vermont's Climate Superfund Act. I am drawing a parallel to federal law using Vermont's Climate Superfund Act as an illustration because there is a lack of Vermont case law regarding a court's "hard look" review.

When assessing its decisions and rules, a federal agency must give an "'adequate' consideration and 'reasoned explanation'" for its decisions and

167. *See* VT. STAT. ANN. tit. 10, §§ 596–599c (2024); *see also* Casey & Rathke, *supra* note 123.

168. VT. STAT. ANN. tit. 10, § 599c (2024).

169. *See id.* §§ 596–599c (demonstrating a lack of a specific, mathematical methodology for calculating GHG emissions, tracing GHG emissions to specific companies, or apportioning liability to each respective company).

170. *Summary of the Administrative Procedure Act*, EPA, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act (last updated July 22, 2024); *Administrative Law*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/administrative_law (last visited Apr. 10, 2025).

policies to survive a "hard look" review by the courts.[171] This means that an agency must explain the environmental impacts of its decisions via NEPA analyses and Environmental Impact Statements (EISs).[172] Specifically, when federal agencies calculate GHG emissions and their associated costs, which ultimately will impact environmental decision-making, agencies are required to give an "'adequate' consideration and 'reasoned' explanation" for their decisions and policies.[173] It is an interesting dynamic how federal agencies must articulate this level of reasoning for their decisions, but state legislatures do not.[174] Interesting—eh? I agree. This is flawed reasoning. The same requirements of federal agencies should be required of state legislatures because state legislatures' decisions have a more direct and influential impact on the public than federal acts.[175]

Here, Vermont will fail a "hard look" review because leaving GHG emissions and associated cost determinations up to the State Treasurer seems like anything but an "'adequate' consideration and 'reasoned' explanation" for how these calculations are determined.[176] The Vermont legislature did not articulate any reasoning or evidence for how these calculations are to be determined.[177] The Vermont legislature only said that the State Treasurer would make these determinations in conjunction with the Interagency Advisory Board to the Climate Action Office.[178] The Vermont legislature did not even explain why the State Treasurer and the Interagency Advisory Board to the Climate Action Office are the best people to make these determinations.[179] That is not an "'adequate' consideration and 'reasoned explanation.'"[180]

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171. Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L. J. 151, 156 (2006) (highlighting footnote 39, which discusses how courts have previously applied the "hard look" standard).

172. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553 (1978); *see also* Balt. Gas and Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983); *see also* Garry, *supra* note 171.

173. Garry, *supra* note 171 (highlighting footnote 39, which discusses how courts have previously applied the "hard look" standard).

174. *Id.*; *see also Hard Look Review*, BALLOTPEDIA, https://ballotpedia.org/Hard_look_review (last visited Apr. 2, 2025) (clarifying that the "[h]ard look" standard only applies to federal agencies and not state legislatures).

175. Yemi Adewunmi, *What Are the Differences Between State Legislatures and Congress?*, PLURAL, https://pluralpolicy.com/blog/state-legislature-vs-congress (last visited Apr. 10, 2025).

176. Garry, *supra* note 171 (highlighting footnote 39, which discusses how courts have previously applied the "hard look" standard).

177. *See* V T. STAT. ANN. tit. 10, §§ 596–599c (2024).

178. *Id.*

179. *Id.*

180. Garry, *supra* note 171 (highlighting footnote 39, which discusses how courts have previously applied the "hard look" standard).

Furthermore, when conducting environmental analyses, it is worth noting that some agencies and legislatures use certain variables in their calculations, while others do not include those same variables.[181] This causes inconsistencies in the calculations. Even if two agencies or legislatures use the same variables in their respective calculations, they may value these variables differently, causing another inconsistency in these calculations. It is well-established that "there is no universal methodology for calculating" GHG emissions and the impacts of specific facilities.[182] Instead, the whole basis of these climate change impacts and injuries to Vermonters is based on a concept called attribution science.[183] Attribution science is used to determine whether a particular change in climate caused some event—in this case, alleged injuries to Vermonters.[184] Attribution science is known to be questionable due to the uncertainty in observational data, in the understanding of natural climate variability, in methodologies, and in results produced by climate simulation models.[185] The fact that these climate-related estimations are based on attribution science leaves them vulnerable to criticisms regarding their reliability and accuracy.[186]

Due to the uncertainty in the methods used by Vermont's Climate Superfund Act, and attribution science as a whole, Vermont cannot "reliably link specific companies to emissions, especially emissions caused by the public using their products."[187] The whole process is skewed and subject to the biases of the person, or persons, conducting the calculations, which is problematic. This is problematic because those individuals could be influenced, or even pressured, to produce a particular outcome by manipulating the formulas. Therefore, the emissions estimates attributable

181. *See* Catherine Morehouse, *DC Circuit Orders FERC to Analyze Climate, Environmental Justice More Thoroughly*, UTILITYDIVE (Aug. 4, 2021), https://www.utilitydive.com/news/dc-circuit-calls-on-ferc-to-analyze-climate-environmental-justice-more-tho/604481/ (discussing how methodologies used to calculate GHG emissions vary depending on the individual or agency conducting the analysis).

182. *Id.* (discussing how in Federal Energy Regulatory Commissoin (FERC) "environmental analysis of the projects, it found that it could not determine what the facilities' impacts on the climate crisis would be, because there is no universal methodology for calculating those impacts").

183. L. Delta Merner, *From Research to Action: The Growing Impact of Attribution Science*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Mar. 7, 2023) https://blog.ucsusa.org/delta-merner/from-research-to-action-the-growing-impact-of-attribution-science.

184. *Id.*

185. JONATHAN D. HASKETT, CONG. RSCH. SERV., R47583, IS THAT CLIMATE CHANGE? THE SCIENCE OF EXTREME EVENT ATTRIBUTION 10 (2023).

186. *Id.*; *see also* Renée Cho, *Attribution Science: Linking Climate Change to Extreme Weather*, COLUM. CLIMATE SCH. (Oct. 4, 2021), https://news.climate.columbia.edu/2021/10/04/attribution-science-linking-climate-change-to-extreme-weather/ (discussing how attribution science is the methodology used for climate-related estimates and its limitations).

187. *See supra* notes 185–86.

to each company—established via Vermont's Climate Superfund Act—cannot be accurately determined, are imprecise, and arbitrary.[188]

III. A NEW LIABILITY SCHEME TO REPLACE VERMONT'S CLIMATE SUPERFUND ACT

At the outset, I must admit that I do not know the best solution forward, but Vermont's current route, Vermont's Climate Superfund Act, is illegal. However, before there is an attempt to establish a new liability scheme, it is worth noting that the environmental sector as a whole must come up with a uniform formula for measuring greenhouse gases (GHG) emissions and associated damages.[189] Without a consistent formula to calculate GHG emissions and associated damages, any future analyses will fall victim to the same criticisms previously mentioned in this Article.[190]

However, a possible solution is to begin the covered period for actions occurring sometime in the future. For example, let's suppose the new solution would only apply to fossil fuel companies' actions occurring in 2035 and beyond. This would eliminate the retroactivity challenge while giving notice and allowing these companies to change their actions to comply with the new standards. Also, until the oil and gas industry, and the environmental industry more broadly, has a homogeneous formula to calculate GHG emissions and associated damages, we cannot even begin to tackle the burden of trying to establish an emissions cap standard for the future.

Another possible solution is to tax consumers to account for their end-use of these products. This would be accomplished by taxing the sale of fossil fuel or fossil fuel-related products. Good luck. Petrochemicals derived from oil and natural gas are used as ingredients to produce over 6,000 products we, as consumers, use daily.[191] Lipstick, deodorant, MRI machines, asphalt, footballs, and even diapers "are all made possible by oil and natural gas."[192]

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188. *See id.*

189. *See* discussion *supra* Part II.E.

190. *See* discussion *supra* Part II.E.

191. *See Products Made from Oil and Natural Gas*, U.S. DEP'T OF ENERGY, https://www.energy.gov/sites/prod/files/2019/11/f68/Products (last visited Apr. 10, 2025).

192. *See COGA Fact Sheet: Everyday Products & Uses*, COLO. OIL & GAS ASS'N (June 11, 2024), https://www.coga.org/factsheets/everyday-products-uses (demonstrating the American consumers' dependence on the oil and natural gas industries in their daily lives); *see also* U.S. DEP'T OF ENERGY, *supra* note 191. Ladies, without the oil and gas industries, kiss your lipstick goodbye. Gentlemen, without the oil and gas industry, kiss your beers and wings on Sunday goodbye. Everyone, kiss your deodorant goodbye. Everyone, without the oil and gas industry, say hello to smelly, sweaty,

To reiterate, I do not know the best solution forward; however, the solution must encompass a few critical elements. First, the new solution cannot impose retroactive liability for any actions that were legal at the time those actions were committed. The new solution must only encompass future actions so these companies have notice and time to comply with the new standard. Second, the new solution needs to establish a detailed and uniform cost-assessment structure and formula for measuring GHG emissions. Experts must be included when creating this new formula, and this formula must be established as the industry standard so there is no more arbitrariness. The causal connection between a specific company and specific environmental damages and harms to Vermonters must be capable of being more firmly established. In other words, there needs to be no room for uncertainty and the plagues of attribution science.[193] Third, the new solution must hold consumers and end-users of these products accountable as well, not just the producers and developers. Even if the new solution encompasses all of these considerations, the new solution may still be preempted by federal law—namely, the Clean Air Act.[194]

CONCLUSION

Overall, Vermont's Climate Superfund Act is illegal and should be set aside. Vermont's Climate Superfund Act is illegal because it applies retroactive liability for acts that were legal at the time they were committed, it is preempted by federal law via the Clean Air Act, it violates the Due Process Clause, it violates the Commerce Clause, it violates the Takings Clause, and it makes arbitrary determinations while containing reliability concerns. We need to reel in the Vermont legislature because if we don't, before you know it, Vermont will be apportioning liability for greenhouse gas emissions to the public for passing gas. Therefore, Vermont must develop a new proposal addressing these concerns before things get out of hand.

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and awkward first dates. No one wants these things. Are we prepared to pay more for these things to be more environmentally friendly? Of course not. Consumer behavior and spending have changed with the emergence and evolution of Environmental, Social, and Governance (ESG) standards—but we aren't there yet. This demonstrates that a delicate balance must be struck when formulating a new solution to replace Vermont's S.259.

193. Merner, *supra* note 183.

194. *See* discussion *supra* Part II.B.; Clean Air Act, 42 U.S.C. §§ 7401–7671.

BEYOND THE YELLOW BRICK ROAD: THE BURGEONING ISSUE OF CHILD EXPLOITATION IN MODERN MEDIA

Gabriella Miller*

INTRODUCTION

This Article explores the issue of child exploitation on social media, a new branch of entertainment that has few regulations protecting young performers in the United States. This Article compares proposed laws in the United States that would protect child social media performers to laws in other nations that have already taken measures to protect child performers

* Gabriella Miller belongs to the Vermont Law and Graduate School Class of 2025. She earned her B.A. from the University of Vermont, where she double majored in English and Psychology. This Article, inspired by the dark secrets behind old Hollywood's silver screens, would not exist without the support of her faculty advisor, Benjamin Varadi, and her editors, Hannah Koniar and Ryan Sterling. She would also like to thank the following *Vermont Law Review* editors for their diligent work: Hadley Chance, Brett Francis, Ilinca Johnson, Julia Wickham, Ariana Richmond, and Benjamin Albertson. Finally, she would like to extend her deepest and most ardent gratitude for the loyal support of her cats, Willie and Cupcake, whose contributions made everything possible.

from exploitation on the internet. Finally, it proposes potential remedies and applicable strategies that could help online child performers in the United States. Part I of this Article provides a history of relevant laws and examples of exploitation. Part II focuses on legislation relating to those issues as well as how foreign laws address similar issues. Finally, Part III suggests changes to United States law by adopting language from foreign legislation, expanding on existing laws, and addressing potential counterarguments.

I. BACKGROUND

From the early days of cinema, the issue of child exploitation has pervaded the entertainment industry, especially regarding parents using their children's talents for financial gain.[1] The passing of the Coogan Law[2] targets children in entertainment, with a focus on rectifying problems specifically within the film and television industry. As a result, child performers on social media remain largely unprotected.[3] Children featured on their parents' social media accounts do not fall under the protection of the Coogan Law because these accounts are private, rather than associated with a larger production industry.[4] Because parents own these accounts and are legally responsible for their children, children's labor to create the content does not need to be compensated.[5] Child entertainers in general are also not protected by the Fair Labor Standards Act (FLSA), which provides restrictions on how long employees can work.[6] Further, parents are able to share their child's likeness without the child's consent because they are in charge of their minor child's images.[7] Unless new laws are implemented to combat these issues, they will remain vulnerable to exploitation.

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1. Jennifer González, *More Than Pocket Money: A History of Child Actor Laws*, LIBR. OF CONG. BLOGS (June 1, 2022), https://blogs.loc.gov/law/2022/06/more-than-pocket-money-a-history-of-child-actor-laws/.

2. The Coogan Law mainly protects children who work in film and television and was revised in 2000 to further combat the issues of child exploitation in these fields. CAL. FAM. CODE § 6752(b)(1) (West 2025).

3. Margaret Arabpour, *Lights, Camera, (Legal) Action: Expanding Child Entertainment Laws to Protect Children on Social Media*, AM. UNIV. J. GENDER, SOC. POL'Y, & THE L. BLOG, https://jgspl.org/lights-camera-legal-action-expanding-child-entertainment-laws-to-protect-children-on-social-media/ (last visited Mar. 30, 2025).

4. *Id.*

5. *See* 17 U.S.C. § 102 (2018); Taylor Lorenz, *There Are Almost No Legal Protections for the Internet's Child Stars*, WASH. POST (Sept. 1, 2023), https://www.washingtonpost.com/technology/2023/04/08/child-influencers-protections-congress/.

6. 29 U.S.C. § 213(c)(3) (2018).

7. *See generally* 15 U.S.C. § 6501(9) (2018); Lorenz, *supra* note 5.

A. Child Exploitation in Entertainment

Judy Garland, star of Metro-Goldwyn-Mayer's 1939 film *The Wizard of Oz*, is a classic example of child exploitation in entertainment. Garland's mother would "drug her with stimulants so she would stay awake for 72-hour shoots, only to then force-feed her sleeping pills to knock her out when she wasn't required on set."[8] This behavior by Garland's mother began when Garland was 10 years old and led to her eventual dependence on these drugs.[9] At only 16, Garland was "groped and harassed repeatedly by Louis B. Mayer, the . . . co-founder of Metro-Goldwyn-Mayer studios."[10] Further, Garland was "hounded to lose weight and made to feel ugly," which increased her drug dependence and led her to abuse alcohol as well.[11] Tragically, Garland died at only 47 years old, due to a sleeping pill overdose.[12]

Brooke Shields was similarly exploited both by Hollywood and by her family. At 11, she portrayed a child prostitute in the 1978 film *Pretty Baby*, during which her mother was also her manager.[13] Shields's mother hired a photographer to "take nude photographs of [Shields] for the Playboy publication *Sugar'n'Spice*" when Shields was only 10 years old.[14] Shields

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8. Tom Taylor, *The Uncomfortable Truth Behind Judy Garland's 'Wizard of Oz' Experience*, FAR OUT (Nov. 28, 2024), https://faroutmagazine.co.uk/truth-behind-judy-garland-wizard-of-oz-experience/.

9. *Id.*

10. Michael S. Rosenwald, *'I'll Ruin You': Judy Garland on Being Groped and Harassed by Powerful Hollywood Men*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/11/14/ill-ruin-you-judy-garland-on-being-groped-and-harassed-by-powerful-hollywood-men/; *see also* Andrea Park, *Judy Garland was Allegedly Molested by "Wizard of Oz" Munchkins*, CBS NEWS (Feb. 8, 2017), https://www.cbsnews.com/news/judy-garland-allegedly-molested-munchkins-wizard-of-oz/ (stating that Garland was also groped by the actors who played the munchkins on *The Wizard of Oz*, who "would make Judy's life miserable on set by putting their hands under her dress . . . [They] were 40 or more years old" and "thought they could get away with anything because they were so small").

11. Rosenwald, *supra* note 10.

12. Suyin Haynes, *The True Story Behind the Movie Judy*, TIME (Sept. 26, 2019), https://time.com/5684673/judy-garland-movie-true-story/; *see also* Lynette Rice, *Oscars Flashback: The Tragic Life and Death of Former Disney Star Bobby Driscoll*, ENT. WKLY. (Jan. 22, 2019), https://ew.com/oscars/2019/01/22/bobby-driscoll-former-disney-star-oscar-winner/ (discussing sudden cancellation of *Peter Pan* star Bobby Driscoll's contract with Walt Disney Studios). Driscoll's treatment by Walt Disney Studios led him to a life of crime and drug abuse, similar to Judy Garland. *Id.* Driscoll eventually died alone and unidentified in an abandoned New York City apartment. *Id.*

13. Rhonda Garelick, *Brooke Shields and the Curse of Great Beauty*, N.Y. TIMES (Apr. 12, 2023), https://www.nytimes.com/2023/04/03/style/brooke-shields-pretty-baby.html.

14. Emine Saner, *Brooke Shields on Child Stardom, Sexualisation and Nailing Comedy: 'It's Not in My Nature to Be a Victim'*, THE GUARDIAN (Nov. 22, 2021), https://www.theguardian.com/lifeandstyle/2021/nov/22/brooke-shields-on-child-stardom-sexualisation-and-nailing-comedy-its-not-in-my-nature-to-be-a-victim.

"understood early that her career provided the family's sole income."[15] She had to "detach herself from reality" and live within a "vaporous existence" due to the continued sexualization on film and the overall exploitation of her talents.[16] Shields's experiences were so damaging that she was amazed to have survived them.[17] Even so, Shields "probably" would have let her daughters perform in a film like *Pretty Baby* in 1977 because "[i]t was a different era."[18]

Shirley Temple is another particularly egregious example of Hollywood exploiting its young stars. Temple has been described to have a "fundamentally pedophilic appeal" and to possess an "infantile sexuality" onscreen.[19] Indeed, Temple was "fondled by grown men" in multiple films, even depicting a prostitute in the movie *War Babies* when she was 3 years old.[20] Temple's sexualization, however, was not limited to the silver screen. When Temple was 12, movie producer Arthur Freed "exposed himself" to her, and when she was 8, a reviewer stated that Temple "measure[d] a man with agile studio eyes [and] with dimpled depravity" in one of her films.[21] In 1945, after marrying her second husband, Temple discovered that "most of her childhood earnings had been frittered away, poorly invested or spent by her parents and relatives."[22]

These examples illustrate a large problem that has plagued the entertainment industry since the early days of cinema and extending into modern times. These stories establish a worrying pattern of parents stealing the money their famous children earn, simultaneously disregarding their children's well-being for the sake of fame and fortune.[23] While it is clear that child exploitation in the entertainment industry is not a new phenomenon, it is certainly one that requires further regulations to prevent its extensive reach. Regulations such as the FLSA and the Coogan Law seek to address the shortcomings in this industry by providing financial- and labor-related protections for children.

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15. Garelick, *supra* note 13.

16. *Id.*

17. *Pretty Baby: Brooke Shields: Part One* (Hulu released Jan. 20, 2023).

18. Saner, *supra* note 14.

19. Ara Osterweil, *Reconstructing Shirley: Pedophilia and Interracial Romance in Hollywood's Age of Innocence*, 24 CAMERA OBSCURA 1, 1–2 (2009).

20. Rua Fay, *The Sinister, Untold History of Shirley Temple*, CINEMASTERS (Apr. 3, 2024), https://www.cinemasters.net/post/the-sinister-untold-history-of-shirley-temple.

21. *Id.*

22. *Gertrude & Shirley*, CHI. TRIB. (Aug. 8, 2021), https://www.chicagotribune.com/1988/10/20/gertrude-shirley/.

23. González, *supra* note 1.

B. Fair Labor Standards Act

In the early days of cinema, children were afforded almost no legal protections.[24] Movie studios were hesitant to sign contracts with children because children could break contracts at any time, without the repercussions that adult performers would face for breach of contract.[25] Child performers were provided even fewer protections in 1927, when the California Family Code was updated to disallow young performers from breaking contracts based on their status as a minor.[26]

Currently, child entertainers are still exempt from the restrictions created by the FLSA, which restricts the hours and types of work that children can perform.[27] Thus, state laws control the regulation of child entertainers' work in the entertainment industry.[28] These laws have major discrepancies from state to state.[29] For example, California has "extensive requirements" that must be met to allow a child to perform, including documentation from school districts (alongside other permits), while Georgia requires only a special permit and written consent from the Commissioner of Labor.[30]

The FLSA is important because it protects employees—adults and children alike—from exploitation at the hands of their employers.[31] According to the FLSA, children under the age of 17 are generally not allowed to do work that puts them at risk of injury or work hours that interfere with their education.[32] However, these provisions do not apply to children who are "employed as an actor or performer in motion pictures or theatrical productions."[33] While child movie stars do have some legal protections based on state-specific laws, children who perform on social media do not have any protections because they are not considered

24. *Id.*

25. *Id.*

26. CAL. FAM. CODE § 6751(a) (West 2024).

27. 29 U.S.C. § 213(c)(3) (2018).

28. Arabpour, *supra* note 3.

29. *Child Entertainment Laws as of January 1, 2023*, U.S. DEP'T OF LAB.: WAGE AND HOUR DIV., https://www.dol.gov/agencies/whd/state/child-labor/entertainment (last updated Jan. 1, 2023).

30. Compared to states like Georgia, California's child-entertainer laws are extensive. Georgia has fewer requirements to allow children to perform. Child performers must only have a permit and permission from the Commissioner of Labor in Georgia, while California law also requires a permit issued by its Commissioner of Labor. Minors are also required to provide documentation from their school districts in California and cannot miss more than five consecutive days of school. They are also required to procure other work permits to work in California's entertainment industry. *See id.*

31. *See, e.g.*, 29 U.S.C. § 213(c) (2018).

32. *Id.* § 213(c)(4)–(5).

33. *Id.* § 213(c)(3).

employees in movies, theatrical productions, or radio shows, as required by the FLSA.[34]

C. The Coogan Law

One of the first child movie stars, Jackie Coogan, achieved massive stardom when he performed the lead role in Charlie Chaplin's movie, *The Kid*.[35] When he turned 21 and went to claim his fortune, Coogan discovered that his parents spent most all of it.[36] After suing his parents, Coogan managed to recover only $126,000 of his $4 million fortune.[37] Jackie Coogan's story exposed the lack of legal protections for performers at the time.[38] His story provided the basis for California's Coogan Law. This entertainment law ensures that a child performer's contract must set aside a portion of their earnings in a trust, for the performer's benefit, which could not be opened until the child reached the "age of majority."[39]

Unfortunately, the Coogan Law was not enough to prevent child exploitation. Judy Garland and Elizabeth Taylor's mothers were paid stipends from their daughters' salaries because they acted as their daughters' managers.[40] A similar issue occurred with *Home Alone* star Macaulay Culkin, whose parents took 15% of his earnings in a situation where Culkin was the family's sole source of income.[41] The Coogan Law has since been reformed to target these issues and now requires that 15% of a minor performer's contracted earnings be set aside in a trust for the minor's benefit.[42]

Social media is a fairly new phenomenon and, as such, child entertainers on various social media platforms are not afforded many protections.[43] Currently, the Coogan Law does not apply to social media entertainers because it only applies to contracts between a child and a third-party employer—contracts in which the parent or guardian is assumed to be

34. *Id.*
35. González, *supra* note 1.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. González, *supra* note 1.
41. Susie Linfield, *Trouble in the House that Mac Built: A Custody Battle for Macaulay Culkin by his Parent-Managers Offers a Glimpse into what Can Happen in Hollywood when a Son Is Also a Star*, L.A. TIMES (Nov. 5, 1995), https://www.latimes.com/archives/la-xpm-1995-11-05-tm-64948-story.html.
42. CAL. FAM. CODE § 6752(b)(1) (West 2025).
43. *See* Arabpour, *supra* note 3.

the child's advocate and the legally responsible party in the agreement.[44] The Coogan Law also repeatedly references the "parent or guardian" and "the minor's employer," presuming the two are separate entities.[45] For minors, the law requires parental consent for "the collection, use, or disclosure of personal information."[46] These clauses, however, provide little to no protection if the parents themselves are the ones disseminating their child's images for monetary gain. When parents are directly in charge of putting their child's images on social media, there is no contract between the social media conglomerate and the child that could potentially fall under the scope of the Coogan Law. Rather, the only agreement that exists is between the parent and the social media company.[47]

D. Examples of Exploitation on Social Media

The exploitation of children's talent is certainly not limited to the big screen. With social media becoming a more and more prevalent form of entertainment, new ways to exploit vulnerable parties are also coming to light. In recent years, "sharing mundane aspects of life on social media has become commonplace" and "more parents have made money and gained attention by posting about their children online."[48] As the ability to gain attention and make money on social media grows, parents are beginning to exploit their children the same way young stars in old Hollywood were exploited.[49] This time, however, legal recourse is more complicated because modern social media allows parents to be guardians, producers, and managers all in one, and there are no protective contracts involved like in traditional entertainment.

A recent example of child exploitation on social media is the now-defunct 8 Passengers YouTube channel, owned by Ruby Franke, which features the daily lives of her and her six children.[50] Franke's videos delve deeply into her children's personal lives, and she is considered just one of many content creators who "force children, too young to consent, to trade their privacy for her financial gain."[51] What set Franke apart from others,

44. CAL. FAM. CODE § 6752(a)–(b) (West 2025).
45. *Id.*
46. 15 U.S.C. § 6502(b)(1)(A)(ii) (2024).
47. Arabpour, *supra* note 3.
48. Lorenz, *supra* note 5.
49. *Id.*; *see supra* Part I.A. (discussing exploitation of child actors in historical Hollywood).
50. Emily Olson, *Who Is Ruby Franke? What to Know About the Mommy Vlogger Accused of Child Abuse*, NPR (Sept. 1, 2023), https://www.npr.org/2023/09/01/1197289217/ruby-franke-utah-youtube-child-abuse.
51. *Id.*

however, was her open abuse of her children.[52] Franke reportedly took away her children's "bedroom privileges" and commonly withheld food as punishment—all of which was filmed for the entertainment of her millions of followers.[53] Franke was arrested after her 12-year-old son escaped their home in a state of malnourishment and physical anguish, having suffered lacerations from being tied up with a rope.[54] She was charged with four counts of aggravated child abuse and sentenced to up to 60 years in prison.[55]

Some social media families will go to great lengths to create content that will garner more followers and therefore more money, even at the expense of their children. Myka and James Stauffer, who ran a YouTube channel dedicated to creating family-oriented content, adopted a child from China for that express purpose.[56] Videos on their channel that featured any of their children tended to gain more views, thus prompting them to have their children on screen more, monetize their pregnancies, and even document the adoption process from start to finish.[57] Documenting the adoption process brought the Stauffers hundreds of thousands of views and followers.[58] They were even able to make money through adoption-related fundraising schemes and company sponsorships.[59] When the behavioral issues of their adopted child became overwhelming, however, the Stauffers ultimately gave him up to another family.[60] Notably, the Stauffers have since left YouTube and are no longer making money from their children.[61]

In these and many other instances of child exploitation online, the main issue is that children have no protections on the internet, especially when their parents are the ones putting them online.[62] Laws like the Coogan Law

52. *Id.*

53. *Id.*

54. *Id.*

55. Olivia Craighead, *Ruby Franke Sentenced to up to 60 Years in Prison*, THE CUT (Feb. 20, 2024), https://www.thecut.com/article/ruby-franke-sentenced-up-to-60-years-prison.html.

56. Caitlin Moscatello, *Un-Adopted YouTubers Myka and James Stauffer Shared Every Step of Their Parenting Journey. Except the Last.*, THE CUT (Aug. 18, 2020), https://www.thecut.com/2020/08/youtube-myka-james-stauffer-huxley-adoption.html.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Fourteen-year-old YouTube star Piper Rockelle's successful channel is run by her mother, Tiffany Smith. Eleven other children, known as "Rockelle's Squad," were regularly featured on Rockelle's channel. Although Rockelle's channel pulls in up to $625,000 per month, the "Rockelle's Squad" members were not compensated for their work and were, in fact, "frequently subjected to an emotionally, physically, and sometimes sexually abusive environment." Mary McNamara, *Social Media Platforms Must Stop the Exploitation of Child Performers. Now*, L.A. TIMES: VOICES (Dec. 20, 2022),

protect traditional media stars,[63] which does not extend to online child stars, who are either in charge of their own content or participate in creating content that is overseen by their parents.[64] Not only are online child entertainers at risk of not being compensated for their work, but they also do not have the other protections that film and television stars do: on-site educators to ensure that they are keeping up with their schoolwork and limited working hours.[65]

Another important issue facing this industry is that the agencies that enforce child labor laws are unfamiliar with social media and its stars.[66] These young social media performers seem to fall into a gray area where their work certainly meets the definition of "work" because they are generating income, yet this "work" is not considered as legitimate as child performers on film and television.[67] These performers should be provided with the same legal protections as their traditional media costars by incorporating those protections into new legislation that would apply to new media.[68]

II. HOW OTHER COUNTRIES ADDRESS THE GAP IN U.S. LAWS

Compared to other countries, the United States is underdeveloped in terms of online entertainment laws and how these laws protect children's rights. There are many concerns associated with parents sharing their children's images and information online, such as financial exploitation, the risk of sexual exploitation, and a general lack of privacy.[69] This Part discusses other countries that the United States should look to for

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https://www.latimes.com/entertainment-arts/story/2022-12-20/column-social-media-must-stop-exploiting-child-performers.

63. *See* CAL. FAM. CODE § 6752(b)(1) (West 2025) (applying protections for minors who enter into a contract to earn wages).

64. Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them from Parents*, HOLLYWOOD REP. (Aug. 20, 2019), https://www.hollywoodreporter.com/business/digital/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968/.

65. *Id.*

66. McNamara, *supra* note 62.

67. *Id.*

68. "New media" refers to digital media, including media published online to a mass audience. *New Media*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100231836 (last visited Apr. 11, 2025).

69. Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L. J. 839, 850 (2017); *Posting Photos of Your Children on Social Media? Experts Warn There May Be Consequences*, CBS NEWS (June 9, 2022) https://www.cbsnews.com/sacramento/news/posting-photos-of-your-children-on-social-media-experts-warn-there-may-be-consequences/.

recommendations to improve the way that the United States protects children online.

A. The Gap in U.S. Laws

The United States does not have laws in place that sufficiently protect online child performers. Similar to the arrival of film, the advent of social media brings novel issues to the legal field. As in the early days of film, children are vulnerable to exploitation in this largely unregulated area.[70] The lack of regulation within this industry makes it a "wild west" where parents are the only people with any control over how much their child performers work, how much they are exposed to online, and what happens with the money they earn.[71]

One of the most egregious issues that child entertainers face is being sexualized, which is only encouraged by their parents selling exclusive "VIP" photos or creating Amazon wish lists for fans to fulfill.[72] While this is not "technically illegal," parents who engage in this behavior "[place] their children in a gray area that is not explicitly sexual but that many people would consider to be sexualized."[73] The main issue here is that profiting off of one's children, especially in ways that place them in danger of exploitation, is not "technically illegal."[74] Additionally, children whose careers are completely controlled by their parents have no limits on how many hours they work, nor are there specifications on how much of their earnings should actually be allocated to them.[75] Because there are limited legal regulations or protections for child performers on social media, the United States has a large gap in its laws that should be rectified.

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70. *See supra* Part I.

71. Katie Collins, *TikTok Parents Are Taking Advantage of Their Kids. It Needs to Stop*, CNET (Aug. 7, 2022), https://www.cnet.com/tech/services-and-software/tiktok-parents-are-taking-advantage-of-their-kids-it-needs-to-stop/.

72. *Id.*; *see also* Gabriela Barkho, *More Platforms Are Helping Influencers Make Wish Lists for Fans*, MODERNRETAIL (Dec. 22, 2023), https://www.modernretail.co/technology/more-platforms-are-helping-influencers-make-wish-lists-for-fans/ (explaining Amazon wish lists are a form of "digital gifting" where fans can view what their favorite influencers put on their wish list and purchase it for them).

73. Collins, *supra* note 71; *see also* EJ Dickson, *A Toddler on TikTok Is Spawning a Massive Mom-Led Movement*, ROLLING STONE (July 20, 2022), https://www.rollingstone.com/culture/culture-news/tiktok-wren-eleanor-moms-controversy-1385182/ (discussing four-year-old Wren Eleanor, whose mother often posts videos of her on TikTok). Viewers have expressed concern about Eleanor's possible sexual exploitation due to the page's questionable content, such as fans that are suspected pedophiles and inappropriate searches for concerning videos featuring the four-year-old, like "Wren scandalous outfits." *Id.*

74. Collins, *supra* note 71.

75. *Id.*

Other countries have laws that specifically or tangentially address the issues outlined above. Countries like France legislate specific protections for online child performers.[76] Countries like Thailand do not have laws specific to online child performers, but they do limit sharing photos of adopted children online for a certain period of time.[77] The United States should consider similar restrictions to protect children from being exploited online.

1. The Fair Labor Standards Act and Child Employment

The Fair Labor Standards Act (FLSA) and associated judicial decisions are not clear as to whether children performing for their parents' social media accounts is considered child labor.[78] While these children are certainly working, it is difficult to regulate that work because it is within the family and parents generally have a right to raise children the way they want.[79] Additionally, under the FLSA, parents are not considered people who can inflict oppressive labor conditions upon their own children.[80] Therefore, it is difficult to establish child labor violations regarding child influencers whose work is controlled by their parents.[81]

The Supreme Court addressed parents' rights in *Meyer v. Nebraska*, where parents challenged a Nebraska law that prohibited children from learning foreign languages until they passed the eighth grade.[82] In this case, the Court stated that individuals have a right to "establish a home and bring up children . . . according to the dictates of [their] own conscience."[83] This

76. Sounak Mukhopadhyay, *World-First Law Bans Parents from Sharing Children's Photos on Social Media*, MINT (Mar. 22, 2023), https://www.livemint.com/news/world/worldfirst-law-bans-parents-from-sharing-children-s-photos-on-social-media-11679458176060.html; Laura Kayali, *France to Introduce Legal Protection for YouTube Child Stars*, POLITICO (Oct. 6, 2020), https://www.politico.eu/article/france-to-introduce-legal-protection-for-youtube-child-stars/.

77. Thai Family Law Child Adoption Act § 32, THAI. L. ONLINE, https://www.thailandlawonline.com/thai-family-and-marriage-law/thai-family-law-child-adoption-act (last visited Apr. 11, 2025); Charissa Cheong, *Footage of a YouTuber Saying She Canceled an Adoption Because She Wouldn't Be Able to Film the Child Has Resurfaced, Shocking Viewers*, INSIDER (June 5, 2023), https://www.insider.com/resurfaced-clip-influencer-cancels-adoption-film-child-2023-6.

78. *See supra* Part I.B.

79. Valeriya Safronova, *Child Influencers Make Big Money. Who Gets It?*, N.Y. TIMES (Oct. 13, 2023), https://www.nytimes.com/2023/10/10/style/children-influencers-money.html.

80. *See* 29 U.S.C. § 203(l) (2018) (discussing "oppressive child labor " as a type of employment that occurs only when the employer is not the parent or guardian of an employee under the age of 16; as such, parents cannot, by definition, inflict oppressive labor conditions upon their own children).

81. *Id.*

82. 262 U.S. 390, 396–97 (1923).

83. *Id.* at 399.

allowed parents to make decisions about their children's learning, overriding the Nebraska law.[84] However, in *Prince v. Massachusetts*, the Court established that states do have the power to regulate the family in certain instances, especially when it comes to child labor as it pertains to child welfare.[85] The Court stated that "the state as *parens patriae* may restrict the parent's control by . . . regulating or prohibiting the child's labor" and that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[86] These cases pose an interesting dichotomy between deference towards parents' abilities to choose how to raise their children and the state's ability to act in the child's best interest, as each is permissible in different circumstances.

If parents are considered to be their children's employer, there are several federal labor provisions that some of these parents consistently violate. For example, Child Labor Regulation No. 3 limits the hours that 14- and 15-year-olds can work to non-school hours between 7 a.m. and 7 p.m.[87] A prevalent problem that child influencers face is that they often work "excessive hours" at the behest of their parents.[88] Some of these children do not even meet the youngest age stipulations under the FLSA—many are between 2- to 4-years old and have been online since they were born.[89] However, in its definition of "oppressive . . . labor," the FLSA explicitly excludes parents.[90] This means when parents inflict these oppressive labor conditions upon their own children, the law does not recognize it as illegal.[91]

Child performers are subject to state laws since there is no federal standard for this area of work.[92] However, child influencers do not enjoy what protections might be available to traditional media stars in most

84. *Id.* at 403.

85. 321 U.S. 158, 158–59, 166 (1944).

86. *Id.* at 166–67.

87. Children can only work less than three hours on school days and less than eight hours on non-school days. 29 C.F.R. § 570.35 (2023).

88. Lorenz, *supra* note 5; *see also* Rachel Dunphy, *The Abusive 'Pranks' of YouTube Family Vloggers*, N.Y. MAG.: INTELLIGENCER (Apr. 28, 2017), https://nymag.com/intelligencer/2017/04/daddyofive-youtube-abuse-controversy-explained.html (discussing "DaddyOFive" YouTube channel's abuse scandal, which exemplifies the issue of children always being on-camera, having no control over labor conditions, and having their parents completely in control of income the children are partially responsible for earning).

89. Sapna Maheshwari, *Online and Earning Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html.

90. 29 U.S.C. § 203(l) (2018).

91. *Id.*

92. U.S. DEP'T OF LAB.: WAGE AND HOUR DIV., *supra* note 29.

states.[93] Because they earn money from performing, child influencers should be considered employees, even if they perform for their parents' social media accounts.

2. Intellectual Property Concerns

Child influencers are targets for exploitation because they do not own the content that they help create. According to the Copyright Act, copyright protection applies to original authorship.[94] Since many child influencers are too young to make their own social media accounts or are forced to perform for their parents' accounts, they do not own the content that they participate in—their parents do.[95] Because parental employment is more private and less formal than work completed under legitimate productions, many labor laws treat the two differently.[96] Therefore, child influencers do not have the rights to the content they participate in. To rectify this problem, the United States should recognize children as employees under labor laws or create laws that mandate compensation for their work.

Copyright law protects creative works, which include "pictorial, graphic, and sculptural works" alongside "motion pictures and other audiovisual works."[97] As such, copyright law certainly covers the content that child influencers create or participate in for social media. Furthermore, the U.S. Copyright Office states that a minor can own a copyright, as there are no age restrictions on copyrighting creative works.[98] Complications arise because, while minors can hold a copyright, the Federal Rules of Civil Procedure prevent them from enforcing this copyright in federal court.[99]

Child influencers are further limited by Children's Online Privacy Protection Act (COPPA), which requires parental consent for social media users under the age of 13.[100] This means the parents of children under 13 govern the personal information shared on social media.[101] While this is not necessarily a negative consequence of COPPA, it provides another route for

93. CAL. FAM. CODE § 6752(b)(1) (West 2025); Ananya Bhattacharya, *Child Influencers in Illinois Have a Jazz Age Actor to Thank for Their Earnings*, QUARTZ (Aug. 24, 2023), https://qz.com/child-influencers-in-illinois-have-a-jazz-age-actor-to-1850769254.

94. 17 U.S.C. § 102 (2018).

95. Safronova, *supra* note 79.

96. *Id.*

97. 17 U.S.C. § 102(a)(5)–(6) (2018).

98. *Who Can Register?*, COPYRIGHT.GOV, https://www.copyright.gov/help/faq/faq-who.html (last visited Apr. 8, 2025).

99. FED. R. CIV. P. 17(c).

100. 15 U.S.C. § 6501(1) (2018).

101. 15 U.S.C. § 6502 (2018).

parents to exploit their children creatively and financially when acting against their best interests. Additionally, the Federal Rules of Civil Procedure limit minors over 13 who are pursuing a copyright lawsuit in federal court, forcing them to rely on parents who could exploit them for their financial gain.[102]

Recognizing children who perform for their parents' social media accounts as employees is not a perfect solution to the issue of who owns the copyrighted works because employers typically own the work that they hire their employees to make.[103] The Copyright Act implies that "work[s] made for hire" are works that are necessarily compensated by the employer, though economic scholarship indicates that artists consider themselves better off when they own the copyright themselves.[104] However, even if child influencers cannot fully own the work they help create, recognizing them as as employees would mandate financial compensation for their work.

B. Laws in France, Thailand, and India

Recent legislation in France represents a step forward for protecting children's online privacy.[105] The French legislature is contemplating a new bill that "would allow courts to prohibit parents from posting images of their youngsters online, with both parents being held responsible for their children's image rights."[106] Another important aspect of this bill is that it would take children's choices about how their images are shared into account, which is not currently provided for in U.S. laws.[107]

Because U.S. laws place children's privacy rights under their parents' protection, these laws do not give children the opportunity to opt out of having their image shared online.[108] More specifically, COPPA gives parents control over what information is collected from the child.[109] This means that parents can control how much of their children's information, like their children's image, is exposed to the world. COPPA is in direct contrast with France's proposed law, which would offer children the

102. FED. R. CIV. P. 17(c).

103. 17 U.S.C. § 201(b) (2018).

104. *See* I. Trotter Hardy, *An Economic Understanding of Copyright Law's Work-Made-for-Hire Doctrine*, 12 COLUM. J.L. & ARTS 181, 183 (1988).

105. Mukhopadhyay, *supra* note 76.

106. *Id.*

107. *Id.*

108. Arabpour, *supra* note 3.

109. 15 U.S.C. § 6502(b)(1)(B) (2018).

opportunity to decide if their image is shared based on their age and maturity level.[110]

France's proposed bill specifically "seeks to punish influencer parents who try to gain followers and earn money by posting images of their children," thereby reducing the risk of child exploitation online.[111] France emphasizes parents respecting their children's privacy, which the United States should seek to do as well.[112]

French law also requires YouTube channels featuring children under 16, whether that channel is owned by the parents or the children themselves, to obtain official authorization from an administrative authority.[113] Penalties for breaking this law include fines of up to €75,000 ($81,400) and five years in prison.[114] This law presents an important juxtaposition to U.S. laws: it showcases how little restitution there is in the United States for children who perform on online platforms.

The United States should adopt platform-specific laws, like France's YouTube law, to provide more structure to websites that do not already have sufficient restrictions to protect their young users. The United States should consider serious ramifications for violations—such as France's high fines and jail time—to deter circumvention and protect vulnerable individuals.

Additionally, France's YouTube law is significant because it requires parents to obtain official permission to run a YouTube channel—a platform that does not have very specific user restrictions to begin with.

Thailand is another country that implements strict laws to protect its children. One of its laws specifically prohibits adoptive parents from posting their adoptive child's photo or information online before that adoption is finalized.[115] Because no similar laws exist in the United States, adopting children from Thailand poses a unique restriction that some consider an insurmountable challenge.

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110. Mukhopadhyay, *supra* note 76.

111. *Id.*

112. *Id.*; *see generally* Sarah Szczypinski, *Kids Deserve Privacy. As Parents, We Need to Give it to Them—Online and IRL*, WASH. POST (Mar. 7, 2019), https://www.washingtonpost.com/lifestyle/2019/03/07/kids-deserve-privacy-parents-we-need-give-it-them-online-irl/.

113. Laura Kayali, *France to Introduce Legal Protection for YouTube Child Stars*, POLITICO (Oct. 6, 2020), https://www.politico.eu/article/france-to-introduce-legal-protection-for-youtube-child-stars/.

114. *Id.*

115. Thai Family Law Child Adoption Act § 32, THAI. L. ONLINE, https://www.thailandlawonline.com/thai-family-and-marriage-law/thai-family-law-child-adoption-act (last visited Apr. 8, 2025); Cheong, *supra* note 77.

One couple in particular, the Phillippis, specifically cited Thailand's law as the reason they did not go through with their adoption of a child from Thailand.[116] Their issues with the social media restriction implied they sought adoption primarily to generate income from the process.[117] Posting the child's information online garnered traffic to the Phillippis' social media accounts because interest in the adoption brought in millions of viewers.[118] This situation exemplifies common concerns with "young children being used as a source of income by their parents and family," thus leading to their exploitation.[119]. The ability to profit from adoption on social media in the United States and other countries displays the breadth of areas children can be exploited online.

Thailand provides a positive example of how targeted laws can protect children from exploitation. The United States does not have similar laws that limit how much parents can share of their children—including their adoptive children.[120] Targeting a specific area in which children are vulnerable, like adoption, can allow the United States to eliminate child exploitation in that area. It is particularly concerning that even a child's adoption can be exploited on social media. However, if the United States were to adopt a law like Thailand's to limit the initial time frame in which adopted children can be posted online, this would help limit the online exploitation of children.

Laws in India provide a more drastic option for online protection. India has proposed a law that would limit social media usage for people under the age of either 18 or 21.[121] While this law is extremely restrictive and somewhat unrealistic for use in the United States, the reasoning behind this law displays the government's desire for strong protections for its young citizens.[122] The High Court in India cited maturity concerns for the use of social media.[123] While this law would not directly target the exploitation of children on social media, it would tangentially prevent this from occurring

116. Cheong, *supra* note 77.

117. *Id.*

118. *Id.*

119. Hannah Lacy, *YouTube Mom Admits She Canceled Adoption Because She Couldn't Post Child Online*, CAFEMOM (June 6, 2023), https://cafemom.com/parenting/youtube-mom-admits-she-canceled-adoption.

120. *See generally* Lambert, *supra* note 64.

121. *Why Court Wants to Put an Age Limit on Using Social Media in India*, ECON. TIMES (Sept. 20, 2023), https://economictimes.indiatimes.com/news/how-to/why-court-wants-to-put-an-age-limit-on-using-social-media-in-india/articleshow/103801209.cms.

122. *Id.*

123. *Id.*

by prohibiting minors from using social media entirely.[124] Although this is a drastic measure that the United States should not necessarily adopt, it should also consider children's maturity when looking at their online presence. Some U.S. laws, however, are catching up to the standards being set internationally.

III. CHANGING U.S. LAW

Laws in countries like France and Thailand provide an international comparison to the less stringent laws found in the U.S. Online entertainment is a fairly new form of entertainment, but based on the advancements made in other countries, the United States can clearly create new legislation to create protections for these modern issues. It is important to create a new law that specifically protects child entertainers because this realm is just as vulnerable to exploitation as the movie industry. Much like the Coogan Law in 1939, a new law could provide monetary protections for online child entertainers.[125] Additionally, a new law could allow children to protect their own image and exercise some control over the release of their own personal information.

A recent Illinois law protects online child performers.[126] This law is novel in the United States because it mandates that online child performers, more commonly known as "influencers," are entitled to a percentage of the earnings from content that they help create.[127] This law is actually based on the Coogan Law, which provides protections for children who work in traditional media.[128] This Illinois law is important because it is the first of its kind in the United States and sets a precedent for other states that might be interested in creating similar legislation.

A. The Importance of Federal Law

The recent law in Illinois that entitles child influencers to a certain percentage of their earnings sets an important precedent for the rest of the country.[129] However, the United States should establish a federal law to provide similar protections throughout the country. Based on the Coogan

124. *Id.*

125. *See* CAL. FAM. CODE § 6752(b)(1) (West 2025) (requiring employers to set aside 15% of a minor's gross earnings).

126. Bhattacharya, *supra* note 93.

127. *Id.*

128. *Id.*

129. *Id.*

Law, the Illinois law specifically targets children's earnings instead of providing them with broader protections.[130] A limitation of the Coogan Law, like the Illinois law, is that it is state-specific and does not apply to other states.[131] Some states, like Mississippi and New Hampshire, do not provide any regulations at all.[132] Furthermore, as discussed earlier, "[c]hild entertainers are exempt from the federal labor laws created by the Fair Labour Standards Act [sic], which means that they are completely dependent on state law to protect them."[133]

Federal law is important because it would provide standardized protections in every state. Some state-based provisions are inconsistent with federal labor laws.[134] This means that whichever law is more restrictive—state or federal—will apply.[135] Eliminating such discrepancies would not only reduce confusion, but also would provide child entertainers in all states with a predictable standard of protection.

For traditional media stars, production is concentrated in states like California and New York.[136] Therefore, these states have stricter guidelines in terms of what certificates, permits, and parental consent are required for child performers to work.[137] However, this model is not strictly applicable to online child performers because these performers can work in one state with the same level of production as they might have in another state.[138] Additionally, because these performers create online content, exploitative parents could move them to a different state to take advantage of less stringent laws unavailable to traditional media stars.[139] While the mobility of being an online creator is often beneficial because of the flexibility it can provide, this is also something that parents can take advantage of, to their children's detriment. Therefore, Congress should implement a federal law to protect online child performers, providing consistent standards throughout the country.

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130. *Id.*

131. CAL. FAM. CODE § 6752(b)(1) (West 2025).

132. U.S. DEP'T OF LAB.: WAGE AND HOUR DIV., *supra* note 29.

133. González, *supra* note 1.

134. *See generally* U.S. DEP'T OF LAB.: WAGE AND HOUR DIV., *supra* note 29; CAL. FAM. CODE § 6752(a)–(b) (West 2025).

135. 29 U.S.C. § 218(a) (2018).

136. U.S. DEP'T OF LAB.: WAGE AND HOUR DIV., *supra* note 29.

137. *Id.*

138. Maheshwari, *supra* note 89 (discussing the fact that "child labor guidelines vary by state").

139. Katie Collins, *The U.S. Is Finally Dealing With the Exploitation of Child Influencers*, CNET (Feb. 17, 2023), https://www.cnet.com/news/politics/the-us-is-finally-dealing-with-the-exploitation-of-child-influencers/.

B. Suggestions

There are many avenues that the United States can take to offer better protections for child influencers and even child performers in general. These avenues include allowing children to take ownership of their own image when they are old enough, creating new legislation to target issues that child influencers face, and giving these child influencers the same protections as traditional child performers.

One provision that the new legislation could include is allowing children of a certain age to request that content featuring their image be taken down.[140] Many children whose parents are in charge of their online presence have no control over content posted about them, even after they are adults and are concerned about having those posts "weaponized against" them.[141] Children's privacy should be protected, and children should have the right to control their image once they obtain a certain level of maturity.

New legislation should target the issues of "sacrifice of privacy, excessive hours, and lack of fair compensation" that online child stars face.[142] These issues persist because of the lack of "protection and oversight" that occurs when content is made at home without the supervision of an official production studio.[143] Without the standards that movie and television studios have had in place since the 1920s, online child stars are left without similar protections.[144] New legislation will prevent modern child stars from facing these already well-known problems.

Another possible solution is to give online child stars the same protections as children working within the realm of traditional media. For example, states like Florida require employers to show the Division of Labor the exact dates and amount of time that minors worked in the entertainment industry.[145] New York requires certificates and permits for minors to work, and sometimes requires some of the minor's earnings to be set aside in a trust.[146] Such provisions, if extended to online child stars, would provide them with some protections, as the amount of time they work would be regulated and at least some of their earnings would be protected.

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140. Jacqueline Yoo et al., *Social Media Posts by Parents Bring Concern for Children's Privacy, Safety*, ABC NEWS (July 6, 2023), https://abcnews.go.com/US/social-media-posts-parents-bring-concerns-childrens-privacy/story?id=100706825.

141. *Id.*

142. Lorenz, *supra* note 5.

143. *Id.*

144. *See generally* Part I.

145. U.S. DEP'T OF LAB.: WAGE AND HOUR DIV., *supra* note 29.

146. *Id.*

C. New Proposed Legislation

There are many potential routes that would prevent the exploitation of the vulnerable population of child influencers. While adopting legislation from other countries or states are viable options, new legislation could also effectively protect child influencers. This legislation should focus on providing these children with the same protections as children who work in traditional media. Child influencers who perform for their parents should be treated as employees, paid for their work, given reasonable control over their image, and decide how much of themselves they choose to share with the world. The proposed legislation reads as follows:

Proposed Federal Legislation to Protect Minors Who Perform on Internet-Based Entertainment Platforms

> 1. Minor children who perform for a social media account owned by a parent or guardian shall be considered employees and are entitled to fair compensation of no less than the federal minimum wage.
>
> 2. The minor child's employer shall set aside 15% of the minor's earnings to be held in a trust, savings account, or other savings plan until the minor reaches the age of majority.
>
> a. If the minor performs for a social media account owned by the minor, the minor's parent or guardian shall set aside 15% of the minor's earnings to be held in a trust, savings account, or other savings plan until the minor reaches the age of majority.
>
> 3. Minor children who perform for a social media account owned by someone other than themselves shall be considered employees under the Fair Labor Standards Act. Minor children shall not work more hours per week than mandated by their state of residence, and shall not engage in any labor that their state deems hazardous.
>
> 4. Parents or guardians who wish to feature a minor child in photos or videos broadcast to more than 10,000 audience members must obtain a license from their state of residence's department of labor.
>
> 5. Minor children who are featured on a social media account are, once they reach the age of majority, entitled to have content

> featuring their image removed if the state deems it exploitative, harmful, or excessive.
>
> 6. Social media account owners who utilize minors for content that is sexually suggestive or explicit, physically or emotionally abusive, or deliberately harmful in other ways will have their account removed and may be fined up to $10,000.
>
> 7. Minor children who move to a new state will be subject to their prior state's labor laws for a period of 12 months.
>
> 8. Adopted or fostered children are not eligible to appear on their parent or guardians' social media accounts for a period of 12 months after the adoption or foster situation is made official.

IV. COUNTERARGUMENTS

A. Parents' Rights

Online safety is an important concern for parents. Maryland and California have proposed bills to create social media safety measures, and Utah has already enacted such laws.[147] Utah's law specifically "requires social media companies to provide a parent or guardian 'access to the content and interactions of an account held by a Utah resident under the age of 18.'"[148] Concerns about children's mental health, especially when it comes to participation on social media, prompted the Surgeon General to create an advisory on the subject, upon which the Utah law is based.[149] The solution lawmakers found for the problems outlined by the Surgeon General, and largely linked to social media usage, was to get parents more involved.[150]

However, this solution raises issues with privacy rights for minors.[151] The United Nations addressed this issue and ultimately deemed that a child has a lawful right to privacy.[152] In the United States, however, parental rights over children are prioritized.[153] For example, *Pierce v. Society of*

147. Alfred Ng, *Where Parental Snooping Is Becoming the Law*, POLITICO (Apr. 11, 2023), https://www.politico.com/news/2023/04/11/social-media-privacy-parents-kids-00091400.

148. *Id.*

149. *Id.*; OFF. OF THE SURGEON GEN., PROTECTING YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY 25 (2021).

150. Ng, *supra* note 147.

151. *Id.*

152. G.A. Res. 44/25, Convention on the Rights of the Child, Art. 16 (Nov. 20, 1989).

153. Ng, *supra* note 147.

Sisters established that parents have the right to choose what type of school to send their children to, despite a state statute mandating that children attend public school.[154] Further, the right of parents to make decisions for their children was established in *Troxel v. Granville*, which held that judges could not force parents to allow more visitation with their children's grandparents than the parents wanted.[155]

While it is important for parents to have rights over their children, it is also important for children to have a certain amount of privacy. Parents having more control over their children's social media usage could help protect them, but could also lead to increased exploitation when parents hold all of the control.

B. Free Speech

Sharing information about their children online is a method for parents to communicate with friends and family.[156] While it is important to establish boundaries regarding what and how much is shared, users can largely share what they want unless the platforms themselves opt to take that content down.[157] The Supreme Court has explicitly dissuaded the government from interfering with internet users' freedom of expression.[158] The Court stated that the government "cannot prohibit private actors from expressing certain views" on major social media platforms to suit the government's "values and priorities," as this would be a violation of the First Amendment.[159] Therefore, a counterargument to giving parents less control over their children's social media accounts is that it can be difficult to limit a parent's ability to share information about their children as doing so would have both legal and social implications.[160]

Minors also have a right to free speech, even in an unfamiliar medium like social media, as established by way of violent video game sales in *Brown v. Entertainment Merchants Association*.[161] In this case, the

154. 268 U.S. 510, 534–35 (1925).

155. 530 U.S. 57, 69–70 (2000).

156. Michel Walrave et al., *The Limits of Sharenting: Exploring Parents' and Adolescents' Sharenting Boundaries Through the Lens of Communication Privacy Management Theory*, 7 SEC. EDUC. PSYCH., at 2 (2022).

157. Adam Liptak, *Supreme Court to Hear Challenges to State Laws on Social Media*, N.Y. TIMES (Sept. 29, 2023), https://www.nytimes.com/2023/09/29/us/supreme-court-social-media-first-amendment.html.

158. Moody v. NetChoice, L.L.C., 603 U.S. 707 (2024).

159. *Id.* at 743.

160. *Id.*

161. 564 U.S. 786, 805 (2011).

Supreme Court held that "video games qualify for First Amendment protection."[162] The Court emphasized that, generally, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[163] Additionally, the Court recognized that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."[164] Therefore, minors are able to participate in activities related to free speech without broad governmental restrictions.

In *Brown*, the Court also pushes responsibility for children's access to seemingly dangerous items like violent video games onto the parents: "[P]arents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest."[165] The Court also points out that restricting minors' ability to purchase violent video games would limit "the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime."[166] Minors have a right to free speech through platforms such as social media and video games, and the Court has shown a general tendency to lean towards keeping parents in charge of that.[167]

Restricting both parents' and children's use of social media could fall into the category of First Amendment free speech restrictions. Additionally, the Supreme Court has shown a tendency to defer to parents in oversight of the media their children are exposed to—this is not considered a government issue.

C. Mental Health Considerations

Some argue that parents should be completely in charge of their children's social media presence because social media can lead to an increase in mental health issues in adolescents.[168] However, this issue does

162. *Id.* at 790.

163. *Id.* at 790–91 (2011) (quoting Ashcroft v. Am. C.L. Union, 535 U.S. 564, 573 (2002)).

164. *Id.* at 794 (2011) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212–13 (1975)).

165. *Id.* at 803.

166. *Id.* at 805.

167. *Id.* at 803–04.

168. *See* Jean M. Twenge et al., *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6 ASS'N PSYCH. SCI. 15 (2018).

not apply when parents are exploiting their children by posting their children's information online on their own accounts.[169]

Caymi Barrett, who grew up with her mom constantly sharing personal information about her on the internet, experienced many negative effects from this type of oversharing.[170] After suffering stalking and bullying due to her online presence, Barrett eventually dropped out of high school.[171] She is now extremely private and does not have a relationship with her mom.[172]

Barrett provides an example of why parental control is not always the answer: for some children, parents are the ones damaging their mental health by oversharing and giving them little to no privacy. It is true that, "[i]n the United States, parental authority supersedes a child's right to privacy . . . ."[173] Because there are no laws protecting children in Barrett's situation, putting children's social media presence entirely in the hands of their parents could prove detrimental in certain situations.

CONCLUSION

Child exploitation on social media is a growing issue. Performers whose audience is online are not offered the same protection as their more traditional counterparts. This situation has led to rampant child exploitation, as many people seek to make money on the internet and often do so through their children. This is not a new issue; it is a familiar one that has spread to a uniquely modern method of entertainment. The lack of rights provided to child entertainers in old Hollywood has gradually brought about more protections in the modern day.These protections should be expanded to child influencers as well, who can benefit from laws that already target traditional child performers. Additionally, Congress should craft legislation to protect children who are in the unique situation of performing online under the management of their parents, since their parents already control their children's social media use.

Creating federal laws to protect the interests of children would help child influencers and traditional performers alike. This solution would standardize laws across the country and provide equal benefits to young

169. Kate Lindsay, *The First Social-Media Babies Are Growing Up—And They're Horrified*, ATLANTIC (May 23, 2023), https://www.theatlantic.com/technology/archive/2023/05/parents-posting-kids-online-tiktok-social-media/674137/.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

performers no matter where they live. Instead of perpetuating the suffering that performers like Judy Garland and Jackie Coogan endured, lawmakers can implement protections for child performers in the modern day who face similar types of exploitation.

STRUCTURAL WAIVERS AND CONGRESS'S AUTHORITY TO COIN MONEY: DIGITAL CURRENCY AND STATE SOVEREIGN IMMUNITY IN THE NEW ERA

Emanuele S. Putrino*

*Law Clerk to the Honorable David S. Leibowitz, United States District Court for the Southern District of Florida; J.D., 2024, Maurice A. Deane School of Law at Hofstra University; B.S., Criminal Justice and Sociology, 2021, Adelphi University. For this piece, I thank Professor James Sample for sparking my interest in sovereign immunity from our federal courts course at Hofstra. I am also indebted to Professor Eric M. Freedman for very helpful comments and insight. The views and arguments expressed in this Article are solely my own.

INTRODUCTION

The end of paper currency is increasingly becoming a reality rather than a fantasy. For the first time in over 70 years, the United States money supply is shrinking and the demand for cash and deposits is declining.[1] According to Goldman Sachs and the Federal Reserve, cash was used in only 18% of financial transactions in 2022, compared with 31% of transactions in 2016.[2] On the other hand, the swipe of a card or the use of digital payments is becoming more and more commonplace.

Central banks across the globe have already begun experimenting with a new form of exchange: central bank digital currency (CBDC). These are virtual currencies that operate similarly to Bitcoin, but differ becaue governmental entities back them.[3] As of June 2024, 134 countries were piloting and exploring the potential use of CBDC for their economies.[4] Countries such as China, Japan, Sweden, the Bahamas, and England have all conducted trials with this new form of currency.[5] China's pilot CBDC, the digital yuan or e-CNY, has already been in use for five years, with July 2023 total transactions reaching a cumulative value of 1.8 trillion yuan, roughly $249.9 billion.[6] Implementing e-CNY may soon transcend the international trade scene where it could undermine the value and dominance of the U.S. dollar.

Meanwhile, the United States has not made such significant strides. In 2022, President Joe Biden signed an executive order directing the Office of Science and Technology Policy to investigate the potential use of CBDC in the United States; President Donald Trump recently revoked the order.[7]

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1. *Why the US Money Supply Is Shrinking for the First Time in 74 Years*, GOLDMAN SACHS (Aug. 28, 2023), https://www.goldmansachs.com/insights/articles/why-the-us-money-supply-is-shrinking.

2. *Id.*

3. Eswar Prasad, *Cash Will Soon Be Obsolete. Will America Be Ready?*, N.Y. TIMES (July 22, 2021), https://www.nytimes.com/2021/07/22/opinion/cash-digital-currency-central-bank.html (explaining the difference between this currency and other virtual currency like Bitcoin, which operates privately and is decentralized).

4. Tobi Opeyemi Amure, *What Will a U.S. Central Bank Digital Currency Look Like?*, INVESTOPEDIA (June 8, 2024), https://www.investopedia.com/us-cbdc-6740586.

5. Prasad, *supra* note 3.

6. Mia Nulimaimaiti, *What's the State of China's Digital Yuan in 2023?*, S. CHINA MORNING POST (Oct. 10, 2023), https://www.scmp.com/economy/china-economy/article/3237317/whats-state-chinas-digital-yuan-2023.

7. Exec. Order No. 14,067, 87 Fed. Reg. 49 (Mar. 9, 2022). This was revoked by Trump's Executive Order, stating that all federal agencies "are hereby prohibited from undertaking any action to establish, issue, or promote CBDCs within the jurisdiction of the United States or abroad." *Strengthening American Leadership in Digital Financial Technology*, THE WHITE HOUSE (Jan. 23,

Bipartisan congressional approval for CBDC has also been lacking.[8] In 2023, Congressman Mooney Alexander (R-WV) introduced a bill prohibiting the Federal Reserve from approving or executing a pilot program to test CBDC.[9] The Federal Reserve published a paper in 2022 analyzing the use and potential benefits of CBDC currency,[10] so congressional support for CBDC in the future is still a possibility despite the current gridlock.

As is often the case, the state and federal governments have different systems and operations. At least 11 states have proposed legislation blocking CBDC efforts and others have already passed such laws.[11] Florida Governor Ron DeSantis signed the first anti-CBDC bill into law, which preemptively excludes CBDC from the definition of money within the state's Uniform Commercial Code should Congress adopt the currency.[12]

Assuming the federal government makes the transition into CBDC, several federalism issues quickly come to mind regarding states' refusal to adopt CBDC as a form of money currency. This Article, however, does not wholly focus on the separation of power between states and the federal government but rather the dynamic between private individuals and the states. Instead, this Article focuses on sovereign immunity and whether private individuals could sue states when there is a dispute over currency.

Under the Eleventh Amendment of the Constitution, private citizens cannot sue a state government for money damages.[13] The doctrine of sovereign immunity predates the Constitution and is implicit in the

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2025), https://www.whitehouse.gov/presidential-actions/2025/01/strengthening-american-leadership-in-digital-financial-technology.

8. *Trump Vows to Block a CBDC*, LEDGER INSIGHTS (Jan. 18, 2024), https://www.ledgerinsights.com/trump-vows-to-block-a-cbdc.

9. Digital Dollar Pilot Prevention Act, H.R. 3712, 118th Cong. (2023). Recently, Senator Mike Lee (R-Utah) co-sponsored a bill with other Republicans to prevent a CDBC in the United States after Trump's Executive Order. *Lee Introduces Bill Making Trump Ban on Central Bank Digital Currency Permanent*, MIKE LEE (Feb. 6, 2025), https://www.lee.senate.gov/2025/2/lee-introduces-bill-making-trump-ban-on-central-bank-digital-currency-permanent.

10. BD. OF GOVERNORS OF THE FED. RSRV. SYS., MONEY AND PAYMENTS: THE U.S. DOLLAR IN THE AGE OF DIGITAL INFORMATION 14–16 (2022) [hereinafter THE U.S. DOLLAR].

11. *11 States Have Pending Anti-CBDC Legislation*, LEDGER INSIGHTS (Feb. 2, 2024), https://www.ledgerinsights.com/11-states-have-pending-anti-cbdc-legislation-south-dakota-votes-in-favor.

12. *Governor Ron DeSantis Signs First-in-the-Nation Legislation to Protect Against Government Surveillance of Personal Finances*, EXEC. OFF. OF THE GOVERNOR RON DESANTIS 46TH GOVERNOR OF FLA. (May 12, 2023), https://www.flgov.com/eog/news/press/2023/governor-ron-desantis-signs-first-nation-legislation-protect-against-government. [hereinafter *DeSantis Legislation*].

13. Alden v. Maine, 527 U.S. 706, 712–13 (1999) (discussing the Eleventh Amendment of the U.S. Constitution).

document's design.[14] States can only be subject to suit if they consent to being sued or Congress validly abrogates their immunity pursuant to the Fourteenth Amendment's enforcement clause.[15]

However, the Supreme Court recently broadened the importance of the Constitution's design to extend implied consent to suit via structural waivers of immunity.[16] In *PennEast Pipeline Co. v. New Jersey*, the Court held that a state may implicitly consent to suit as part of the "plan of the Convention" or "structure of the original Constitution itself."[17] One year later in *Torres v. Texas Department of Public Safety*, the Court expanded *PennEast*, ruling that a state implicitly consents to suit in a dispute involving Congress's Article I power "[t]o raise and support Armies" and "[t]o provide and maintain a Navy" as part of the "plan of the Convention."[18]

Since the Court had foreclosed Congress's ability to abrogate state sovereign immunity via its Article I Commerce Power in the late 20th century,[19] courts should extend the *PennEast* and *Torres* framework to incorporate implied structural waivers under Congress's power to coin money. With the possible federal adoption of CBDC, private litigation against states is foreseeable if they refuse to accept such currency. In fact, several individuals recently sued the National Park Service for refusing to accept cash as a form of payment for entry fees.[20] An analogous scenario could play out in the future between individuals and states not recognizing CBDC in their respective commercial codes. States should not be able to defend on sovereign immunity grounds because Congress's authority to establish CBDC as a form of money is one that is "complete in itself."[21]

This Article begins with a background on CBDC and its progressive implementation around the globe.[22] Then, a doctrinal discussion of sovereign immunity will follow.[23] Part II reviews and critiques the Court's

14. *Id.* at 727–29.

15. Sossamon v. Texas, 563 U.S. 277, 284–85 (2011); Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 587 (2022); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

16. *See, e.g.*, PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 500 (2021).

17. *Id.*

18. *Torres*, 597 U.S. at 584; U.S. CONST. art. I, § 8, cls. 12–13.

19. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47, 72 (1996).

20. Summer Lin, *The National Park Service Will Only Take Plastic at Its Parks. Three Visitors Are Suing to Use Cash*, L.A. TIMES (Mar. 20, 2024), https://www.latimes.com/california/story/2024-03-20/the-national-park-service-will-only-take-plastic-at-its-parks-three-visitors-are-suing-to-use-cash.

21. *Torres*, 597 U.S. at 594. To note, this solution's application is broad and not limited to the CBDC context. This Article encourages the widespread adoption of structural waivers of immunity in any dispute involving Congress's authority to coin money and regulate currency.

22. *See infra* Part I.A.

23. *See infra* Part I.B.

longstanding expansion of the sovereign immunity defense.[24] It also presents one of many possible fact patterns where this issue intersects with CDBC.[25] Part III proposes to extend the Court's holdings in *PennEast* and *Torres* to Congress's power to coin money under the Coinage Clause. This will ultimately give individuals the ability to sue a sovereign for money damages.[26] In doing so, Part III closely scrutinizes the constitutional text and history of the Coinage Clause as well as the relevant precedent to confirm that the states yielded to Congress's authority under this power, forfeiting their sovereign immunity rights.[27] This Article recognizes and addresses counterarguments to its solution, confirming that broadening structural waivers is consistent with the constitutional design and will not swallow up the sovereign immunity defense entirely.[28] This Article concludes by arguing that this is the proper course for the Court to follow given its recent decisions and the rise of new currency around the world.[29]

I. A HISTORY OF CENTRAL BANK DIGITAL CURRENCY AND SOVEREIGN IMMUNITY

Countries are beginning to phase out paper currency and transition into new forms of digital currency, such as central bank digital currency (CBDC). The new adoption of currency will surely breed many problems and disputes, domestically and abroad. This Article explores how CBDC overlaps with state sovereign immunity issues as states progressively ban its adoption. Subpart A discusses the origins of CBDC and its introduction to global economies, including its effects and potential federal adoption in the future.[30] Subpart B provides a history of the state sovereign immunity doctrine and how it has developed up until the *Torres* decision.[31]

A. Central Bank Digital Currency

CBDC is a form of digital currency that is tokenized through blockchain technology similar to cryptocurrencies.[32] This currency,

24. *See infra* Part II.A.
25. *See infra* Part II.B.
26. *See infra* Part III.A.
27. *See infra* Part III.A.
28. *See infra* Part III.B.
29. *See infra* CONCLUSION.
30. *See infra* Part I.A.
31. *See infra* Part I.B.
32. Amure, *supra* note 4. Blockchain technology is outside the scope of this Article, but for a general overview see John J. Healy, Note, *Veto the Black-Box Politics: How Implementing Blockchain*

however, would be regulated by the Federal Reserve and secured by the federal government.[33] Individuals could use this digital currency in lieu of physical cash without the volatility associated with cryptocurrencies. According to the International Monetary Fund, there are at least 100 CBDCs in the research or trial stages worldwide.[34]

Finland pioneered this type of digital currency in the late 20th century. In 1993, the Bank of Finland adopted an electronic form of fiat currency, the Avant smart card.[35] The card proved to be an efficient method for ordinary merchant purchases and users remained anonymous; data from transactions was neither recorded nor stored for user identification and tracking.[36] The Avant card was introduced in several phases. Once fully introduced, the card was expected to replace 50% of coins and small-denomination fiat cash.[37] These cards were preferred options for low-value purchases and did not the carry fees or limits associated with debit or credit cards.[38] The Avant card was eventually discontinued after fees were later leveraged on consumers and debit cards had gained wider acceptance after improved security measures.[39]

Out of the 134 countries that have researched or tested the use of CBDC, 11 countries, such as the Bahamas, Jamaica, and Nigeria, have successfully implemented it as a supplement to traditional fiat currency.[40] The Bahamas adopted the first retail CBDC, the Sand Dollar, allowing use of digital wallets for financial transactions via phone application or physical card.[41] This trend is continuing to grow.[42]

Other countries have only conducted trial runs and pilot programs, most notably China. Its pilot program, the e-CNY, began in 2019 with over

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Technology into the United States Voting System Will Give Our World the Transparency We Deserve, 52 HOFSTRA L. REV. 131, 135–43 (2023).

33. Amure, *supra* note 4.

34. Andrew Stanley, *The Ascent of CBDCs*, INT'L MONETARY FUND: FIN. & DEV. MAG. (Sept. 2022), https://www.imf.org/en/Publications/fandd/issues/2022/09/Picture-this-The-ascent-of-CBDCs.

35. *Id.*

36. Aleksi Grym, *Lessons Learned from the World's First CBDC*, 8 BOF ECON. REV. 1, 3–4 (2020).

37. *Id.* at 5.

38. *Id.* at 8. Avant cards also used encryption, while other payment cards used some form of magnetic stripe technology. *See id.*

39. *Id.* at 17.

40. Amure, *supra* note 4. The others include Antigua and Barbuda, Anguilla, St. Kitts and Nevis, Montserrat, Dominica, Saint Lucia, Saint Vincent and the Grenadines, and Grenada. *Id.*

41. Raphael Auer et al., *Central Bank Digital Currencies: Motives, Economic Implications and the Research Frontier* 5 (Bank for Int'l Settlements, Working Paper No. 976 2021).

42. Amure, *supra* note 4 (noting the increasing level of interest in experimenting with CBDC across the globe).

20 cities as test sites and over five million registered users as of 2022.[43] By the end of 2023, 120 million digital wallets were created and domestic transactions totaled 1.8 trillion yuan, almost 250 billion U.S. dollars.[44] The use of e-CNY has extended outside the mainland. Hong Kong residents can now open digital wallets and engage in digital transactions.[45]

While CBDC is still relatively new and research is underway, it is a modern medium of exchange with great potential. The speculative nature of cryptocurrencies and the development of new technology and business models have procured interest in a new type of legal tender—so much so that President Biden signed an executive order calling on the Office of Science and Technology Policy and myriad agencies to study and report on the use and risks of CBDC in America.[46] With advanced economies like China's successful use of CBDC thus far, it is no surprise that President Biden advocated for "reinforc[ing] United States leadership in the global financial system," recognizing the importance and value of the U.S. dollar.[47]

The following discussions summarize the implications of CBDC adoption in the United States. There are ample advantages to CBDC use in America, yet several disadvantages serve as counterweights to its unanimous approval and acceptance. Nonetheless, the United States may one day formally incorporate the digital wallet as a medium of exchange. A plethora of issues would then surface and this Article covers those percolating in the sovereign immunity field.

1. The Benefits

CBDC could positively impact the nature of financial transactions in the United States. Prior to President Biden's executive order, the Federal Reserve released a paper in January 2022 summarizing research conducted regarding CBDC's potential benefits and risks.[48] The paper highlights that CBDC's introduction would provide a safe and efficient payment method,

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43. Nulimaimaiti, *supra* note 6.

44. Selena Li, *Hong Kong Allows China's Digital Yuan to Be Used in Local Shops*, REUTERS (May 17, 2024), https://www.reuters.com/markets/currencies/hong-kong-allows-chinas-digital-yuan-be-used-local-shops-2024-05-17.

45. *Id.*

46. Exec. Order No. 14,067, 87 Fed. Reg. 14143 (Mar. 9, 2022) ("Advances in digital and distributed ledger technology for financial services have led to dramatic growth in markets for digital assets . . . .").

47. *Id.* at 14144.

48. *See generally* THE U.S. DOLLAR, *supra* note 10 (providing background information and policy implications of digital currency in the United States).

making it easier to execute online transactions involving very small sums of money where delivery of payment could be programmed at specific times.[49] This efficiency would transcend outside American borders; digital wallet holders could make transactions through different jurisdictional channels instantly and cheaper than current methods of payment.[50] Other mediums of exchange, especially cash or wire transfers, lack the design capabilities to carry out such transactions efficiently.[51]

Another advantage of having CBDC in the United States is strengthening the role of the U.S. dollar. Now that China has been experimenting with CBDC and is beginning to use it outside its borders, the U.S. dollar's value and dominance may be at risk.[52] Undermining its value could increase transaction and borrowing costs for consumers and businesses.[53]

Government-backed digital currency may also promote financial equity and inclusion. Giving every individual access to a digital wallet provides increased options for the "underbanked" who traditionally do not have a bank account.[54] Lower-income households would benefit from reduced transaction costs and fees accompanying consumer bank deposit accounts.[55]

CBDC would foster financial stability and increase financial activity amongst the public and private sectors by reducing speculation and credit or liquidity risks.[56] Since the Federal Reserve would fully secure it, it would be required to protect against anti-money laundering and counterfeiting

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49. *Id.* at 14–15.

50. *Id.* at 15. The use of Automated Clearing House or wire transfers cross-border can take several days to clear and transactions can result in fees up to 10%. U.S. DEP'T OF THE TREASURY, THE FUTURE OF MONEY AND PAYMENTS: REPORT PURSUANT TO SECTION 4(B) OF EXECUTIVE ORDER 14067 6 (2022) [hereinafter THE FUTURE OF MONEY AND PAYMENTS]. At least a quarter of a sample size of 50 central banks would incorporate interoperable features for CBDC to allow frictionless and less costly cross-border payments. Auer et al., *supra* note 41, at 21.

51. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 5–6, 20.

52. Nulimaimaiti, *supra* note 6; Rajesh Bansal & Somya Singh, *China's Digital Yuan: An Alternative to the Dollar-Dominated Financial System* 3, 21 (Carnegie Endowment for Int'l Peace, Working Paper 2021); Exec. Order No. 14067, 87 Fed. Reg. 49, 14144 (Mar. 9, 2022). This Executive Order states:

> The United States has an interest in ensuring that it remains at the forefront of responsible development and design of digital assets . . . . The United States derives significant economic and national security benefits from the central role that the United States dollar and United States financial institutions and markets play in the global financial system.

Id.

53. THE U.S. DOLLAR, *supra* note 10, at 15; Amure, *supra* note 4.

54. THE U.S. DOLLAR, *supra* note 10, at 16; THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 24.

55. Amure, *supra* note 4.

56. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 4.

risks.[57] The central bank would monitor consumer transactions and subsequently protect against suspicious activity. However, greater access to private transaction information and data may present more problems.

2. The Drawbacks

Perhaps the leading concern behind CBDC is the government's unchecked access to one's private information and data. In the 13 states that have enacted or have pending anti-CBDC legislation, most of the concern resides with privacy risks.[58] Florida spearheaded the anti-CBDC trend when Governor Ron DeSantis signed the first piece of legislation in 2023.[59] The short three-to-four-page law omits the term "central bank digital currency" from its state commercial code.[60] Jimmy Patronis, Florida's Chief Financial Officer, stated that congressional adoption of CBDC is "another way for Floridians to have their vital financial information surveilled and controlled by the federal government."[61] Indeed, a U.S. Department of the Treasury report drafted pursuant to President Biden's executive order confirmed that "CBDC ledger[s] could collect significant amounts of information" and "user information could be pseudonymously recorded on the ledger" leading to decreased user privacy and increased vulnerability to cyberattacks.[62]

Holders of digital wallets are also subject to privacy exploitation by private parties. A robust CBDC system in the United States would require heightened operational safeguards against cybersecurity threats.[63] Otherwise, criminals may abuse the digital nature of the currency to steal information, money, or even engage in schemes for personal gain.[64] There would need to be a proper monitoring and supervisory system to assess and mitigate any possible risks. The United States would also need to work closely with other countries to ensure that jurisdictions with lax anti-money laundering or counterfeiting regulatory frameworks adjust accordingly so that bad actors do not exploit loopholes in the system to undermine user privacy.[65]

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57. *Id.* at 23.
58. *11 States Have Pending Anti-CBDC Legislation*, *supra* note 11.
59. *DeSantis Legislation*, *supra* note 12.
60. S.B. 7054, 2023 Leg., Reg. Sess. (Fla. 2023); FLA. STAT. § 671.201(25) (2023) ("Money . . . does not include a central bank digital currency.")
61. *DeSantis Legislation*, *supra* note 12.
62. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 22.
63. THE U.S. DOLLAR, *supra* note 10, at 20.
64. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 25, 42–43.
65. *See id.* at 43.

On the commercial side, uniform implementation of CBDC in the United States could harm private industries and businesses. With CBDC substituting bank funds, overall bank deposits will decrease.[66] This will result in less credit available for loans and higher credit costs and expenses for businesses and credit applicants.[67] Chartered financial institutions could also be subject to runs if there is a sudden transition to CBDC.[68] Additionally, long-term CBDC acceptance over time could negatively influence the country's monetary policy; the Federal Reserve might need to increase the levels of reserves, leading to higher interest rates and inflation.[69]

B. State Sovereign Immunity

The issue of whether states enjoy sovereign immunity from private suits has been a controversial topic for over 200 years.[70] As with other common law doctrines, it is no surprise that sovereign immunity principles derived from England and the British Crown; the King of England was not subject to suit by a private entity unless he consented.[71] A plaintiff's only recourse against the King was to sue "in the respectful form of a petition, and [the King] never fails to comply with the judgment of his court."[72] As noted by Dean Erwin Chemerinsky, one interpretation of the English maxim, "the [K]ing can do no wrong," suggests that the sovereign cannot be sued without consent.[73]

Sovereign immunity jurisprudence began with the adoption of the Constitution at the Grand Convention in 1787. At that time, Alexander Hamilton authored *The Federalist No. 81*, where he reasoned

66. THE U.S. DOLLAR, *supra* note 10, at 17.

67. *Id.*

68. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 17. A bank "run" is when customers withdraw their deposits rapidly out of fear of insolvency. Adam Hayes, *What Is a Bank Run? Definition, Examples, and How it Works*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bankrun.asp (last updated Dec. 22, 2023).

69. THE FUTURE OF MONEY AND PAYMENTS, *supra* note 50, at 18–20.

70. *See* Pfander, *infra* note 87, at 1271 ("[S]cholars and judges disagree about what, if anything, the history of the Amendment can tell us about its proper interpretation some two hundred years later.").

71. United States v. Lee, 106 U.S. 196, 205 (1882); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001).

72. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see also* Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 440 (1793).

73. 3 WILLIAM BLACKSTONE, COMMENTARIES *140 (1768); Chemerinsky, *supra* note 71, at 1201 & n.1. However, Professor Eric Freedman pointed out that this maxim really means that the King could not command another to do something "legally wrong" and thus no wrongs could be committed on his behalf. ERIC. M. FREEDMAN, MAKING HABEAS WORK: A LEGAL HISTORY 80 (2018).

that authorizing suits against states in federal court would breed coercion upon the states and war.[74] The original enabling provision that arguably provided federal jurisdiction over suits by private citizens against states was in Article III. Article III, Section 2 states that "[t]he judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State . . . ."[75] The Supreme Court interpreted this provision to foreclose state sovereign immunity in *Chisolm v. Georgia*, a case involving an out-of-state citizen suing the state of Georgia for repayment on a debt.[76] Furious by the *Chisolm* decision, the states subsequently ratified the Eleventh Amendment to the Constitution to overrule the Supreme Court.[77]

The Eleventh Amendment reads that "[t]he Judicial power *of the United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by Citizens of another State*, or by Citizens or Subjects of any Foreign State."[78] According to Professor James Sample and Dean Chemerinsky, the text of the Eleventh Amendment is clear on its face: only an out-of-state citizen is prohibited from suing a sovereign and the immunity applies only under federal court jurisdiction.[79] Yet, the Supreme Court held in *Hans v. Louisiana* that an in-state citizen is barred from suing the sovereign[80] and the Court extended this immunity to state courts in *Alden v. Maine*.[81]

Scholars have labeled this method of interpretation as purposivist construction: developing precedent not through the plain text of the amendment, but rather through its underlying purpose.[82] William Blackstone believed that "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by

74. THE FEDERALIST NO. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent* . . . . [T]o ascribe to the federal courts [the power for a citizen to sue a State] . . . would be altogether forced and unwarrantable.") (emphasis in original). This is, however, not the case when "there is a surrender of this immunity *in the plan of the convention* . . . ." *Id.* (emphasis added).

75. U.S. CONST. art. III, § 2, cl. 1.

76. 2 U.S. (2 Dall.) at 466–67.

77. James Sample, *Textual Rights, Living Immunities*, 41 S. ILL. U. L.J. 1, 7 (2017).

78. U.S. CONST. amend. XI (emphasis added).

79. Chemerinsky, *supra* note 71, at 1205–06; Sample, *supra* note 77, at 7.

80. 134 U.S. 1, 13–15 (1890)

81. 527 U.S. 706, 754 (1999).

82. *See, e.g.*, Sample, *supra* note 77, at 10 ("Strong purposivists . . . believe, however, that even the clearest statutory language will sometimes contradict a statute's apparent 'purpose' . . . .") (quoting John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 10 (2001)). *See generally* Anthony J. Bellia, Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Purposivism*, 65 WM. & MARY L. REV. 485 (2024) [hereinafter Bellia & Clark, *New Purposivism*] (discussing the Supreme Court's new purposivism approach with implied structural waivers of immunity).

considering the reason and spirit of it; or the cause which moved the legislator to enact it."[83] According to the Court in *Hans*, despite the language of the Eleventh Amendment, there was essentially no way the states would have adopted it had it meant that they were only protected from suits prosecuted by out-of-state citizens.[84] Justice Bradley and the majority believed that such a supposition would be "an absurdity on its face."[85] The principle of sovereign immunity was more inherent in the constitutional design.[86] The Amendment was ratified merely to correct an erroneous construction of the only enabling provision of the Constitution that arguably abrogated state sovereign immunity.[87] The Amendment's underlying purpose at the time of the Founding—to shield the individual states and protect their sovereignty—prevailed.

In the next two segments, this Article provides background with exceptions the Court has created regarding the sovereign immunity defense.[88] The first segment discusses how Congress can abrogate state sovereign immunity pursuant to its enforcement authority via Section Five of the Fourteenth Amendment.[89] Then, the second segment details how a state can consent to suit.[90] While traditionally this waiver was strictly construed, the Court has recently expanded the principle of implied structural waivers, making it eaiser to sue a state when an Article I power "complete in itself" is at issue.[91]

1. Congressional Abrogation of State Sovereign Immunity

Section Five of the Fourteenth Amendment states "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[92] In 1976, the Supreme Court established the rule in *Fitzpatrick v.*

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83. WILLIAM BLACKSTONE, SEC. 2 OF INTRODUCTION TO COMMENTARIES ON THE LAWS OF ENGLAND 61 (1758).

84. *Hans*, 134 U.S. at 15.

85. *Id.*

86. Bellia & Clark, *New Purposivism*, *supra* note 82, at 556 ("[T]he source of the States' immunity was the rule, inextricably woven into the Constitution itself . . . .").

87. *Id.* at 527. The Eleventh Amendment is said to have been an "explanatory" amendment to clarify an ambiguity or erroneous judicial interpretation. *Id.* (quoting James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1314–15 (1998)).

88. *See infra* Part I.B.1.–2.

89. *See infra* Part I.B.1.

90. *See infra* Part I.B.2.

91. Bellia & Clark, *New Purposivism*, *supra* note 82, at 493.

92. U.S. CONST. amend. XIV, § 5.

Bitzer that Congress may abrogate or nullify a state's sovereign immunity,[93] provided that Congress's intent to do so is "unmistakably clear" from the statutory language and Congress has acted "pursuant to a valid exercise of power," such as through Section Five.[94] This new limit on state sovereign immunity, however, was short-lived in its application.

The Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* weakened Congress's power to abrogate immunity via Section Five of the Fourteenth Amendment, holding that: (1) there must be a "pattern" of existing constitutional violations since Congress's enforcement power is "remedial" in nature; and (2) the legislation must be "congruent and proportional" between the injury to be prevented or remedied and the means adopted to that end.[95] There, the Patent Remedy Act could not abrogate sovereign immunity because there was no pattern of patent infringement nor constitutional violations by the states.[96] Immediately following *Florida Prepaid*, the Court refused to abrogate sovereign immunity pursuant to Section Five involving cases of employment discrimination because they lacked a pattern of constitutional violations by the state.[97]

Aside from the enforcement provision of the Fourteenth Amendment, litigants asserted that Congress's Article I Commerce Clause authority was sufficient to abrogate state sovereign immunity. The Court, in a plurality decision, embraced the argument in *Pennsylvania v. Union Gas Co.*, holding that a federal law authorizing suits against a state for monetary damages enacted pursuant to Congress's Commerce Clause authority was sufficient to abrogate state sovereign immunity.[98] Not long after, the Court overturned *Union Gas* in the landmark case, *Seminole Tribe of Florida v. Florida*, holding that Congress can only abrogate sovereign immunity pursuant to Section Five of the Fourteenth Amendment.[99]

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93. 427 U.S. 445, 456–57 (1976).

94. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); *see also* Quern v. Jordan, 440 U.S. 332, 343 (1979) ("Our cases consistently have required a clear[] showing of congressional purpose to abrogate Eleventh Amendment immunity . . . ."); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57–58 (1996).

95. 527 U.S. 627, 638–39 (1999) (applying the test established in City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997)).

96. *Fla. Prepaid*, 527 U.S. at 640, 647.

97. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001). *Cf.* Tennessee v. Lane, 541 U.S. 509, 528–30 (2004) (holding that the Americans with Disabilities Act abrogated state sovereign immunity because there was a pattern of the state blocking access to courthouses).

98. 491 U.S. 1, 5, 23 (1989) (plurality opinion).

99. 517 U.S. 44, 66, 72–73 (1996).

The significance of Article I in the sovereign immunity arena, however, has not disappeared. As will be discussed in the next segment, Congress's Article I authority plays a role when a state consents to suit. Prior cases alluded to this new type of consent, and two recent Supreme Court decisions have paved the way for its future broad application.

2. Structural Implied Waivers

The Eleventh Amendment does not bar an action by a private citizen against a state if the state waives the immunity and consents to suit.[100] Initially, the Court recognized only an express waiver that had to be unequivocal or one implied solely by the statute's text.[101] Then, the Court began recognizing implied consent as part of the states acquiescing to the "plan of the Convention."[102] Not until recently did the Court openly embrace this test and suggest a new turn in sovereign immunity jurisprudence: implied waivers when Congress is acting pursuant to federal power that is "complete in itself."[103]

Alexander Hamilton championed the phrase "plan of the Convention" at the time of the Founding.[104] In *The Federalist No. 81*, Hamilton described that while it is "inherent" in a sovereign that it retains immunity from suit, a state may surrender its immunity in the "plan of the [C]onvention."[105] Justice William Brennan trailblazed its adoption by the Court in several dissenting and concurring opinions.[106] The test gained traction in *Union Gas*'s plurality involving Congress's Commerce Clause powers. There, Justice Brennan wrote that "[b]ecause the Commerce Clause withholds power from the States at the same time as it confers it on Congress . . . [the States] gave their consent all at once, in ratifying the

100. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).

101. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 673 (1974).

102. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 377 (2006) (holding states waived immunity to suit by a bankruptcy trustee to set aside preferential transfers as part of the "plan of the Convention" for Congress to regulate bankruptcy law).

103. PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 508 (2021); Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 589 (2022).

104. *See* THE FEDERALIST NO. 81 (Alexander Hamilton).

105. *Id.* at 487 (Clinton Rossiter ed., 1961).

106. *See, e.g.*, Port Auth. Trans-Hudson Corp v. Feeney, 495 U.S. 299, 310–11 (1990) (Brennan, J., concurring) ("States surrendered that immunity, insofar as challenges under federal statutes are concerned, 'in the plan of the Convention' when they agreed to form a union and granted Congress specifically enumerated powers."); *Edelman*, 415 U.S. at 687 (Brennan, J., dissenting); Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 317–22 (1973). This phrase was also referenced by the *Hans* Court. Hans v. Louisiana, 134 U.S. 1, 12–13 (1890).

Constitution containing the Commerce Clause, rather than on a case-by-case basis."[107] After *Union Gas* was overruled, this test lost importance until the *Central Virginia Community College v. Katz* decision in 2006.[108]

Katz involved a Chapter 11 trustee seeking to avoid and recover preferential payments made by the debtor to several Virginia universities.[109] The colleges moved to dismiss on sovereign immunity grounds.[110] In a bare 5-4 majority, the Court held that the states had implicitly waived their immunity since they agreed "in the plan of the Convention" that Congress ultimately creates uniform bankruptcy law under its Article I authority.[111] To be clear, the Court expressly stated that "the relevant question is not whether Congress has 'abrogated' States' immunity . . . ."[112] Thus, after *Seminole Tribe*, *Katz* set the ball rolling for the Court to solidify a new framework limiting the sovereign immunity defense, notwithstanding the abrogation doctrine. That shift took place 15 years later.

In 2021, the Supreme Court was presented with the question of whether private pipeline companies, given the eminent domain power by federal statute, could initiate condemnation proceedings against states.[113] *PennEast* revived the test advocated by Justice Brennan and embraced by *Katz*, answering in the affirmative. [114] With another 5-4 decision not split along party lines, the Court ruled that the "States consented in the plan of the Convention to the exercise of federal eminent domain power" and could not use the sovereign immunity defense.[115] In other words, when the states ratified the Constitution, they yielded to the federal government's eminent domain authority—a power "complete in itself."[116]

The Supreme Court decided *Torres* the following term.[117] Petitioner Torres, an Army Reserves veteran, sued Texas in state court alleging the state violated federal law by refusing to employ him, though he had a service-related disability.[118] Congress enacted the Uniform Services Employment and Reemployment Rights Act of 1994, the federal law in question, pursuant to Congress's Article I army and navy authority. The law

107. Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (plurality opinion).
108. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).
109. *Id.* at 360.
110. *Id.*
111. *Id.* at 377; *see* U.S. CONST. art. I, § 8, cl. 4.
112. *Katz*, 546 U.S. at 379.
113. PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 488 (2021).
114. *Id.* at 482.
115. *Id.* at 501.
116. *Id.* at 502, 508.
117. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580 (2022).
118. *Id.* at 585–86.

authorized private suits against noncomplying state employers.[119] Texas moved to dismiss, arguing that sovereign immunity barred the suit.[120]

Reaffirming *PennEast*, the *Torres* Court held that sovereign immunity did not bar the suit because states consented to Congress exercising sole authority to "raise and support Armies" and "provide and maintain a Navy" as part of the "plan of the Convention."[121] Citing Alexander Hamilton, the Court stated that a structural waiver under this test is appropriate in three contexts: (1) "where the Constitution in express terms granted an exclusive authority to the Union"; (2) "where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority"; and (3) "where it granted an authority to the Union, to which a similar authority in the States would be totally contradictory and repugnant."[122] By reviewing the Constitution's text, history, and Supreme Court precedent, *Torres* concluded that Congress's Article I power to build and maintain an army and navy is "complete in itself" and the states could not thwart such federal objectives.[123]

Importantly, the *Torres* decision helped create another pathway for Article I to limit the sovereign immunity defense. The *Torres* decision recognized that Congress could still not abrogate sovereign immunity under Article I, but relied on *PennEast* and *Katz* to create structural waivers when Article I powers "complete in [themselves]" are implicated.[124] The Court now stands on the reverse side of *Hans*: structural waivers are not grounded in textualism, but rather the constitutional design itself.

II. STATE SOVEREIGN IMMUNITY AS THE ABSURDITY DOCTRINE

Since the *Chisolm* decision, sovereign immunity has expanded too far in protecting state governments and officials.[125] After the adoption of the Eleventh Amendment, the Supreme Court took an active role immunizing states for over 200 years.[126] Only recently has the Court begun to finally

119. 38 U.S.C. § 4323(a)(3) ("A person may commence an action for relief with respect to a complaint against a State (as an employer) . . . .").

120. *Torres*, 597 U.S. at 586.

121. *Id.* at 590, 594; U.S. CONST. art. I, § 8, cls. 12–13.

122. *Torres*, 597 U.S. at 587–88 (emphasis removed) (quoting THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (J. Cooke ed. 1961)).

123. *Id.* at 590–94.

124. *Id.* at 595–96.

125. *See infra* Part II.A.

126. Bellia & Clark, *New Purposivism*, *supra* note 82, at 519 (explaining since the Eleventh Amendment's passage until 2021, the Supreme Court consistently recognized state sovereign immunity).

chip away at sovereign immunity's powerful standing in American jurisprudence.[127] The Court should continue this trend. With the possible implementation of central bank digital currency (CBDC) in the United States, there will be yet another opportunity to expand structural implied waivers of immunity.

Subpart A reviews previous scholarship on sovereign immunity, detailing and arguing that the doctrine is unsound and should not be as commanding as it has been.[128] Here, other real-life and practical consequences resulting from sovereign immunity's reign will be discussed.[129] Subpart B connects both issues of CBDC and sovereign immunity and demystifies how they will intersect should CBDC be federally adopted in the United States.[130]

A. Sovereign Immunity Is the "Absurdity On its Face"

Dean Chemerinsky put it perfectly: why would the United States hold so dear a doctrine derived from the British Crown when the 13 colonies formed the Union to reject these ideas—especially a doctrine with an unclear foundation?[131] Chief Justice John Jay, the first Chief Justice of the Court, brilliantly observed that sovereignties in England existed on feudal principles where the Prince was the sovereign and the people were merely subjects that swore allegiance to him.[132] He wrote that "[n]o such ideas obtain[ed] here [in the United States]" and that the people are the sovereigns of the country who possess the right to govern.[133] If the people are on equal footing, it follows that one citizen may freely sue another or one citizen may freely sue a state comprised of thousands of citizens.[134] Since it is "undeniable" that any state may sue another state,[135] it follows that a state may be sued by any one citizen if that same state could be sued by another state made up of thousands of citizens.[136]

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127. *Id.* ("In the last two Terms, however, the Supreme Court dispensed with this established framework.").

128. *See infra* Part II.A.

129. *See infra* Part II.A.

130. *See infra* Part II.B.

131. Chemerinsky, *supra* note 71, at 1202; *see infra* note 161 and accompanying text (discussing conflicting origins of sovereign immunity between William Blackstone and Sir Edward Coke).

132. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793).

133. *Id.* at 471–72.

134. *See id.* at 472.

135. *Id.* at 473; U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . [and] Controversies between two or more States . . . .").

136. *See Chisolm*, 2 U.S. (2 Dall.), at 473.

Yet still, a judge-made doctrine based on feudalistic principles has superseded the Constitution and Article III, in direct contravention of the Supremacy Clause.[137] Article III provides that "[t]he judicial Power *shall* extend to *all* Cases . . . [and] Controversies . . . between a State and Citizens of another State."[138] Such words are "express, positive, [and] free from ambiguity," leaving no other conclusion that if a controversy exists, there is jurisdiction to hear the case.[139] Alternatively, if a federal statute provides a right of action against a state, the Supremacy Clause presumably confers jurisdiction.[140] Not so. A common law defense reigns supreme over federal law granting citizens redress for their injuries. This adherence renders many laws toothless as "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[141] Such a doctrine has rigged the judiciary to "assure that defendants win and plaintiffs lose."[142]

There is also dubious supporting evidence that the text of the Constitution grants states immunity.[143] The Constitution, except for the Eleventh Amendment, makes no mention or reference to general governmental immunity.[144] Even if its words granted immunity to a state government, its words allude to immunity *only* in federal, not state tribunals.[145] The *Alden* Court nonetheless extended the immunity to a suit against a state in its own courts.[146] And as already mentioned, the Amendment by its terms restricts only diversity suits against states, but *Hans* barred prosecution even when a state was sued by its own citizen.[147]

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137. *Id.*; U.S. CONST. art. VI ("The Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

138. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

139. *Chisolm*, 2 U.S. (2 Dall.), at 476–77. There was, however, debate during the Founding on whether the provision "between a State and Citizens of another State" meant that federal courts had power to hear only cases *by* a state against a citizen rather than a case by a citizen *against* a state. Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1822–23 (2010).

140. *See* Chemerinsky, *supra* note 71, at 1211.

141. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see also* Chemerinsky, *supra* note 71, at 1213 (quoting the Court's emphasis on accountability in *Marbury*); Sample, *supra* note 77, at 12.

142. FREEDMAN, *supra* note 73, at 65.

143. *See* Chemerinsky, *supra* note 71, at 1205.

144. *Id.*

145. *Id.*; U.S. CONST. amend. XI ("The Judicial Power *of the United States* . . . .") (emphasis added).

146. Alden v. Maine, 527 U.S. 706, 754 (1999).

147. U.S. CONST. amend XI ("[T]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by citizens of another State* . . . .") (emphasis added); Hans v. Louisiana, 134 U.S. 1, 15 (1890).

Sovereign immunity and its progeny have had damaging consequences. Scholars from various ideological backgrounds agree that the doctrine has created a "disaster area."[148] Not only have states been immune to suits and answering for their faults, but also state officials enjoy immunity when acting pursuant to their official duties. Professor Eric Freedman remarked that these claims have been "narrowed to the point of invisibility" to shield officials.[149] No matter how meritorious their claims may be, litigants forfeit damages suits involving abhorrent government conduct.[150] In *Edelman v. Jordan*, the Supreme Court also ruled that the Eleventh Amendment barred actions against state officials for *retroactive* monetary damages.[151] While plaintiffs have a cause of action under 42 U.S.C. § 1983 against state officials in their *personal* capacity, remedies have been limited due to the Court's qualified immunity jurisprudence.[152] On another extreme, *private* individuals have successfully used the defense to bar suits for monetary damages based on "derivative immunity."[153]

Oftentimes, people of color and disadvantaged groups bear the brunt of wrongful acts by the state or its officials.[154] Law enforcement seldom executes the law fairly and equitably across racial and socioeconomic lines 100% of the time. Much of the same can be said about state employers. As seen in *Kimel v. Florida Board of Regents* and analogous cases, aggrieved plaintiffs suffering from age discrimination or the like are powerless despite an act of Congress authorizing such suits for recovery.[155] The "congruence and proportionality" and "pattern of discrimination" restrictions on Congress's abrogation power have made many claims unsuccessful.[156] The

148. FREEDMAN, *supra* note 73, at 65.

149. *Id.*

150. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101–02 (1984).

151. 415 U.S. 651, 677 (1974). The minor exception is when a plaintiff seeks prospective injunctive relief when challenging the constitutionality of a state official's action. *See* Ex Parte Young, 209 U.S. 123, 157–60 (1908).

152. *See Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 HARV. L. REV. 1068, 1068 n.10 (2016); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

153. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 800 (2009). Private contractors hired by the government have dodged liability using this doctrine. *See, e.g.*, Yearsley v. W.A. Ross. Constr. Co., 309 U.S. 18, 20–21 (1940).

154. Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1752 (2022).

155. *See generally* 528 U.S. 62 (2000).

156. *See, e.g.*, *id.* at 81–82, 87–92 (foreclosing an age discrimination action under the Age Discrimination in Employment Act).

remedial nature of Section Five of the Fourteenth Amendment demands that Congress bear the burden of showing substantial evidence documenting the violations it is trying to remedy.[157] This implies that many individual cases of egregious government conduct go unchecked, rendering the principle of government accountability hollow.[158] The overseers enjoy the license to discriminate—and that is conduct sanctioned by the judiciary based on a common law rule. This is oxymoronic because the Supreme Court building entrance reads "Equal Justice Under Law."[159]

If the Supreme Court chooses to abide by an ancient doctrine from England, it would be reasonable for it to similarly consider other doctrines from England. Take, for instance, the Magna Carta's principle that "no man is above the law, not even a king."[160] Why should the former control over the latter? Further, during Anglo-Saxon England, as informed by Sir Edward Coke, the King's Court was open to plaintiffs who could seek remedial writs "against the King or against the Queen."[161] Therefore, even the foundation that sovereign immunity is built on is a shaky one. Drawing from the words of Justice Bradley: sovereign immunity is the "absurdity on its face."[162]

B. The Crossroad of CBDC and Sovereign Immunity

It may be difficult to imagine how sovereign immunity is possibly related to CBDC or how the two points can ever intersect. This Subpart clears the obscurity and connects the two issues, providing a hypothetical scenario on how this situation may present itself before a court. A recent case study involving the National Park Service (NPS) provides a great reference.

In March 2024, three park visitors sued the NPS for refusing to accept cash at various parks, historic sites, and monuments in Arizona, New York, and Georgia.[163] The short ten-page complaint alleges that the NPS violated 31 U.S.C. § 5013, which states that "United States coins and currency (including Federal Reserve Notes and circulating notes of Federal Reserve

157. *Kimel*, 528 U.S. at 81–82.

158. *See* Chemerinsky, *supra* note 71, at 1213.

159. FREEDMAN, *supra* note 73, at 65.

160. *Magna Carta: Muse and Mentor*, LIBR. CONG., https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/executive-power.html#text=ThemedievaljuristHenryde,oneisabovethelaw (last visited Apr. 9, 2025).

161. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 460 (1793) (rebutting William Blackstone's contention that no suit could be brought against the King of England).

162. Hans v. Louisiana, 134 U.S. 1, 15 (1890).

163. Lin, *supra* note 20.

Banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts."[164] As the facts allege, the plaintiffs were denied entry because the locations accepted only credit or debit payment, not cash.[165] The plaintiffs contend that the refusal violated federal law. By not accepting cash for "public charges," the no-cash policy contravenes Congress's authorized regulation of currency.[166] The plaintiffs seek declaratory relief and attorneys' fees and costs.[167]

The government moved to dismiss, arguing that: (1) plaintiffs lack standing to sue under Article III because they were not personally injured by choosing not to utilize non-cash payment options; and (2) the federal law at issue does not require entities to accept payment in cash, only for taxes owed to the government or for debts owed to a creditor.[168]

Many disputes come to mind with the introduction of a possible CBDC, but this Article introduces one akin to the NPS case to conceptualize the issue. Assume for argument's sake that Congress passes a CBDC law authorizing its use as currency, but some state governments refuse to adopt its acceptance, such as Florida.[169] And assume it is settled law that the federal CBDC statute does not preempt the anti-CBDC legislation. A hypothetical student attends a state university in Florida and does not take out student loans to pay for tuition. Tuition is roughly $10,000 a year after the student's merit scholarship is applied. Each semester, the student is to pay the amount of tuition due per the credits enrolled, approximately $5,000. Right before the semester is to begin, the student wants to use CBDC to pay for the tuition. The student does not have another form of payment: she does not carry cash nor does she have a credit card, debit card, or bank account. In fact, she replaced those methods of exchange for a digital wallet after hearing the news that she could apply for one as allowed by the federal government. The university responds that

164. Complaint at 5, 8–9, Van der Werf v. Nat'l Park Serv., No. 24-cv-00639-TJK (D.D.C. filed Mar. 6, 2024) (citing 31 U.S.C. § 5013) [hereinafter NPS Complaint].

165. *Id.* at 7.

166. *Id.* at 8; U.S. CONST. art. I, § 8, cl. 5 (stating Congress has power "[t]o coin Money, [and] regulate the Value thereof").

167. NPS Complaint, *supra* note 164, at 10.

168. Mot. to Dismiss at 4–8, Van der Werf v. Nat'l Park Serv., No. 24-cv-00639-TJK (D.D.C. filed June 6, 2024); Defs. Reply in Supp. of Mot. to Dismiss at 5–7, Van der Werf v. Nat'l Park Serv., No. 24-cv-00639-TJK (D.D.C. filed July 10, 2024). The court recently granted NPS's motion to dismiss for lack of standing, Van de Werf v. Nat'l Park Serv., No. 24-cv-00639-TJK, 2025 WL 579704, at *2–3 (D.D.C. Feb. 21, 2025), and the plaintiffs have filed an amended complaint to cure the deficiencies. *See* Amended Complaint, Stover v. Nat'l Park Serv., No. 24-cv-00639-TJK (D.D.C. filed Mar. 5, 2025).

169. *DeSantis Legislation*, *supra* note 12.

CBDC is not a form of currency in the state and refuses to accept the student's digital wallet payment; the university only accepts credit card payments or checks. As a result, the student misses the deadline and is forced to pay a late fee. This university charges a $200 late fee, plus 5% of the outstanding balance after the second month. The disgruntled student wants to assert her right to use CBDC and insists that the university accept it, but to no avail. Another month goes by and the student—who refuses to apply for a credit card or re-open a bank account—incurs another $500 in late fees.

The student seeks the advice of an attorney. The attorney informs her that the university's decision is due to the Florida legislature passing a law banning CBDC as a form of money. With her attorney's advice, the student decides to bring suit against the state university to recover the late payments incurred, as well as future late payments. She argues that the federal law officially recognizing CBDC as currency compels the university to accept it as a form of payment. The state university responds and moves to dismiss on state sovereign immunity grounds.

Based on the current law of the land, the student is out of luck and her lawsuit is dismissed. However, her attorney decides to appeal her case with a novel argument.

III. EXTENDING THE *PENNEAST* AND *TORRES* TEST TO THE ARTICLE I COINAGE CLAUSE

There is a great chance that central bank digital currency (CBDC) becomes the future medium of exchange in the United States, as it has already made tremendous strides abroad.[170] As states pass their own laws prohibiting CBDC as acceptable currency, a new federalism issue materializes, should Congress authorize its use. Beyond that, as seen from the hypothetical illustrated above, private individuals may sue a state (or state entity) for rejecting CBDC where then the state will presumably plead sovereign immunity. This Article is the first to argue that Congress's power to coin and regulate money is "complete in itself" sufficient for a structural waiver of immunity. Courts should hold accordingly, continuing the trend from the *PennEast* and *Torres* cases. Doing so affirms the Court's purposivism approach based on the Constitution's structure and design. This time, however, purposivism tips the scale in favor of weakening the sovereign immunity defense.

170. Amure, *supra* note 4 (recognizing that as of June 2024, over 130 countries have explored CBDC initiatives).

First, this Part makes the argument that states have implicitly waived their sovereign immunity defense when faced against Congress's power to coin and regulate money.[171] The Constitution's text, history, and legal precedent make this clear.[172] Second, this Part considers recent scholarship criticizing the Court's test in *PennEast* and *Torres*.[173] It addresses counterarguments proposed by this scholarship and the dissenting opinion in *Torres*, ultimately concluding that extending this exception is consistent with the constitutional structure as evaluated by the Court and will not swallow up the sovereign immunity defense in its entirety.[174]

A. States Have Waived Sovereign Immunity for Congress's Power to Coin Money: A Power "Complete in Itself"

The Supreme Court in *PennEast* and *Torres* unearthed the power of implied structural waivers to supersede state sovereign immunity.[175] As long as Congress's power is one that states yielded to "in the plan of the Convention" that is "complete in itself," states have surrendered their sovereign immunity defense.[176] This Subpart follows the Court's analysis in *Torres*—finding that there was a structural wavier for Congress's power to raise an army and navy—to suggest the same for Congress's power to coin money. The text and history of the Constitution, as well as Supreme Court and lower court precedent regarding the Coinage Clause, support the conclusion that such a structural waiver of immunity exists.

1. Constitutional Text

For one, the Constitution's text spanning several provisions confirms that the states yielded to Congress's control over currency and money. Similar to the Army and Navy clauses, the Constitution cites to the coinage power in more than a single provision.[177] The Framers went even further and inserted clear language divesting the states of sharing that power.

Article I provides that Congress "shall have Power . . . [t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the

171. *See infra* Part III.A.

172. *See infra* Part III.A.

173. *See infra* Part III.B.

174. *See infra* Part III.B.

175. *See* Bellia & Clark, *New Purposivism*, *supra* note 82, at 536–42.

176. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 589 (2022) (discussing PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 501, 503 (2021)).

177. *See Torres*, 597 U.S. at 590.

Standard of Weights and Measures."[178] This clause does not stand alone in the abstract, however. Other provisions in the Constitution affirm Congress's command in the field of money and currency. Congress has the power to "lay and collect Taxes," "borrow Money on the credit of the United States," "regulate Commerce with foreign Nations, and among the several States," and, most notably, the power to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States."[179]

In finding the Army and Navy Power "complete in itself," the *Torres* Court acknowledged that the Constitution divested states of like power.[180] The same inures to the currency power. Article I Section 10, the so-called "Powers Denied States" provision, reads that "*No State shall . . . coin Money* . . . make any Thing but gold and silver Coin a Tender in Payment of Debts."[181] Notably, this prohibition on the states is much stricter than the limitation on the Army and Navy Power. Article I Section 10 Clause 3 gives the states certain war powers *with the consent of Congress*, but conversely, the coinage power denied to the states is completely restricted; there is no possible way for the states to coin money, even with Congress's consent.[182] This "substantial limitation" on the states coupled with the broad vesting of authority in the federal government indicates that the states are estopped from "frustrating national objectives in this field."[183]

2. History of Article I Section 8 Clause 5

History leads us to the same conclusion. Being that sovereign immunity jurisprudence is founded on ideals that predate the Constitution during the era of the British Crown, it is appropriate to begin there. In 1604, the Privy Council decided the *Case of Mixed Money*, a seminal decision on

178. U.S. CONST. art. I, § 8, cl. 5.

179. U.S. CONST. art. I, § 8, cls. 1–3, 6.

180. *Torres*, 597 U.S. at 590 ("States may not 'engage in War, unless actually invaded,' 'enter into any Treaty,' or 'keep Troops, or Ships of War in time of Peace.'") (quoting U.S. CONST. art. I, § 10, cls. 1, 3).

181. U.S. CONST. art. I, § 10, cl. 1 (emphasis added). I refer to Article I Section 10 as the "Powers Denied States" provision throughout this Article as it is labeled in other scholarship pieces. *See, e.g.*, M. Henry Ishitani & Alexandra Fay, *Revising the Indian Plenary Power Doctrine*, 29 MICH. J. RACE & L. 1, 7 (2024).

182. *Compare* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . keep Troops, or Ships of War . . . ."), *with id.* § 10, cl. 1 ("No State shall . . . coin Money . . . .").

183. *Torres*, 597 U.S. at 590.

the currency power.[184] There, an Irish merchant purchased goods from a London merchant, promising to pay £200 in "sterling, current and lawful money of England."[185] Before tendering payment, Queen Elizabeth ordered that "mixed money" was the new currency, and the London merchant refused to accept it.[186] The Privy Council ruled that the Crown had exclusive authority over the power to coin money and regulate currency, stating, "*[j]us cudendae monetae ad solum principem, hoc est, imperatorem, de jure pertinent*."[187] Therefore, if English principles are to guide sovereign immunity as they have been (they should not), Anglo-American law provides strong evidence that Congress's power to coin and regulate money is one that is "complete in itself."[188]

Much more important is the history of the Founding and the lessons it teaches. The Articles of Confederation read in pertinent part that Congress "shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states - fixing the standard of weights and measures throughout the united states."[189] Notwithstanding this grant of power, the Confederate Congress did not exercise it, as it was not given a general power over commerce.[190] It had delegated this power to the states who issued and printed their own currency.[191]

At least ten states issued paper money throughout the seven-year period of the Articles of Confederation.[192] Strikingly, Rhode Island stalled participation in the Grand Convention for "the express purpose" of retaining the power to issue their own currency.[193] This resulted in extreme

184. *See* Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017, 1030 (2008) (detailing how the Legal Tender Cases holding remains consistent with the Coinage Clause). As this source and others confirm, most available versions of this case are entirely in Law-French or Latin. *Id.* at 1030 n.65.

185. *Id.* (citing *Case of Mixed Money*, 80 Eng. Rep. 507, 507 (1604)).

186. *Id.* at 1030–31 (citing *Case of Mixed Money*, 80 Eng. Rep. at 507).

187. *Id.* at 1032 n.71 (translating to "[b]y law, the right of striking money extends only to the prince, that is, the emperor").

188. *See supra* notes 184–86 and accompanying text (showing the power to coin money was exclusively the national sovereign's prerogative).

189. ARTICLES OF CONFEDERATION OF 1777, art. IX.

190. Natelson, *supra* note 184, at 1052.

191. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 16 (1833); Natelson, *supra* note 184, at 1050.

192. Natelson, *supra* note 184, at 1051.

193. Joseph M. Cormack, *The Legal Tender Cases–A Drama of American Legal and Financial History*, 16 VA. L. REV. 132, 145 (1929); 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES WITH NOTICES OF ITS PRINCIPAL FRAMERS 329 (1858).

cases of inflation, depreciation, and even fraud.[194] Indeed, one of the main reasons that Congress was given this power was to prevent "the frauds and injustice perpetrated by the States in their issues of paper money."[195] This would explain why Rhode Island proposed an amendment to clarify "eliminat[ing] *any suit* by any person against a state in federal court."[196] In addition, states passed discriminatory laws against one another to block the payment of debts, and many individuals feared interstate trade wars.[197] This paved the way for the "plan of the Convention" where powers were divided between the governments and where states, like Rhode Island, whose proposed amendment did not make it in the Constitution, surrendered and yielded their sovereign rights to issue currency to the federal government.[198]

James Madison adamantly believed that the power to coin and regulate money should reside with the federal government. In his view, foreign nations would not respect a league of states each with their own system of currency.[199] Some went further and suggested that having 13 types of currencies at the time would be "embarrassing."[200] Others, such as James Wilson of Pennsylvania, warned of the "impropriety of admitting the interference of state governments" in regulating currency and commerce.[201] Certain powers must vest in the federal government, detached from the influence and historical injustice committed by state governments. That is why James Wilson advocated for members of Congress to be elected by electors chosen by the people, not by state legislatures.[202]

While the Convention records were not clear on whether the delegates approved of the federal government's power to issue *paper* money,[203] one thing was clear: the "one who strikes money also has the power to set its value."[204] The power to "coin Money, [and] regulate the Value thereof" is

194. *See* Natelson, *supra* note 184, at 1050–51.

195. CURTIS, *supra* note 193, at 329.

196. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 495 (2001) (emphasis added).

197. *See* Natelson, *supra* note 184, at 1051.

198. *Id.* ("Such struggles between states later became fodder for the ratification debates."); *see also infra* text accompanying note 220.

199. *See* Natelson, *supra* note 184 at 1052 n.224 (citing 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS OF THE CONVENTION VOLUME 1].

200. Natelson, *supra* note 184, at 1074 (discussing the words of Federalist David Ramsay).

201. FARRAND, RECORDS OF THE CONVENTION VOLUME 1, *supra* note 199, at 318.

202. *See id.*

203. *See* Natelson, *supra* note 184, at 1053–60.

204. *Id.* at 1060.

also not restricted to metallic coins as we understand the word *coin*.[205] Professor Robert G. Natelson posits that coin in the Coinage Clause includes currency "made of substances other than gold and silver," as evidenced by the original meaning of the word at the time of the Founding.[206] Consistent with the history of the Coinage Clause, coin should be interpreted broadly, covering the issuance and regulation of CBDC. That issuance cannot be thwarted by the actions of state governments, even those involving private individuals. The history of the constitutional design after the states' actions during the period of the Articles of Confederation corroborates the idea that states forfeited sovereign rights so that certain federal policy is efficiently carried out without interference.

3. Precedent

Torres concluded that "[a]n unbroken line of precedents" proves that Congress's Army and Navy Power is one "complete in itself."[207] In so holding, the Court found a structural waiver of sovereign immunity.[208] A review of Supreme Court and lower court precedent confirms the same regarding the Coinage Clause.

The story begins with the *Legal Tender Cases*, a collection of seminal decisions from the 19th century upholding Congress's power to issue currency under Article I.[209] In these cases, disputes arose over the conversion of sheep and the sale of land, and what form of currency would be used to settle them.[210] During this time, Congress passed a law authorizing the issuance of government notes or *greenbacks*—the first paper currency in the United States—for the payment of debts.[211] The issue presented in both cases was: (1) whether the paper currency authorized for use by the act of Congress could be accepted to pay debts and (2) whether

205. *See id.* at 1061–67.

206. *Id.* at 1063–66. For support, Professor Natelson considers the words of Chief Justice John Marshall who stated that the absence of modifiers, such as the words "gold" and "silver," suggests a wider meaning of the word coin. *Id.* at 1066 (discussing McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 387–88 (1819)).

207. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 592–94 (2022) (citing cases since the 19th century).

208. *Id.* at 594.

209. *See* Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870). As mentioned in his article, Professor Natelson refers to these cases as a combination of eight decisions decided in the 1800s. Natelson, *supra* note 184, at 1019 n.3. However, the real Legal Tender Cases is a decision composed of two cases, *Knox v. Lee* and *Parker v. Davis*.

210. Legal Tender Cases, 79 U.S. (12 Wall.) at 457–58, 462.

211. *Id.* at 458.

the act itself was a constitutional exercise of Congress's power "[t]o coin Money, [and] regulate the Value thereof."[212]

The Supreme Court answered in the affirmative to both questions. Rather than holding the new congressional statute constitutional solely under the Coinage Clause, however, the Court gave weight to Congress's authority under the Necessary and Proper Clause.[213] Authorizing the use of paper currency was indeed necessary at the time, as the Civil War ruined the economy.[214] The public treasury was drained, the army was unpaid, and the "entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government."[215] In so noting, the Court ruled that the legal tender provision accepting treasury notes as currency was not "an inappropriate means for carrying into execution the legitimate powers of the government" nor was it "forbidden by the letter or spirit of the Constitution."[216]

In more ways than simply affirming Congress's power to strike currency, the *Legal Tender Cases* prove significant. The opinion alludes to several textual and historical underpinnings of Congress's power to regulate currency that is wholly applicable to finding such power "complete in itself" sufficient for a structural waiver of state sovereign immunity.[217] Additionally, the opinion eliminates any doubt as to whether the Coinage Clause extends to forms of currency other than metallic coins.[218] This provides ample support that the clause similarly authorizes Congress to issue and regulate CBDC.

The Court recognized the withdrawal of this power from the states based on the text of the Constitution: "They gave to Congress express powers on the subject of money. They laid Congress under no express restrictions on the subject of money. *The only restrictions which they imposed in this matter were upon the States*."[219] Indeed, the Framers were aware of how states made their own notes legal tender which came "with

212. *Id.* at 462–63.

213. *Id.* at 521–22, 533–34. The Necessary and Proper Clause states that Congress may enact legislation "which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ." U.S. CONST. art. I, § 8, cl. 18.

214. Legal Tender Cases, 79 U.S. (12 Wall.) at 540.

215. *Id.*

216. *Id.* at 544.

217. *Id.* at 540–545.

218. *Id.* at 544.

219. *Id.* at 518 (emphasis added). This portion of the opinion refers to the Powers Denied States provision. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts . . . .").

results that disgusted the people."[220] Holding that the issuance of paper money is consistent with "the letter or the spirit of the Constitution,"[221] the Court—in perhaps the most important part of the opinion for purposes of structural waivers—explained:

> It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit *was withdrawn from the States*. The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. *If the power to declare what is money is not in Congress, it is annihilated*. . . . [I]t might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, *the power which had belonged to the States, and which they surrendered*.[222]

Breaking down this quoted material, it is analogous to the Court's reasoning in *Torres*. The Court noted that the power to raise an army and navy was specifically withdrawn from the states in Article I Section 10.[223] Further, the *Torres* Court insisted that the states could not qualify or limit this power because doing so would annihilate the power to wage war successfully.[224] And both *PennEast* and *Torres* teach that states surrendered certain powers to the federal government and thereby forfeited their immunity.[225] In fact, there may be even a better argument for structural waivers under the currency power than under the army and navy powers because "[i]nsurrection could not be suppressed, armies could not be raised and supported, and a navy could not be provided and maintained, without a currency."[226]

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220. Legal Tender Cases, 79 U.S. (12 Wall.) at 497.

221. *Id.* at 552.

222. *Id.* at 545–46 (emphasis added).

223. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 590 (2022). Relatedly, this withdrawal of state authority to coin money was noted by the *Chisolm* court. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 468 (1793).

224. *Torres*, 597 U.S. at 594.

225. *Compare* PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 488 (2021) ("Although nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution."), *with Torres*, 597 U.S. at 584 ("Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military.").

226. Legal Tender Cases, 79 U.S. (12 Wall.) at 523–24.

The final important takeaway from the *Legal Tender Cases* is the contours of the Coinage Clause in what type of currency can be regulated. As suggested by Professor Natelson, the Court in these cases refused to narrow Congress's currency power to the mere issuance and regulation of metallic coins.[227] Here, the Court stated that "[t]he Constitution nowhere declares that nothing shall be money unless made of metal."[228] Rather, the Coinage Clause ought to be interpreted not as a limiting principle, but rather of an "enlarging" character to incorporate more than just metallic coins.[229] This provides strong support that Congress can validly pass a law under the Coinage Clause authorizing the use of CBDC in the United States. Any objection overlooks the idea that "[i]t is not given to man, when framing a constitution, to foresee all the cases to which the conferred powers will properly extend."[230]

Decisions following the *Legal Tender Cases* have endorsed many of these principles. One of the first being *Juilliard v. Greenman*, which upheld Congress's power to issue paper currency during times of peace, not just war, as it was in the original two *Legal Tender Cases*.[231] Paper currency could now be used for all public and private debts, whether retrospective or prospective.[232] And unlike the original *Legal Tender Cases*, the *Juilliard* Court more definitively relied on Congress's enumerated currency power, among others, to find that the issuance of paper money is constitutional.[233]

The same is true in the lower courts. For example, the Eighth Circuit Court of Appeals relied on the Coinage Clause to affirm a defendant's conviction for altering currency with intent to defraud under 18 U.S.C. § 472.[234] Indeed, it stated that Congress's power to criminalize counterfeit and altered U.S. currency is part of its broader currency power "to protect and to preserve in its purity this constitutional currency for the benefit of the nation."[235] The Second Circuit Court of Appeals recognized Congress's power to delegate this authority and how Congress has delegated this broad power to the Federal Reserve to help with the nation's monetary policy.[236] Bringing it back full circle, a Ninth Circuit Court of Appeals decision

227. *See supra* Part III.A.2.

228. Legal Tender Cases, 79 U.S. (12 Wall.) at 520.

229. *Id.* at 545.

230. *Id.* at 527.

231. 110 U.S. 421, 450 (1884).

232. *Id.* at 449–50; *see also* Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3, 22 (2019).

233. *Juilliard*, 110 U.S. at 439–40, 447.

234. United States v. Gayekpar, 211 F. App'x 533, 534 (8th Cir. 2007) (per curiam).

235. *Id.* (quoting United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850)).

236. United States v. Wells Fargo & Co., 943 F.3d 588, 603 (2d Cir. 2019).

reiterated that "[t]he states *cannot declare what shall be money, or regulate its value*. Whatever power there is over the currency is *vested in the Congress*."[237]

B. Counterarguments to Extending Structural Implied Waivers

The debate over the Eleventh Amendment and state sovereign immunity has been ongoing for over 200 years since the Founding.[238] With that being true, it would be naïve to suggest that proponents of retaining sovereign immunity present meritless arguments. Rather, this Article seeks to challenge the premise of state sovereign immunity being grounded in English common law. As previously discussed, it is peculiar that we still adhere to a doctrine so rooted in English monarchism—an ideology that forced us into a seven-year war with Great Britain and one that is repugnant to the foundation of the United States and the Constitution.[239] This Article further highlights this error and defends its ultimate proposal of expanding structural waivers of immunity.

Scholars and the Court since *Hans* contend that state sovereign immunity is supported by purposivist ideals.[240] The text of the Eleventh Amendment is not the sole authority backing state sovereign immunity. The argument goes; it is the underlying purpose behind the Amendment that justifies immunizing states from citizen suits.[241] That is, the so-called "nature of the Union" during the Framers' constitutional drafting presumed the legitimacy of state sovereign immunity.[242] If anything, the Eleventh Amendment merely closed the Article III state-citizen diversity provision loophole that arguably authorized such suits, which was blessed by the *Chisolm* Court.[243] Now, the same adherents to this purposivist approach admonish the *PennEast* and *Torres* Court for embracing purposivist principles to expand structural waivers of immunity.[244] This time, however, the Court—referencing the "plan of the Convention"—has used purposivist

237. Laycock v. Kenney, 270 F.2d 580, 590 (9th Cir. 1959) (emphasis added).

238. *See* Bellia & Clark, *New Purposivism*, *supra* note 82, at 485; Pfander, *supra* note 87, at 1271.

239. *See supra* Part III.A.2.

240. *E.g.*, Clark, *supra* note 139, at 1826–30 (discussing adherence to the theory that sovereign immunity is regarded not as a principle merely supported by the text of the Eleventh Amendment but rather supported by the underlying purpose of the constitutional structure).

241. Sample, *supra* note 77, at 4 ("Purposivists attempt to determine what purpose the drafter(s) of the relevant legal text sought to accomplish.").

242. Clark, *supra* note 139, at 1837.

243. *Id.* at 1838.

244. *See generally* Bellia & Clark, *New Purposivism*, *supra* note 82 (criticizing the Court's new purposivism analysis).

interpretation to retract rather than to expand state sovereign immunity.[245] This was the right call.

This Subpart begins by briefly refuting general principles surrounding state sovereign immunity.[246] Then, this Subpart will keenly focus on recent scholarship and the *Torres* dissent that criticize the Court's *PennEast* and *Torres* framework.[247] Here, this Article addresses the arguments undermining the expansion of implied structural waivers and subsequently attempts to rebut them.[248]

1. Sovereign Immunity as Good Law

This Article has already mentioned general counterarguments to state sovereign immunity,[249] so for the sake of brevity this segment will give a high-level overview of these arguments and others favoring the absurdity doctrine. One serious gripe with sovereign immunity is that it has roots in the British Crown.[250] Scholars though, have suggested that this conceptualization (or idea) of sovereign immunity is "seriously skewed" and that the United States derived it independently, as other countries like Italy and Japan did.[251] This argument is contrary to *Chisolm*'s detailed analysis, a decision from the Court authored less than ten years after the Founding. There, the Court made clear that state sovereignty is "derived from a feudal source" where there was no superior power over the king and it "exclude[s] all others from jurisdiction over him."[252] In addition, as Justice Souter wrote in *Seminole Tribe*, "[t]here is and could be no dispute that the doctrine of sovereign immunity . . . 'derived from the laws and practices of our English ancestors' . . . ."[253]

Being that we adopted common law principles from England in other respects, some would say that it makes sense to embrace sovereign immunity as a common law doctrine with roots in England. But again, there is no good reason to hold as gospel a principle that is the antithesis of our

245. *Id.* at 536–42 (explaining that *PennEast* and *Torres* expanded structural waivers, which has limited the sovereign immunity defense).

246. *See infra* Part III.B.1.

247. *See infra* Part III.B.2.

248. *See infra* Part III.B.2.

249. *See supra* Part II.A.

250. *See supra* Part II.A.

251. *E.g.*, Hill, *supra* note 196, at 489 (stating that "[t]here is probably not a country in the world that permits itself to be sued except on terms satisfactory to it").

252. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 457–58 (1793) (discussing William Blackstone and the English feudal system's influence over state sovereignty).

253. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 130 (1996) (Souter, J., dissenting) (quoting United States v. Lee, 106 U.S. 196, 205 (1882)).

republican system of government. This adherence also makes little sense given that following the American Revolution the "intelligent as well as unintelligent laymen" felt "prejudice against the system of English Common Law" . . . [254] The Constitution was specifically drafted to abrogate many features of English common law.[255]

Justice Thomas would have us believe that it would be "difficult to conceive that the Constitution would have been adopted" had the states been stripped of their immunity from suit.[256] Presumably, one would think then that if English common law—specifically the sovereign immunity doctrine—was so obviously legitimate, the Framers would have written it into the Constitution. Ironically, there is mention of the common law habeas corpus doctrine, but nothing on immunizing governments from suit.[257] In fact, James Madison went so far as to say to George Washington that the "[c]ommon law is not secured by the new Constitution" and "is nothing more than the unwritten law" that is subject to legislative preemption.[258]

Another argument is that sovereign immunity is not a common law doctrine and carries "none of the significant incidents of [it]."[259] The underlying theory is that if a sovereign cannot be sued without its consent, the consent must be *of the sovereign*, requiring a waiver enumerated in legislation rather than offered by judicial interpretation.[260] Proponents of this argument suggest that if sovereign immunity is truly a product of the common law, then the judiciary can consent for the sovereign in essentially *all cases*.[261]

To be clear, state sovereign immunity is "such a common law rule" and deserves that label.[262] If anything less, it is a common law rule that has a

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254. *Id.* at 135 (Souter, J., dissenting); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 224–25 (1911); *see also* FREEDMAN, *supra* note 73, at 83–85.

255. *See, e.g.*, Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 41–44 (1992) (discussing how the Impeachment Clause of the Constitution overruled the English common law practice of simultaneous removal of public officials and the imposition of criminal punishment).

256. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 601 (2022) (quoting Alden v. Maine, 527 U.S. 706, 743 (1999)).

257. *See Seminole Tribe*, 517 U.S. at 137–38 (Souter, J., dissenting) (citing U.S. CONST. art. I, § 9, cl. 2).

258. 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 205 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS OF THE CONVENTION VOLUME 3].

259. Hill, *supra* note 196, at 523.

260. *See id.* at 524.

261. *Id.*

262. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 8 (2017).

"backdrop" in constitutional law since Congress cannot abrogate state sovereign immunity without regard to certain constitutional limitations.[263] *Alden* recognized that sovereign immunity derives from the common law tradition that exists in a broader constitutional design.[264] If nothing more, it can be regarded as federal common law that is not subject to alteration by a state legislature or state courts.[265] Under this approach, the judiciary could waive a sovereign's immunity—which it has done in *Katz*, *PennEast*, and *Torres*—but can only do so in federal court, which is consistent with the textual restriction of the Eleventh Amendment regarding the "[j]udicial power of the United States . . . ."[266] As Dean Chemerinsky and others contend, sovereign immunity is a core common law rule that predated the Constitution and was borrowed from the British Crown.[267] Being a common law principle, it is wrong for sovereign immunity to "reign supreme over the Constitution and federal law" in direct violation of the Supremacy Clause.[268]

2. Returning New Purposivism to Old Purposivism

Hans and subsequent decisions were guided by purposivism principles in that they construed the Eleventh Amendment based on the spirit and underlying purpose of the Constitution rather than the plain text of the law.[269] Constitutional law scholars have praised and accepted the original meaning and design of the Constitution at the time of the Founding.[270] These same scholars denounce the *PennEast* and *Torres* decisions as employing "novel" purposivism that misinterprets the Constitution and its design, and places no limit on the stretch of structural waivers reaching beyond the Army and Navy Clauses.[271] Justice Thomas and the dissent in *Torres* speak on some of these points and similarly criticize the expansion of structural waivers of immunity.[272] While many of these are strong arguments on subject matter that has been controversial for over 200 years,

263. *Id.* at 8, 13; Sample, *supra* note 77, at 24.

264. Alden v. Maine, 527 U.S. 706, 733 (1999).

265. Baude, *supra* note 262, at 28 n.155 (citing Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 SUP. CT. REV. 249, 266 n.59).

266. U.S. CONST. amend. XI.

267. Chemerinsky, *supra* note 71, at 1202; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and States Sovereign Immunity*, 98 YALE. L.J. 1, 80 (1988).

268. Chemerinsky, *supra* note 71, at 1211.

269. *See* Sample, *supra* note 77, at 10.

270. *See* Bellia & Clark, *New Purposivism*, *supra* note 82, at 529–30.

271. *Id.* at 493, 542.

272. Torres v. Dep't of Pub. Safety, 597 U.S. 580, 601–28 (2022) (Thomas, J., dissenting).

this Article attempts to undermine them to expand acceptance of structural waivers.

3. The Law of Nations

Professors Anthony J. Bellia, Jr. and Bradford R. Clark, two prominent constitutional law scholars, insist that the *Law of Nations*, an authority on the affairs of sovereigns predating the Constitution, governs the background constitutional interpretive rules since immunity adjusts the rights and powers between sovereigns.[273] It teaches that sovereign states enjoy a right not to be commandeered by another sovereign, and accordingly, that the "plan of the Convention" did not give Congress the authority to requisition the states directly.[274] Under the *Law of Nations*, a legal instrument could not alienate these sovereign rights, such as immunity rights, unless the instrument did so "clearly and expressly or by unavoidable implication."[275] To alienate a sovereign right by "unavoidable implication," according to Professors Bellia and Clark, the instrument "must grant 'an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.'"[276] Applying these rules, Professors Bellia and Clark contend that *PennEast* and *Torres* were wrongly decided because the Constitution did not give Congress the ability to commandeer the states—whose sovereign rights were not alienated expressly or by implication—and thereby could not subject the states to suits by private individuals based on a supposed Article I power that is "complete in itself."[277]

First, we assume that the *Law of Nations* guides the analysis as suggested by Professors Bellia and Clark. According to the *Law of Nations*, a sovereign retains the right not to be commandeered by another.[278] To requisition is to threaten war between sovereigns.[279] On the one hand, this "concern" of war is unconvincing because the Civil War occurred *without*

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273. *Id.* at 494–95; Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 523–24 (2022) [hereinafter Bellia & Clark, *The Constitutional Law of Interpretation*].

274. Bellia & Clark, *New Purposivism*, *supra* note 82, at 564–65.

275. *Id.* at 494; Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 273, at 530.

276. Bellia & Clark, *New Purposivism*, *supra* note 82, at 494 n.31 (emphasis in original) (quoting THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

277. Bellia & Clark, *New Purposivism*, *supra* note 82, at 544–45.

278. *Id.* at 505, 564.

279. *Id.* at 509–10, 513.

Congress requisitioning the states.[280] Indeed, Congress's *inability* to requisition the states ultimately led to the rise and power of the Confederacy.[281] It was only until after this oversight that the Reconstruction Amendments were passed, which finally allowed congressional supervision by appropriate legislation.[282] On the other hand, the people in the states represent and act as the sovereign state.[283] Professors Bellia and Clark concede this point, but contend that regardless of whether "the States" or "the People" of the states adopted the Constitution, the *Law of Nations* governs the final ratified document that affected sovereign rights.[284] But it seems unpersuasive that the mere strokes of a pen renders this distinction insignificant. While the anti-commandeering principle and the Tenth Amendment remain foundational law, "the framers of the [C]onstitution did not intend that the exercise of all the powers of the national government should depend upon the discretion of the [s]tate governments."[285] It was in fact in *McCulloch v. Maryland* where the Supreme Court held that the federal government could at least requisition the states from not taxing its entities.[286] The "unavoidable consequence" is that the Supremacy Clause of the Constitution renders state action invalid if it conflicts with applicable federal law.[287]

Even assuming that Congress has absolutely no power to requisition the states, structural waivers do not implicate any coercion. The Court recognized that the states entered the Union with their sovereignty and immunity rights "intact."[288] But there is no coercive alienation of these

280. While it is known that the Kansas-Nebraska Act was a cause of the Civil War, it did not force or commandeer the southern states to refrain from expanding slavery in the new territories. *The Kansas-Nebraska Act*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Kansas_Nebraska_Act.htm (last visited Mar. 30, 2025). It merely allowed the states to decide themselves whether or not to allow slavery. *Id.*

281. *See* G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 477–78 (2011) (discussing how Congress was precluded from abolishing slavery and the matter was left to the states).

282. *See* Bellia & Clark, *New Purposivism*, *supra* note 82, at 521–22; Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) ("The legislation considered in each case was grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers and made part of the Constitution upon the States' ratification of th[e] [Reconstruction] Amendments . . . .").

283. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 470–71 (1793).

284. Bellia & Clark, *The Constitutional Law of Interpretation*, *supra* note 272, at 547.

285. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 362 (1819).

286. *Id.* at 432–36.

287. *Id.* at 436; U.S. CONST. art. VI; *see, e.g.*, *supra* Part III.A. (using the Coinage Clause as an example of federal preemption over state action).

288. Torres v. Dep't of Pub. Safety, 597 U.S. 580, 587 (2022) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

rights when states consent to suit.[289] That is especially true if the states consented to certain actions "at the [F]ounding."[290]

Moreover, the Constitution, under either the "clear[] and express[]" or "unavoidable implication" tests, alienates the states' sovereign immunity regarding the Coinage Clause.[291] Professors Bellia and Clark stress that nothing in the text of Article I imposes clear and express prohibitions on the states.[292] And, unlike Article I, the Reconstruction Amendments facially impose such limits.[293] Yet, Article I Section 10 "clearly and expressly" prohibits the states from coining money.[294] The same *limiting terms* found in the Reconstruction Amendments appear in the Powers Denied States provision.[295] It is immaterial that this limiting language in the Reconstruction Amendments has only been relevant to Congress's enforcement power because, as the Court in *Torres* stated, "congressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of the Convention."[296] Professors Bellia and Clark do not address Article I Section 10 and how it divests state authority other than that it says nothing about impacting sovereign immunity.[297] But, as the *Torres* Court detailed, this divestiture is "strong evidence" that the constitutional structure prevents states from undermining federal objectives.[298] Relatedly, Section 5 of the Fourteenth Amendment says nothing about abrogating sovereign immunity either.[299] Nonetheless, *Fitzpatrick* and *Seminole Tribe* interpreted it to alienate sovereign rights because its text placed express prohibitions on the states due to their rebellious actions during the Antebellum Era.[300] This is similar to Article I Section 10's express prohibition in response to the states' actions with currency during the Articles of Confederation period.[301] Pre-

289. *See id.*

290. *Id.* (quoting PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 509 (2021)).

291. *See infra* notes 294–316 and accompanying text.

292. Bellia & Clark, *New Purposivism*, *supra* note 82, at 548.

293. *Id.*

294. *See supra* Parts III.A.1., III.B.3. (discussing the Coinage Clause and *The Law of Nations*); U.S. CONST. art. I, § 10, cl. 1.

295. *Compare* U.S. CONST. amend. XIV, § 1 ("*No State shall* make or enforce any law . . . ."), *with id.* art. I, § 10, cl. 1 ("*No State shall* . . . coin Money . . . .") (emphasis added).

296. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 595 (2022) (quoting PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 502 (2021)).

297. Bellia & Clark, *New Purposivism*, *supra* note 82, at 561.

298. *Torres*, 597 U.S. at 590.

299. *See* U.S. CONST. amend. XIV, § 5.

300. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996).

301. *See* U.S. CONST. art. I, § 10, cl. 1.

Founding, because different state currencies led to massive inflation, fraud, and trade difficulties, the states implicitly consented to Congress's exclusive coinage authority "in the plan of the Convention," subjecting them to suit for thwarting this policy.[302]

What transpired during the Civil War helps conceptualize this point. During that time, the Union was powerless to stop the Confederacy from issuing their own currency. The Confederate currency was "poorly regulated," led to high inflation, forgery, and "[in]consistency in payment methods."[303] The southern states' attempt to raise money for the war backfired on many Southerners. When the war ended, the currency was worthless and many Southerners lost a good deal of money after their states ran the printing presses.[304] Should the states act in contravention of this prohibition as they did during the Civil War but Congress cannot commandeer them in this fashion, this issue "c[ould] not be corrected without a suit against the State."[305]

There has also been an alienation of immunity by "unavoidable implication" because the power to strike and regulate currency inheres to the Union, and that same authority given to the states would be "totally contradictory and repugnant."[306] Congress commands the field of currency enumerated in not just one, but several provisions of Article I.[307] One even calls for Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . . ."[308] The states, on the other hand, are prohibited from coining money under the Powers Denied States provision.[309] It would be contradictory having different forms of currency or to say that a state could coin money without Congress being able to exercise its other Article I power in punishing counterfeit or duplicate currency. This would not be "a mere possibility of inconvenience in the exercise of powers,"[310] but rather an "insecure basis to trade" that will "defeat, yet very much retard and confuse the collection of Federal

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302. *See supra* Part III.A.2.

303. *Cornerstone Contributions: Paying for Rebellion: Confederate Currency in the Lee Cornerstone Box*, DEP'T OF HISTORIC RES. (Jan. 31, 2022), https://www.dhr.virginia.gov/blog-posts/cornerstone-contributions-paying-for-rebellion-confederate-currency-in-the-lee-cornerstone-box.

304. *See id.*

305. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 422 (1793) (discussing the currency power).

306. THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis removed); Bellia & Clark, *New Purposivism*, *supra* note 82, at 571.

307. U.S. CONST. art. I, § 8, cls. 1–3, 5–6.

308. *Id.* art. I, § 8, cl. 6.

309. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . coin Money . . . .").

310. Bellia & Clark, *New Purposivism*, *supra* note 82, at 571 (quoting THE FEDERALIST NO. 32, at 202 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

Revenues" and allow the "injustice perpetrated by the States [to occur] . . . ."[311] Drawing from the words of Chief Justice John Marshall who remarked on *The Federalist No. 32*:

> [F]ixing the value of any species of coin, necessarily disposes of the whole power as to that species. They are both instances in which, when Congress has acted at all, *there immediately arises that entire and absolute repugnancy*, and that utter incompatibility, which exclude the States from all power over the subject.[312]

On another point made by Professors Bellia and Clark, there is no erroneous conflation between "merely" giving Congress power to coin money and alienating the states' sovereignty rights, such as immunity from suit.[313] Had that been true, there would be no reason to specifically prohibit the states from coining money in another provision. Assuming that the federal government could not commandeer state governments at all, then there would be no other way to enforce vesting coinage power in Congress and divesting it from the states than to alienate sovereign immunity and allow private suits against noncompliant sovereigns.

Second, the *Law of Nations* should not be the ultimate framework that shapes constitutional interpretation and determines the outcome of sovereignty issues. Professors David M. Golove and Daniel J. Hulsebosch noted that Professors Bellia and Clark agree that "the Constitution, as originally ratified, *did not adopt any part of the law of nations* as the national law of the United States, and *therefore the Constitution did not charge judges*, *or indeed permit them*, *to apply it as such*."[314] Having the *Law of Nations* dictate outcomes violates the *Marbury* principle: "It is emphatically the province and duty of the judicial department to say what the law is."[315] Instead of the Court interpreting the Constitution the way it decides to, the *Law of Nations* ought to command the Court to determine

311. CURTIS, *supra* note 193, at 310, 329; FARRAND, RECORDS OF THE CONVENTION VOLUME 3, *supra* note 258, at 192.

312. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 40 (1824) (emphasis added). Here, Chief Justice Marshall speaks to concurrent powers of the federal and state governments, and insisted that a power that is granted in exclusive terms to Congress and that same power is prohibited in express terms to the states fits the test of "contradictory and repugnant." *Id.* at 37–39.

313. *See* Bellia & Clark, *New Purposivism*, *supra* note 82, at 555.

314. David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1601 (2018) (discussing ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017)) (emphasis added).

315. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

the contours of sovereign rights. To be sure, the *Law of Nations* can be persuasive authority to help the Court interpret the Constitution, as a canon of construction, but it should not strip the judiciary of its authority to say what the law ultimately means.

Additionally, Professors Bellia and Clark seem to acquiesce in the *Katz* decision that recognized an implied waiver based on the "plan of the Convention," so it is peculiar to critique the *PennEast* and *Torres* decisions that rested on the same reasoning.[316] If nothing in the words of the Bankruptcy Clause "clearly and expressly" alienated sovereign rights and there was marginal support in the *Katz* decision evincing "unavoidable implication" that immunity was waived, the *Law of Nations* should not control the analysis.[317]

4. The Torres Dissent

To conclude this Part, this Article addresses Justice Thomas's dissenting opinion in *Torres*, which Professors Bellia and Clark also find persuasive. First, it is said that this new structural waiver test "includes no clear limits" and that all of Congress's Article I powers fit this test forcing the exception to swallow the entirety of the sovereign immunity defense.[318] Indeed, Justice Thomas wrote that the "complete in itself" test has roots in the landmark *Gibbons v. Ogden* case, where Chief Justice Marshall concluded that *every* power vested in Congress is "complete in itself."[319] However, Chief Justice Marshall also recognized that the commerce power is a concurrent power as it is not expressly prohibited from the states.[320] The Powers Denied States provision makes no reference to restricting the states' ability to regulate commerce.[321] While the Court has longstanding precedent characterizing Congress's commerce authority as "plenary,"[322] this has not prevented the states from regulating interstate commerce when such regulations do not either unduly burden nor discriminate against interstate commerce. The Supreme Court's jurisprudence on the Dormant

316. *See* Bellia & Clark, *New Purposivism*, *supra* note 82, at 535–36 (noting that the Court "embarked on a dramatic change of course" beginning with *PennEast*, but not *Katz*).

317. *See id.* at 535–36 (discussing Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 376 (2006)).

318. Bellia & Clark, *New Purposivism*, *supra* note 82, at 540, 560, 575–76; Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 624–25 (2022) (Thomas, J., dissenting).

319. *Torres*, 597 U.S. at 624–25 (Thomas, J., dissenting); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

320. *Gibbons*, 22 U.S. (9 Wheat.) at 18–19, 60–61.

321. *See* U.S. CONST. art. I, § 10, cl. 1.

322. *Torres*, 597 U.S. at 626 (Thomas, J., dissenting) (citing Armour & Co. v. Virginia, 246 U.S. 1, 6 (1918)).

Commerce Clause has confirmed that much.[323] Despite Chief Justice Marshall's words in *Gibbons*, since the states may regulate interstate commerce in some instances, this "feature . . . arguably makes the federal regulatory power less than 'complete.'"[324] The interstate commerce power, among others, is not expressly denied to the states nor essential to the Union as contemplated in the "plan of the Convention."[325] Although more can be said, it is clear that *PennEast* and *Torres* cannot necessarily extend to every Article I power.[326]

Justice Thomas also writes that *Alden* foreclosed the Court's holding in *Torres*.[327] Justice Thomas stated that *Alden*'s holding was broad in that it held that Article I powers were insufficient for Congress to subject "nonconsenting States" to private suits.[328] While that is the case, Article I powers are sufficient involving cases of *consenting* states, explicitly or implicitly in the "plan of the Convention."[329] *Alden* was not presented with the question of whether the states could implicitly consent when addressing certain complete Article I powers. And, in fact, *Alden* involved the Fair Labor Standards Act (FLSA), a federal statute passed pursuant to the commerce power, a power that is "less than complete."[330] Thus, *Alden* is inapposite.

Then, Justice Thomas takes issue with the test itself for a "plan of the Convention" waiver, arguing that there is no "compelling evidence" suggesting implied consent in the structure of the constitutional design.[331] He begins with undermining the idea that a plenary Article I power is insufficient to find a structural waiver.[332] To lend support for his argument, Justice Thomas argues that the majority's reasoning is inconsistent with

323. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 369 (2023) (quoting Guy v. Baltimore, 100 U.S. 434, 443 (1880)) ("[A]bsent discrimination, 'a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to' the interests of its citizens.").

324. *Torres*, 597 U.S. at 596.

325. *See id.*

326. *See supra* text accompanying notes 319–25 (explaining structural waivers cannot be extended to the Article I commerce power).

327. *Torres*, 597 U.S. at 607 (Thomas, J., dissenting).

328. *Id.* at 608 (citing Alden v. Maine, 527 U.S. 706, 712 (1999)).

329. *See, e.g.*, *Torres*, 597 U.S. at 596–97 (majority opinion) (explaining *Alden* does not apply where states consent to suit, such as through structural implied waivers).

330. *Id.* at 596 (internal quotations omitted). Justice Thomas conceded that the *Alden* Court did not even mention which Article I power authorized the FLSA and passively brushed this off stating that "[i]t did not matter," which is unpersuasive. *Id.* at 608 (Thomas, J., dissenting). It does matter. Since *Katz*, the specific Article I power at issue was wholly relevant to whether a structural waiver of immunity was appropriate.

331. *Id.* at 610.

332. *Id.* at 611.

Seminole Tribe, which concluded that although Congress had plenary and exclusive authority with respect to Indian Tribes and the Constitution divested states of like power, that was insufficient to abrogate sovereign immunity.[333] Three points here: (1) there is no express prohibition in the Constitution on the states over Indian matters;[334] (2) some states have criminal jurisdiction over Indian reservations within their borders;[335] and (3) *Seminole Tribe* was an abrogation case and the Court has made a clear distinction between abrogation and structural waiver cases.[336] Justice Thomas also insists that the constitutional structure cuts against inferring a waiver of immunity because of the "coercive" nature subjecting the states to suit, the burden on the sovereign fisc, and the jeopardization of political accountability.[337] Quite the opposite; structural waivers are inherently uncoercive as the states consent in the "plan of the Convention." There is little evidence to support that subjecting state governments to suit would burden the government fisc when state officials are already subject to § 1983 suits as well as local municipalities, and the retention of sovereign immunity has done nothing but undermine government accountability.[338]

Finally, Justice Thomas scorned the *Torres* majority for relying on the "complete in itself" language from *PennEast* as "a single phrase, made in passing" without explanation as insufficient to "rework or erase" centuries-old sovereign immunity doctrine.[339] There are countless examples, but several Supreme Court decisions rested on single phrases, some even creating new rights never circumscribed in the Constitution itself that have become binding on the states and upended prior precedent.[340]

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333. *Id.* (discussing Seminole Tribe of Fla. v. Florida, 517 U.S. 47 (1996)).

334. *See* U.S. CONST. art. I, § 10. Justice Thomas summarily dismisses the relevancy of an express prohibition. *Torres*, 597 U.S. at 612 (Thomas, J., dissenting).

335. U.S. DEP'T OF JUST., CRIM. RES. MANUAL. 688, https://www.justice.gov/archives/jm/criminal-resource-manual-688-state-jurisdiction (last visited Apr. 6, 2025); 18 U.S.C. § 1162(a).

336. *Torres*, 597 U.S. at 595.

337. *Id.* at 616 (Thomas, J., dissenting).

338. *See* Chemerinsky, *supra* note 71, at 1213, 1218.

339. *Torres*, 597 U.S. at 621, 628 (Thomas, J., dissenting).

340. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (creating the *Miranda* rights, made applicable to the states); *see also* Eugene R. Milhizer, *Miranda's Near Death Experience: Reflections on the Occasion of Miranda's Fiftieth Anniversary*, 66 CATH. U. L. REV. 577, 595–96 (2017) (discussing post-*Miranda* cases where Justices on the Court undermined the *Miranda* rights for being "Court-created, prophylactic rule[s] rather than a constitutional necessity"). *Miranda* was considered "destabilizing" and "threatening." Milhizer, *supra* note 340, at 611. Justice White, a dissenting Justice, explained that *Miranda* had "no significant support in the history of the privilege or in the language [of] the Fifth Amendment." *Id.* at 589 (citing *Miranda*, 384 U.S. at 526 (White, J., dissenting)). Justice Harlan believed that the Court-created *Miranda* warnings were unnecessary and that the holding

CONCLUSION

The Supreme Court in *Chisolm v. Georgia* framed the issue of central bank digital currency (CBDC) and sovereign immunity perfectly:

> What, if a State should adulterate or coin money below the Congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What if a State should impair her own contracts? *These evils, and others which might be enumerated like them, cannot be corrected without a suit against the State*.[341]

While CBDC has its flaws, there are many tradeoffs making it a possible future currency in the United States.[342] Countries abroad have already tested and adopted its use, potentially threatening the value of the U.S. dollar.[343] Whereas in the United States, several states have already considered or passed laws excepting CBDC from the definition of money under their respective commercial codes.[344] The National Park Service (NPS) case and the hypothetical presented in Part II.B illustrate just a few of the many examples where the Coinage Clause and sovereign immunity intersect.[345] In order to prevent the injustices resulting from the expansion of the sovereign immunity defense, the Court should continue developing implied structural waivers.

Beginning with *Katz* and then further broadened in *PennEast* and *Torres*, the Supreme Court rightly pursued a purposivist path in recognizing instances where state governments consent to suit in the "plan of the Convention."[346] *Torres* laid the groundwork for Article I's return to the sovereign immunity field after *Seminole Tribe* overturned *Union Gas*.[347] Relying on the same three considerations (constitutional text, history, and precedent) from *Torres*, the coinage power under Article I is "complete in itself," sufficient to imply a structural waiver of sovereign immunity.[348] Although scholars and others suggest otherwise, the test in *PennEast* and

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weakened the importance of the Due Process Clauses in dealing with confessions. *Id.* (citing *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting)).

341. 2 U.S. (2 Dall.) 419, 422 (1793) (emphasis added).

342. *See supra* Part I.A.

343. *See supra* Part I.A.

344. *See supra* Part I.A.2.

345. *See supra* Part II.B.

346. *See supra* Part I.B.

347. *See supra* Part I.B.

348. *See supra* Part III.A.

Torres is consistent with the constitutional design.[349] Its further expansion is warranted to weaken the common law doctrine that has developed into a quasi-bulletproof vest for states and state officials that have committed serious transgressions.[350]

The *Hans* fact pattern arose because states defaulted on their public obligations.[351] The same will continue to happen, as it has been, if the Court does not extend structural waivers of immunity to the Coinage Clause. States like Florida will refuse to accept certain legal tender—as entities such as the NPS have already done[352]—like CBDC should Congress authorize its use. But should courts extend these waivers, individuals could push back. The hypothetical student referenced in Part II.B would have a road to redress against the state university to recover damages.[353]

"All of this is to say that our Government has long functioned under an accountability paradigm in which no one is above the law,"[354] and thus, not even the states themselves—which surrendered several rights and powers in the "plan of the Convention" to the federal government for the sake of the "benefit of the nation"—can undermine that.[355]

349. *See supra* Part III.B.

350. *See supra* Part II.A.

351. Clark, *supra* note 139, at 1912.

352. *See supra* Part II.B.

353. *See supra* Part II.B.

354. Trump v. United States, 144 S. Ct. 2312, 2374 (2024) (Jackson, J., dissenting).

355. United States v. Gayekpar, 211 F. App'x 533, 534 (8th Cir. 2007) (per curiam) (quoting United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850)).