ARTICLES

Utah’s Transfer of Public Lands Act: Demanding a Gift of Federal Lands
Nick Lawton.................................................................1

Rock-Koshkonong Lake District and the Surprising Narrowing of Wisconsin’s Public Trust Doctrine
Christian Eickelberg...................................................38

EB-5 as an Instrument of Sustainable Capitalism
Howard Patrick Barry................................. 66

NOTES

Adding Fuel to the Flames: Why EPA’s New Source Review Program under the Clean Air Act Exacerbates Lead Pollution in Lead Nonattainment Areas
Qian Meng.................................................................121

A Vision or a Waking Dream: Revising the Migratory Bird Treaty Act to Empower Citizens and Address Modern Threats to Avian Populations
Andrew W. Minikowski ........................................152
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VERMONT JOURNAL OF ENVIRONMENTAL LAW
VERMONT LAW SCHOOL
Volume 16, Issue 1   Fall 2014

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UTAH’S TRANSFER OF PUBLIC LANDS ACT: DEMANDING A GIFT OF FEDERAL LANDS

By Nick Lawton

In 2012, Utah passed the Transfer of Public Lands Act (TPLA), which demands that the United States Congress convey federal public lands to the state by the end of 2014. The TPLA putatively requires Congress to fulfill a promise to dispose of public lands, which the state believes the U.S. made in the Utah Enabling Act. Because many other statehood acts feature language comparable to the Utah Enabling Act’s, the TPLA’s success would likely influence other states to enact similar demands for the transfer of federal land.

This article places the TPLA in historical context, explains how it purports to operate, and analyzes its constitutionality. Particularly, this article refutes the claim that the TPLA is a constitutional way for Utah to compel Congress to fulfill an ostensible promise in the Utah Enabling Act to dispose of public lands. This article reveals that Congress never made such a promise and concludes that the TPLA is unconstitutional.

Introduction................................................................................................... 2
I. The TPLA’s Historical Context................................................................. 5
   A. Early History....................................................................................... 5
   B. Westward Expansion........................................................................ 6
   C. Reservation and Conservation......................................................... 8
   D. The Fallout: Federal Ownership of Western Lands ....................... 9
   E. Modern Ferment over Federal Land Management .................... 11
II. The TPLA’s Bold Demand .................................................................... 14
   A. The Lands at Issue........................................................................... 14
   B. The Demand Itself.......................................................................... 15
   C. Enforcing the TPLA ...................................................................... 16
III. Analyzing the TPLA’s Constitutionality ............................................. 17
   A. The TPLA and Utah’s Constitution .............................................. 17
   B. Arguments for the TPLA under the U.S. Constitution .............. 18
      1. Textual Basis for the TPLA Defense......................................... 18
INTRODUCTION

On March 23, 2012, Utah enacted the Transfer of Public Lands Act (TPLA), which purports to require the United States Congress to convey to the state roughly 30 million acres of federal public land by the end of 2014. The TPLA seems to violate the Constitution’s Supremacy Clause by demanding that the United States (U.S.) cede lands it now manages under the Property Clause through various federal laws. Officials in both

2. U.S. CONST. art. VI, cl. 2.
the state and federal governments view the TPLA as unconstitutional, and even Utah Governor Gary Herbert, who signed the TPLA, admits “it’s not a slam dunk.” However, the TPLA’s proponents have made a case for its constitutionality that federal courts have yet to consider. The argument is that by retaining public lands, Congress has broken a promise it made in the Utah Enabling Act to dispose of those lands. Under this view, the TPLA validly demands that Congress fulfill its promise by conveying public lands to the state.

The stakes of the debate are quite high. The U.S. owns roughly two-thirds of Utah and similar portions of other Western states. If the TPLA succeeds, Utah could gain roughly 30 million acres and fossil fuels worth hundreds of billions of dollars. Many federal laws would no longer apply to these lands, giving the state comparatively free reign over their use.


8. KOCHAN, supra note 6, at 4.


10. Id.


12. The TPLA demands, among other lands, the Grand Staircase-Escalante National Monument. See id. at Appendix C (describing and depicting which lands the TPLA demands). This national monument overlays fossil fuel deposits worth hundreds of billions of dollars. M. LEE ALLISON, A PRELIMINARY ASSESSMENT OF ENERGY AND MINERAL RESOURCES WITHIN THE GRAND STAIRCASE ESCALANTE NATIONAL MONUMENT, UTAH GEOLOGICAL SURVEY, Preface (1997).

Moreover, because other statehood acts use terms similar to the Utah Enabling Act’s, other states could also argue that Congress broke promises to dispose of public lands. Although some states rejected this approach in 2012, if the TPLA succeeds, some will likely follow Utah’s lead. Indeed, the American Legislative Exchange Council offers model legislation to hasten this domino effect. Thus, the debate over the TPLA is really about the fate of public lands throughout the West.

This article explains that despite the TPLA, federal lands will almost certainly remain in federal hands. Section I places the TPLA in the historical context of an enduring American debate over public lands, in which the federal government has prevailed time and again. Section II explains the TPLA and how it purports to operate. Section III maintains that the TPLA violates both the Utah Constitution and the U.S. Constitution. It discusses how the Property Clause, Enclave Clause, and Equal Footing Doctrine do not allow states to demand federal lands. Section III also employs a settled rule, requiring courts to resolve ambiguities in federal grants in the federal government’s favor, in order to refute the state’s novel claim that Congress promised to dispose of public lands in the Utah

with NEPA). Eliminating NEPA review, which would promote fossil-fuel drilling and timber harvesting, is likely among the TPLA’s goals. See Utah Constitutional Defense Council, Toward a Balanced Public Lands Policy, A Case Statement for the H.B. 148: Utah’s Transfer of Public Lands Act 4–7 (2012) [hereinafter CDC], available at http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148SummaryInteractive.pdf (“Utah’s ability to access and responsibly develop … resources is often thwarted by federal rules, regulations, processes and management policies.”).


15. E.g., Tucker, supra note 11, at 5 (noting that Arizona Governor Jan Brewer rejected a similar bill in part for failure to articulate a legal or constitutional basis for the demand of public lands).

16. ALEC, American Legislative Exchange Council (ALEC) (2014), http://www.alec.org/about-alec/ (describing ALEC as a “nonpartisan public-private partnership of America’s state legislators, members of the private sector and the general public”); but see What is ALEC?, Center for Media and Democracy (last updated Jan. 23, 2014), http://www.alecexposed.org/wiki/What_is_ALEC%3F (describing ALEC as a “pay-to-play operation where corporations buy a seat and vote”, and describing ALEC’s members as “overwhelmingly conservative republicans”).

17. Resolution Demanding that Congress Convey Title of Federal Public Lands to the States, ALEC (Jan. 28, 2013), http://www.alec.org/model-legislation/resolution-demanding-that-congress-convey-title-of-federal-public-lands-to-the-states/. See also Christopher Ketcham, Public Lands in Jeopardy, Moab Sun News, (Mar. 5, 2014), http://www.moabsunnews.com/opinion/article_48f0bece-a4dc-11e3-8c4b-0017a43b2370.html (noting that the TPLA’s sponsor vetted the bill before ALEC’s corporate members before introducing it in the Utah House of Representatives); Tucker, supra note 11, at 5 (noting that bills like the TPLA in Colorado and Arizona were “the result of intensive lobbying and creation of a lands bill template by the American Legislative Exchange Council”).

Enabling Act. Section IV describes the politics behind the TPLA and concludes that neither courts nor Congress should find it credible.

I. THE TPLA’S HISTORICAL CONTEXT

The TPLA is the latest outburst in a debate over public lands that has smoldered, with periodic eruptions, since the American Revolution. Congress, since the nation’s earliest days, guarded its discretion over public lands carefully and consistently. This section briefly describes the history of public lands law, discussing disposals to repay national debts and encourage westward expansion, reservation and conservation efforts, and modern conflicts over public lands that have set the stage for the TPLA.

A. Early History

Public lands were a national priority after the American Revolution. To repay war debt, seven original states ceded western lands for the federal government to sell. The Northwest Ordinance of 1787 arrogated to Congress exclusive control over selling western lands and admitting new states into the union. Congress thus asserted exclusive power over public lands even before it had express authority to do so. At the same time, the Constitutional Convention was drafting the U.S. Constitution, which would give Congress express power to admit states and manage federal lands in the Property Clause. The Supreme Court has long read the Property Clause expansively, giving Congress broad power over federal lands.

19. Paul W. Gates, History of Public Land Law Development, 59 (Joseph Cellini ed. 1979) (noting that “the issues most urgently demanding the attention of the Congress . . . aside from revenue, were Indians and lands”).
20. Coggins et al., supra note 9, at 54–55. The remaining original states lacked western lands. Id.
21. Id. at 55, 67; Gates, supra note 19, at 69–71 (describing congressional debate about the weaknesses of a prior land ordinance).
22. The Articles of Confederation gave Congress no express authority over western lands or the admission of new states. Gates, supra note 19, at 72.
23. Id. at 74 (noting that Congress, sitting in New York, passed the Northwest Ordinance “[w]hile the Convention was drafting the Constitution in Philadelphia”).
24. U.S. Const. art. VI, § 3, cl. 2.
25. E.g., Kleppe v. New Mexico, 426 U.S. 529, 539–40 (1976) (embracing an “expansive reading” of the Property Clause that gives Congress “the powers both of a proprietor and of a legislature over the public domain,” and relying for this holding on a lineage of cases dating back to 1840).
controversial,\textsuperscript{26} while debate raged about other enumerated powers,\textsuperscript{27} suggests that the Framers indeed intended such broad congressional power. Congress used its Property Clause power to affirm the Northwest Ordinance\textsuperscript{28} and admit new “public land” states, starting with Ohio in 1802.\textsuperscript{29} While granting new states lands for specific purposes, Congress generally required most states to disclaim any right to federal lands,\textsuperscript{30} thus guarding its power over remaining lands.\textsuperscript{31}

B. Westward Expansion

By 1850, the U.S. had acquired vast territories from foreign nations, which would eventually become the lower 48 states.\textsuperscript{32} Congress sold and granted much of this territory to pay off national debt and encourage settlement.\textsuperscript{33} During the 1800s, Congress sold land on increasingly generous terms,\textsuperscript{34} allowed preemption and homesteading,\textsuperscript{35} gave arid land to irrigators,\textsuperscript{36} and granted huge swaths of land for railroads.\textsuperscript{37} Congress also granted states lands for various purposes.\textsuperscript{38} By 1905, Congress had

\begin{itemize}
\item \textsuperscript{26} Gates, supra note 19, at 74 (noting that only Maryland dissented from the Property Clause’s final language and that Maryland’s goal was greater U.S. control over public lands and statehood terms).
\item \textsuperscript{27} Scott W. Reed, The County Supremacy Movement: Mendacious Myth Marketing, 30 Idaho L. Rev. 525, 535–40 (1994) (describing debates over the balance of power between Congress and the States and calls for the type of local control the Articles of Confederation had envisioned).
\item \textsuperscript{28} Coggins, supra note 9, at 67 (“One of the first acts of Congress under the new Constitution was to reconfirm and extend the provisions of the Northwest Ordinance of 1787.”).
\item \textsuperscript{29} Gates, supra note 19, at 74, 288–313. Ohio was the first “public land state,” not the first new state. Id.
\item \textsuperscript{30} Id. Interestingly, Congress did not require such a disclaimer from Ohio, the first state, “perhaps because Congress thought the limitations in the Northwest Ordinance sufficiently binding.” Id. at 74.
\item \textsuperscript{31} John D. Leshy, Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands, 14 U.C. Davis L. Rev. 317, 324–25 (1980) (“[I]n agreeing to admit states, Congress wanted, bargained for and received final say over the lands retained in federal ownership.”).
\item \textsuperscript{32} Coggins, supra note 9, at 55–58; Gates, supra note 19, at 76 (depicting the territories as originally acquired, along with dates of acquisition).
\item \textsuperscript{33} See Coggins, supra note 9, at 103 (noting that Congress began disposing of public lands “[a]fter some years of inconclusive debate over whether revenue-raising or settlement was . . . more important”).
\item \textsuperscript{34} Id. (describing statutory extensions of credit and reductions in price).
\item \textsuperscript{35} Preemption allowed squatters to buy land they had occupied for low prices, while homesteading allowed prospective settlers to acquire land for free based on actual occupation and cultivation. Id. at 103–06.
\item \textsuperscript{36} Id. at 105–06.
\item \textsuperscript{37} Id. at 113–17.
\item \textsuperscript{38} E.g., id. at 97–101 (describing common statehood act grants to fund schools and internal improvements and to establish land grant colleges); Gates, supra note 19, at 321–36 (discussing the Swamp Land Acts, which granted swamps for states to develop, but which were also prone to fraud, abuse, and controversy).
\end{itemize}
disposed of roughly two-thirds of federal lands, giving far more to private parties than to states. Thus, disposal of lands was the most conspicuous feature of nineteenth century public lands policy.

However, this era was not a mad dash to dispose of land at all costs. Instead, Congress often debated public land management and sometimes chose policies that frustrated states by retaining lands. For example, between 1828 and 1833, five states protested federal land ownership, unsuccessfully arguing that Congress lacked power to manage lands within a state after statehood. Although Congress chiefly debated which states should profit from land sales, it also rejected a plan to sell all public lands to states at low prices. Senator Daniel Webster defended federal discretion over public lands, arguing that Congress “has always felt itself bound, in regard to sale and settlement, to exercise its own best judgment, and not to transfer the discretion to others.” Using that discretion, Congress often favored disposal, but on its own terms.

Federal discretion over public lands would prove important in fighting abuse of disposal statutes and preserving vital natural resources. Abuse of disposal policies was common. For example, the Desert Land Act of 1877, which promoted Western settlement by selling land to irrigators at low prices, was so prone to abuse that little of the land that passed into private hands was ever actually irrigated. Similarly, homesteading and

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39. GATES, supra note 19, at 502 (noting that in 1905 the U.S. retained roughly 450 million acres out of the roughly 1.5 billion acres, excluding Alaska, that it had once held).
40. COGGINS ET AL., supra note 9, at 102 (“[T]he federal government disposed of far more land to private parties [than into state ownership] in order to spur economic and social development of the nation.”).
41. See e.g., GATES, supra note 19, at 10–11 (quoting Senator Robert Y. Hayne of South Carolina in an 1829 debate as saying that the “question [of public lands] that is pressed upon us in so many ways; that intrudes in such a variety of shapes; involving so deeply the feelings and interests of a large portion of the Union; insinuating itself into almost every question of public policy, and tinging the whole course of our legislation cannot be put aside or laid asleep”).
42. Leshy, supra note 31, at 320 (describing arguments by Alabama, Illinois, Indiana, Louisiana, and Missouri and noting that these states did not raise these arguments in court, but in petitions to Congress).
43. GATES, supra note 19, at 11–13 (describing the desires of Eastern states to see revenues from land sales).
44. Id. at 11. (describing a proposal from South Carolina Senator Robert Y. Hayne to sell lands for prices recovering only the costs of surveying land and preparing it for sale).
45. 6 REG. DEB. 37 (1830).
46. COGGINS ET AL., supra note 9, at 102 (“Disdain for legal requirements bred widespread lawlessness.”); Id. at 104 (describing Eastern congressmen criticizing “Westerners for being greedy, lawless, disloyal land-grabbers”); GATES, supra note 19, at 326 (noting that state selections of swamp lands were based on records that were “defective, far from complete, and in many instances fraudulent”).
47. COGGINS ET AL., supra note 9, at 106 (noting that “[s]ome people received patents after hauling a can of water to the claim and swearing irrigation had achieved” and that “[v]ery little land ever became irrigated”).
preemption laws provided the dishonest with chances to deforest lands without paying for timber.Congress responded to widespread abuse of disposal policies by gradually asserting greater federal control over public lands. For example, Congress reserved timber resources for the Navy as early as 1817 and often allowed the President to withdraw land from various disposal policies. In the arid West, abuse and failure of the Desert Land Act became clear by 1888. However, it took Congress until 1902 to devise federally controlled irrigation projects to facilitate Western settlement.

C. Reservation and Conservation

Congress asserted steadily more control over public lands throughout the nineteenth century. Disposal statutes allowed executive withdrawals from various disposal policies in 1830, 1841, and 1853. By 1910, the executive had withdrawn or reserved land at least 252 times. Notably, Congress in 1891 authorized the President to reserve forested land regardless of its commercial value. Within three years, two presidents reserved more than 17 million acres, and over the next 16 years, presidents reserved 80% of today’s national forests. Between 1832 and 1900, Congress also reserved more than three million acres in national parks.

Congress soon provided for management of federal land, passing an Organic Act for national forests in 1897 and another for national parks in 1916. In 1934, Congress enacted the Taylor Grazing Act, which governed the range. The Supreme Court has noted that by leasing instead of granting grazing land, the Taylor Grazing Act effectively “locked up all of

48. Id. at 105.
49. Gates, supra note 19, at 533–34. Sadly, this particular reservation effort was “a failure on a ‘colossal scale.’” Id. at 534.
50. Grisar v. McDowell, 73 U.S. 363, 381 (1867) (“The authority of the President in this respect is recognized in numerous acts of Congress[,]” including two Preemption Acts and the system of surveying land for disposal in California).
51. Coggins et al., supra note 9, at 107. As early as 1878, Congress received a warning about the need to adapt policies to suit the arid West from John Wesley Powell’s Report on the Land of the Arid Regions of the United States. Id. However, John Wesley Powell was not heeded for many years. Id.
52. Id. at 108.
53. Grisar, 73 U.S. at 381.
55. Coggins et al., supra note 9, at 124.
56. Gates, supra note 19, at 567–68.
57. Id. at 566–67 (describing the earliest National Parks).
58. Coggins et al., supra note 9, at 125–26.
60. Coggins et al., supra note 9, at 138.
the federal lands in the Western States pending further [federal] action.”61 Thus, by 1934, large-scale disposals of public lands were largely over.

The U.S. does, however, continue to dispose of public lands, chiefly through land exchanges that consolidate its holdings, but also through land sales.62 The U.S. sells mostly range rather than forest lands,63 but the Bureau of Land Management’s (BLM) records of land disposals are far from straightforward.64

D. The Fallout: Federal Ownership of Western Lands

Land ownership patterns in the lower 48 states reflect these policies.65 Today, the U.S. owns much of the 11 states west of the 100th Meridian, but only small portions of the eastern states.66 The reason for the division is simple. Federal policies that disposed of land to encourage settlement were much more successful in the well-watered East than in the arid West.67 In the dry, rugged West, settlers typically took title to land along rivers or streams and grazed sheep or cattle on huge ranches of mostly arid land.68 Congress tried to promote settlement first by granting land to irrigators and

62. COGGINS ET AL., supra note 9, at 447–53.
64. In response to a request for information on land disposals in Utah since the passage of the Federal Land Policy and Management Act (FLPMA) in 1976, a BLM representative offered two databases with dramatically different information. E-mail from Joy Wehking, Utah State Office Real Estate Specialist, Bureau of Land Management, to author (Feb. 18, 2014) (on file with author). One database indicated disposal of roughly 1.2 million acres, but the second indicated disposal of only roughly 175,000 acres. Id. BLM also issues Annual Reports, which are available online, but which date back only to 1996 and do not provide information about land disposals in individual states. See Annual Reports, BUREAU OF LAND MANAGEMENT (last updated Apr. 24, 2012), http://www.blm.gov/wo/st/en/res/Direct_Links_to_Publications/ann_rpt_and_pls.html. In sum, BLM records do not offer a clear picture of how much land the agency has disposed of since the passage of FLPMA in 1976.
65. This paper does not address land ownership in Alaska, because that state is in many ways a special case. See e.g., COGGINS ET AL., supra note 9, at 28–29 (discussing the special case of Alaska).
66. Id. at 14–15.
67. See id. at 15–16 (comparing the amount of public lands in eastern and western states); See also Lesby, supra note 31, at 343-44 (“The principal reason that the federal government has retained more than 87% of the land in [Nevada] is not because the federal government refused to open its lands for development. Rather, relatively little land was homesteaded or otherwise reclaimed and cultivated to qualify for post-statehood federal land grants, because of outright lack of water or the prohibitive cost of bringing it to the land.”).
still by subsidizing federal irrigation projects.\textsuperscript{69} Still, the range (the largest part of the federal lands) remained mostly empty.\textsuperscript{70} In short, the U.S. now owns much of the West because it was too dry to settle.

Utah is a good example. The U.S. acquired the Utah Territory from Mexico in the Treaty of Guadalupe Hidalgo in 1848.\textsuperscript{71} In 1849, Mormon settlers petitioned the U.S. to admit the new state of Deseret, but Congress rejected this petition.\textsuperscript{72} Although Congress acted partly to oppose polygamy, one reason Deseret could not become a state was that it contained too few settlers, despite the fact that it would have been larger than the current states of Utah and Nevada combined.\textsuperscript{73} Utah would not become a state until 1896,\textsuperscript{74} near the end of most major disposal policies.

Today, the U.S. owns 64.5\% of Utah,\textsuperscript{75} mostly because the State’s geography and climate stymied disposal policies. In fact, most federal public lands in Utah are arid lands left unclaimed under disposal policies.\textsuperscript{76} Federal policies to sell or grant lands to defray debt and encourage settlement did not work well in Utah because few people wanted to buy or settle the land. In fact, Congress gave Utah an unprecedented grant at statehood of lands for “permanent water reserves for irrigation” in order to promote settlement.\textsuperscript{77} Nevertheless, most lands in Utah never passed from federal ownership. Contrary to common claims that the federal government obtained these lands at Utah statehood,\textsuperscript{78} the U.S. has owned those lands

\begin{itemize}
\item \textsuperscript{69} \cite{COGGINS ET AL., supra note 9, at 106–09.}
\item \textsuperscript{70} \cite{Rangeland Management, supra note 68, at 542.}
\item \textsuperscript{71} \cite{COGGINS ET AL., supra note 9, at 56–57.}
\item \textsuperscript{72} Linda Thatcher, Struggle for Statehood Chronology, UTAH HISTORY TO GO, http://historytogo.utah.gov/utah_chapters/statehood_and_the_progressive_era/struggleforstatehoodchronology.html (last visited Aug. 30, 2014).
\item \textsuperscript{73} \cite{Id.}
\item \textsuperscript{74} \cite{Id.}
\item \textsuperscript{75} \cite{COGGINS ET AL., supra note 9, at 15.}
\item \textsuperscript{76} \cite{Rangeland Management, supra note 68, at 541 (describing rangelands as “barren lands left after all interested parties, including the government, had taken the lands they wanted”). Today, the BLM controls roughly 23 million of 34 million acres of public lands in Utah, or roughly two-thirds of the public lands in the state. See In The Spotlight, BUREAU OF LAND MANAGEMENT, http://www.blm.gov/ut/st/en.html (last updated Aug. 14, 2014); COGGINS ET AL., supra note 9, at 15.}
\item \textsuperscript{77} \cite{Utah Enabling Act, 28 Stat. 107 (1894); GATES, supra note 19, at 314.}
\item \textsuperscript{78} E.g., \cite{KOCIAN, supra note 6, at 4 (describing Utah’s argument about promises made “at statehood when the federal government obtained the lands”); DONNELL, supra note 7, at 1 (characterizing the TPLA as demanding that the U.S. give lands “back to the state”) (emphasis added); Spencer Driscoll, Utah’s Enabling Act and Congress’s Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement, 2012 BYU L. REV. 999, 1001 (2012) (claiming wrongly that the Utah Enabling Act “effectively transferred title of state land to the federal government”).}
\end{itemize}
since acquiring them from Mexico, mostly because they were too dry and rugged to settle.

E. Modern Ferment over Federal Land Management

The fact that federal ownership of western lands is more a product of geography than politics has not stopped western states from decrying the ostensible tyranny of federal control over public lands. Critics often focus on the Federal Land Policy and Management Act of 1976 (FLPMA), in which Congress proclaimed “the policy of the United States that the public lands be retained in federal ownership . . . unless . . . disposal of a particular parcel will serve the national interest.” These critics often claim that FLPMA was a sea change in federal policy, even though Congress had long since reserved and regulated public lands under other laws.

The “Sagebrush Rebellion” of the 1970s and 1980s, for example, challenged federal control of public lands and claimed the lands for states. In 1976, New Mexico argued that Congress lacked power to protect wildlife on public lands. But the Supreme Court decisively rejected this idea, noting that it had never found any limit to congressional power under the Property Clause and holding that “Congress exercises the powers both of a proprietor and of a legislature over the public domain.” Still, this result did not stop several western states from passing laws several years later

79. See United States v. Gardner, 107 F.3d 1314, 1318 (9th Cir. 1997) (holding the same for public lands in Nevada).
80. See, e.g., Rangeland Management, supra note 68, at 541 (“That the United States owns almost half of the land in the eleven western states is a statistic used often to support the proposition that the West is held in federal bondage, unable to develop and use its resources.”).
82. See e.g., H.R.J. Res. 3, 6, 59th Leg., Reg. Sess. (Utah 2012) (arguing that “FLPMA . . . unilaterally altered [Congress’s] duty in 1976 to extinguish title to all public lands within Utah’s borders by committing to a policy of retention” of public lands); KOCHAN, supra note 6, at 8 (noting that “federal retention of public lands . . . critically culminate[d] in [FLPMA]”); Leshy, supra note 31, at 341 (“If a single development may be said to have triggered the [Sagebrush] rebellion, in fact, it is Congress’ enactment of [FLPMA].”).
83. See supra § II(C) (describing federal conservation and reservation efforts). In fact, the U.S. characterized federal policies in terms that strongly resemble FLPMA when arguing before the Supreme Court in 1840. See United States v. Gratiot, 39 U.S. 526, 530 (1840) (Attorney General Gilpin stating that throughout U.S. history “disposition consisted, either in selling [lands] when no further reason for reserving them existed”).
claiming ownership of federal lands. Legal arguments for these laws later failed in court.

The Sagebrush Rebellion was more successful, however, as a political movement. Ronald Reagan declared himself a Sagebrush Rebel in his successful 1980 presidential campaign, which is unsurprising for a man who said that “government is the problem.” Both Reagan and the Rebellion tapped into national frustration with federal power. However, President Reagan’s later defenses of federal land ownership against Rebels’ claims show that the rebellion was more political theater than true rebellion.

In contrast, the County Supremacy movement of the 1990s much more dramatically pursued local control over federal lands. The movement’s most famous incident followed a resolution from Nye County, Nevada that claimed ownership of public lands. A county commissioner drove a bulldozer into a national forest to grade a road he insisted was county property. He brandished the Constitution as he steered his bulldozer around a Forest Service agent who stood in his path. His son sang the national anthem, and hundreds of onlookers cheered, some waving guns. Shortly after the bulldozer stunt, the U.S. sued Nye County and Nevada to resolve who owned the national forest. The district court ruled that under the Property Clause, the U.S. has “a broad power to regulate land . . . [that] necessarily includes the power to own the regulated public lands.” The court reasoned that “the entire weight of the Supreme Court’s decisions

86. Coggins et al., supra note 9, at 77. Shortly after Nevada passed this law, “state officials hurried to Washington” to ensure that the state would continue to receive payments from federally owned lands. Id.
87. Technically, these state laws were not at issue because the courts never reached the merits of the laws themselves. See Nevada ex rel. Nev. State Bd. of Agric. v. United States, 699 F.2d 486, 487–88 (9th Cir. 1983). However, federal courts later rejected substantially similar arguments. See Gardner, 107 F.3d at 1318 (rejecting arguments that the U.S. lacks authority to retain land for its own purposes and rejecting arguments based on the Equal Footing Doctrine); See also infra § III(D).
88. Coggins et al., supra note 9, at 76–77.
90. Leshy, supra note 31, at 343.
91. Coggins et al., supra note 9, at 77.
94. Id.
95. Id. at 1112.
98. Id. at 1117.
requires a finding that title to the federal public lands . . . did not pass to the State of Nevada upon statehood pursuant to the Equal Footing Doctrine."99 In short, the U.S. owned the public lands; the State and County did not.

Neither the County nor the State appealed,100 but the Ninth Circuit confronted similar arguments a year later in a case involving a claim to vested grazing rights in a national forest.101 After a wildfire, the Forest Service closed the area for reseeding.102 Ranchers grazed cattle there anyway and received a fine, which they refused to pay.103 The federal government sued, and the ranchers argued that the U.S. lacked power to own public lands, which they asserted were actually state property.104 The Ninth Circuit held that the U.S. has owned public lands in Nevada since acquiring them from Mexico, and that no part of the Constitution required lands to pass to Nevada at statehood.105 These cases sounded the County Supremacy movement’s death knell.

Utah has recently resurrected arguments from both the County Supremacy movement and the Sagebrush Rebellion, with the same basic goal of local ownership and control of federal lands. In 2010, Utah passed a law allowing it to take federal lands through eminent domain.106 Some legal arguments in support of this law, and the TPLA, resemble claims from both older movements.107 Moreover, the TPLA’s backers resort to the same type of populist rhetoric the prior two movements used.108 Just as Senator Orrin Hatch once likened a federal land manager to the Sheriff of Nottingham,109 Utah Representative Ken Ivory, who wrote and sponsored the TPLA, recently likened the federal government to a “feudal landlord” and a “land

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99. Id.
100. Conable, supra note 84, at 1265.
102. Id.
103. Id.
104. Id. at 1316–17.
105. Id. at 1319–20 (“as the United States has held title to the unappropriated public lands in Nevada since Mexico ceded the land to the United States in 1848, the land is the property of the United States”); See also infra § III(D) (describing the Equal Footing Doctrine in greater detail).
106. UTAH CODE § 78B-6-503.5 (2012).
107. For example, all of the movements attempted to invoke the Equal Footing Doctrine. E.g., Nye Cnty., 920 F.Supp. at 1117; KOCHAN, supra note 6, at 24–27; Leshy, supra note 31, at 319–20.
109. COGGINS ET AL., supra note 9, at 76.
The TPLA thus evokes the same “strong sense of déjà vu” that Professor Leshy expressed about the Sagebrush Rebellion, as both echo prior efforts to wrest control over federal lands. However, the TPLA presents an argument that distinguishes it from the older movements. Rather than directly claiming federal lands, the TPLA instead requires that Congress give federal lands to Utah. The TPLA’s premise is that the Utah Enabling Act constitutes a binding, but broken congressional promise to dispose of federal lands.

II. THE TPLA’S BOLD DEMAND

The TPLA is simple but bold, demanding that the U.S. convey “public lands” to the State by the end of 2014. The TPLA, however, does not seek all federal lands in Utah, instead picking and choosing among them. This section explains the TPLA’s demand and Utah’s likely strategies for enforcing it.

A. The Lands at Issue

The TPLA defines which lands Utah demands from the U.S. with some specificity. Indeed, the longest part of the TPLA is its definition of “public lands,” which lists each area it excludes. Predictably, the statute excludes state and private lands and state school reservations. It also excludes the following federal lands: all national parks, all existing national wilderness areas, lands the U.S. acquired for the military, federal buildings in Utah towns, tribal lands, and most national monuments.


111. Leshy, supra note 31, at 343.

112. KOCHAN, supra note 6, at 11–16.

113. Id.

114. UTAH CODE § 63L-6-103 (2012).

115. Id. § 63L-6-102(3).

116. Id. § 63L-6-102(3)(a)–(e).

117. Id. § 63L-6-102(3)(c); See Utah National Parks, UTAH.COM (2013), http://www.utah.com/nationalparks/ (listing national parks in Utah, all of which appear in the TPLA’s exclusions).

118. Id. § 63L-6-102(3)(h); Designated Wilderness Areas in Utah, VISITUTAH, http://www.visitutah.com/parks-monuments/wilderness-areas/ (last visited Sept. 3, 2014) (listing designated wilderness areas in Utah, all of which appear in the TPLA’s exclusions).

119. UTAH CODE § 63L-6-102(3)(i) (2012); see also id. § 63L-1-201, 203 (ceding jurisdiction over such lands); Id. §§ 63L-1-201, 203 (2012).

120. Id. § 63L-6-102(3)(j).
The TPLA does demand the Grand Staircase-Escalante National Monument, which is notable for two reasons. First, this national monument overlays fossil fuels worth hundreds of billions of dollars, the exploitation of which seems to be among the TPLA’s main goals. Second, demanding this national monument, which Utah counties unsuccessfully challenged in 2004, shows how the TPLA rehashes old battles.

Claiming the Grand Staircase Escalante National Monument, however, pales in comparison to the demand for lands managed by the BLM, Forest Service (FS), and Fish and Wildlife Service (FWS). In Utah, these agencies manage more than 30 million acres, mostly in BLM lands. Accounting for its exemptions, the TPLA aims to take control of over roughly 60% of Utah.

B. The Demand Itself

The TPLA’s demand is as remarkable as the vast amount of land at issue. Although the TPLA requires the U.S. to convey lands to Utah, it does not require the state to pay fair market value—or any value at all. The TPLA simply requires Congress to “extinguish title” to the lands and “transfer title” to the state. Utah would pay only if it were later to sell the lands. Then, Utah would pay the U.S. 95% of net proceeds and deposit

121. Id. § 63L-6-102(3)(k).
122. Id. § 63L-6-102(3)(f).
123. Id.
125. See Ken Ivory, Here is Why Utah Should Acquire its Federal Lands, DESERET NEWS (Mar. 11, 2012), http://www.deseretnews.com/article/765558273/Here-is-why-Utah-should-acquire-its-federal-lands.html?pg=all (arguing that North Dakota, which is experiencing a fossil fuel boom, is economically better off because it controls a greater portion of lands within its borders); Leonard Gilroy, Pursuing Fiscal Self Reliance in Utah, THE REASON FOUNDATION (Nov. 27, 2013), http://reason.org/news/show/utah-fiscal-self-reliance (quoting Rep. Ivory making the same argument and noting that Utah has “trillions in mineral value locked up that could be used to close that $2.6 billion gap in our education funding”).
127. In addition to challenging the Monument’s formation, Utah also sought and gained compensation for school trust lands in the monument. Tucker, supra note 11, at 4.
128. See Utah Code § 63L-6-102(3) (2012) (failing to exempt these lands). The TPLA does not demand Wilderness Areas managed by these agencies. See supra note 118 and accompanying text.
132. Id. at § 63L-6-103(2).
5% into the state’s school fund, which putatively mirrors the Utah Enabling Act. If the state instead leased the land or its minerals, it would pay nothing.

This demand for a gift of federal lands is remarkable for three reasons. First, it would shift the historic congressional discretion over public lands to the state. Second, it also exceeds the state’s own eminent domain law by essentially requesting a gift instead of offering just compensation. Third, because the TPLA does not require Utah to sell lands, the U.S. and Utah’s schools may never see any money as a result.

C. Enforcing the TPLA

Congress has until the end of 2014 to comply with the TPLA, which it is unlikely to do. Utah has authorized its attorney general to sue the United States to force federal action. Although the Utah attorney general does not have to file such a suit, Utah has appropriated four million dollars for “public lands litigation” suggesting an attempt at enforcement is likely. Utah has two enforcement options. Utah will not likely use its

133. Id. at § 63L-6-103(2), (3). The TPLA defines “net proceeds” as “the proceeds from the sale of public lands, after subtracting expenses incident to the sale of the public lands.” Id. § 63L-6-102(2).

134. See Utah Enabling Act, 28 Stat. 107 (1894); KOCHAN, supra note 6, at 7 (“The division of the proceeds will replicate the same division and school trust commitment that would exist according to the terms of the Utah Enabling Act had (and as if) the United States had sold the property itself.”).

135. See UTAH CODE § 78B-6-503.5 (2012) (“property which may be taken under this part includes property possessed by the federal government unless the property was acquired by the federal government with the consent of the Legislature and in accordance with” the Enclave Clause of the U.S. Constitution). Eminent domain requires just compensation. U.S. CONST. amend. XIV, § 1.

136. UTAH CODE § 63L-6-103(1) (2012).


138. Utah has appropriated four million dollars for “public lands litigation” suggesting an attempt at enforcement is likely. Utah has two enforcement options. Utah will not likely use its

139. The Utah House of Representatives passed a bill requiring the Attorney General to file such a suit. H.B. 91, 59th Leg., Reg. Sess. (Utah 2012). However, the Utah Senate rejected it. See H.B. 91 Substitute, Utah Enabling Act Litigation, UTAH STATE LEGISLATURE, (Mar. 8, 2012), http://le.utah.gov/~2012/hbillhtm/HB0091S01.htm (noting under “Bill Status” that the bill was sent to a House file for defeated bills).

140. See LYLE W. HILLYARD & MELVIN R. BROWN, UTAH LEG., 2012–2013 APPROPRIATIONS REPORT, 74, 84 (Utah Leg. 2012) (noting that the legislature appropriated $1 million and that the Governor appropriated $2 million); LYLE W. HILLYARD & MELVIN R. BROWN, UTAH LEG., 2013–2014 APPROPRIATIONS REPORT, 94, 209, (2013) (noting that the legislature appropriated $2.5 million to the Public Lands Policy Coordination Office and that the Governor appropriated another $1 million for public lands litigation).
eminent domain law to take federal lands, because that would require payment, while the TPLA would not. Utah will more likely ask a federal court for a declaratory judgment that the Utah Enabling Act required Congress to dispose of federal lands within the state. Of course, this remedy begs the question as to whether the TPLA itself is constitutional.

III. ANALYZING THE TPLA’S CONSTITUTIONALITY

The TPLA is almost certainly unconstitutional because its demand for federal land conflicts with congressional authority under the Property Clause to retain and manage public lands. Under the Supremacy Clause, federal law wins. Challenges of federal ownership and management of public land have failed repeatedly. The TPLA’s only distinction is the claim that by retaining public lands, Congress has broken a promise that it ostensibly made in the Utah Enabling Act to dispose of those lands. Of course, the U.S. still sells land in Utah, meaning that the TPLA’s defense should actually decry the laggadly pace of disposal. That argument would still fail because Congress has exclusive power under the Property Clause to set the pace of disposal. Nevertheless, the TPLA’s defenders actually ignore ongoing land sales to simply argue that the U.S. has retained land in violation of a promise to dispose of it. Their argument is doomed to fail.

A. The TPLA and Utah’s Constitution

The TPLA likely violates the Utah Constitution. The Utah Enabling Act required a disclaimer of any right to public lands, which the Utah Constitution in turn made. Notably, the Enabling Act required the State to make this disclaimer “irrevocable without the consent of the United States and the people of [the] State.” The Utah Constitution’s disclaimer

141. UTAH CODE § 78B-6-503.5 (2012).
142. See U.S. CONST. art. IV, §3, cl. 2; Kleppe, 426 U.S. at 543.
143. Kleppe, 426 U.S. at 543.
144. E.g., Kleppe, 426 U.S. at 539–44; Gardner, 107 F.3d at 1317–20; See also infra Pt. III(B) (discussing Property Clause precedents in greater detail).
145. E.g., KOCHAN, supra note 6, at 11–18.
146. E.g., Gibson v. Chouteau, 80 U.S. 92, 99 (1871) (“Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring [federal] property.”).
147. See e.g., H.R.J. Res. 3, 6, 59th Leg., Reg. Sess. (Utah 2012) (arguing that “FLPMA . . . unilaterally altered [Congress’s] duty in 1976 to extinguish title to all public lands within Utah’s borders by committing to a policy of retention” of public lands).
149. UTAH CONST. art. 3.
thus cannot be modified without amending the Constitution. Despite this constitutional impediment, Utah enacted the TPLA as if it were like any other law. But the TPLA violates Section 3 of the Enabling Act because it demands that Congress give Utah public lands, meaning that the TPLA has the same effect as a direct claim to lands. Consequently, the TPLA violates the Utah Constitution.

B. Arguments for the TPLA Under the U.S. Constitution

Although few published articles analyze the TPLA, the Utah House of Representatives passed a joint resolution that explains the TPLA’s basis. Additionally, three recent papers have rallied to its defense. This section describes these arguments, focusing on Professor Donald Kochan’s paper for the Federalist Society, which offered the most thorough reasoning. Professor Kochan offered a three-pillared argument based on the Utah Enabling Act’s text, U.S. history, and Supreme Court precedent.

1. Textual Basis for the TPLA Defense

The first pillar that the TPLA’s defense rests on is a reading of the Utah Enabling Act’s text. The gist of the claim is that the Enabling Act’s text
shows that both the U.S. and Utah intended the law to bind Congress to dispose of public lands in the State, which Congress has not done. To arrive at this reading, Professor Kochan first interpreted Section 3 of the Enabling Act, which required Utah to “forever disclaim all right and title to . . . public lands,” as functioning very differently from how its plain language suggests. Professor Kochan maintained that Section 3 limits this disclaimer by stating that the U.S. will retain jurisdiction over federal public lands in the state only “until the title thereto shall have been extinguished.” He maintained that the disclaimer’s purpose was to facilitate disposals by giving the U.S. clear title to lands it would later sell or grant. In other words, Professor Kochan read Section 3 to facilitate disposal and to create a duty to dispose by suggesting that U.S. jurisdiction would eventually end.

Second, Professor Kochan argued that the federal duty to dispose of public lands becomes clear when reading Section 3 in context. According to Professor Kochan, in Section 9 of the Enabling Act, Congress agreed to a duty to dispose of public lands. Section 9’s basic purpose is to support Utah schools by providing five percent of the proceeds from later sales for state schools. Professor Kochan argued that this purpose “means that the State is . . . relying upon . . . disposal.” He emphasized Section 9’s description of public lands, “which shall be sold by the United States” after Utah’s admission, arguing that “[t]his commanding language indicates that disposal was not only anticipated but demanded and expected as a condition of the agreement.” Similarly, he contended Utah may receive the benefit of the Enabling Act’s bargain “only if it can impose a duty to dispose” of public lands. The first pillar of the TPLA’s defense thus rests on an interpretation of Sections 3 and 9 of the Utah Enabling Act.

158. KOCHAN, supra note 6, at 10–18; DONNELL, supra note 7, at 1–2. The CDC paper raises this argument also, but only in passing and without any detailed analysis. CDC, supra note 13, at 4.
159. KOCHAN, supra note 6, at 10.
160. See COGGINS ET AL., supra note 9, at 15 (noting that the U.S. owns roughly 64% of Utah).
161. Utah Enabling Act, 28 Stat. 108 (1894); KOCHAN, supra note 6, at 12.
162. KOCHAN, supra note 6, at 12–13.
163. Id.
164. Id. at 13–14.
166. KOCHAN, supra note 6, at 13 (emphasis removed).
167. Utah Enabling Act, 28 Stat. 110 (1894) (emphasis removed); KOCHAN, supra note 6, at 13–14 (emphasizing “shall be sold” in bold, italic font).
168. KOCHAN, supra note 6, at 14.
169. Id. at 15 (emphasis removed).
2. Historical Basis for the TPLA Defense

The second pillar of the TPLA’s defense rests on nineteenth century U.S. history. Professor Kochan argued that Utah and the U.S. entered into the Enabling Act “against a backdrop of an ethic of disposal . . . [which] informed the expectations of the parties and is relevant in interpretation.” Particularly, Professor Kochan pointed to a congressional resolution from 1780 stating that public lands “shall be disposed of for the common benefit of the United States . . . under such regulations as” Congress may impose. Professor Kochan relied heavily on a statement that President Andrew Jackson made when pocket vetoing a bill that would have used land sale proceeds for general purposes, which, according to Professor Kochan, showed a belief that the U.S. was obligated to eventually cede all public lands to the states. These historical events form the second pillar of the TPLA’s defense.

3. Ostensible Precedential Basis for the TPLA

The third pillar of the TPLA’s defense emphasized certain Supreme Court precedents while downplaying others. The TPLA’s defense relied heavily on the Equal Footing Doctrine, as it appeared in Pollard v. Hagen. The Equal Footing Doctrine holds that new states must have the same sovereignty as the original 13. In Pollard, the Supreme Court ruled that because ownership of lands under navigable waters was part of the original states’ sovereignty, title to tidelands in Mobile Bay passed to Alabama at statehood. Although the Court has since confined Pollard to submerged lands, Pollard used broad language that suggested to

170. Id. at 16.
171. Id.
172. Id. at 17–18 (quoting President Andrew Jackson: “[i]t cannot be supposed the compacts intended that the United States should retain forever a title to lands within the States which are of no value, and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States.”).
173. 44 U.S. 212, 222 (1845).
174. Coyle v. Smith, 221 U.S. 559, 573 (1911) (“[W]hen a new State is admitted into the Union, it is so admitted with all the powers and sovereignty which pertain to the original States, and . . . such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.”).
175. Pollard, 44 U.S. at 230.
176. Arizona v. California, 373 U.S. 546, 597–98 (1963) (limiting Pollard as “involv[ing] only the shores of and lands beneath navigable waters”); Gardner, 107 F.3d at 1316 (“The Supreme Court has declined to extend the Equal Footing Doctrine to lands other than those underneath navigable waters or waters affected by the ebb and flow of the tides.”).
Professor Kochan that the U.S. may own land only to benefit new states. The TPLA’s supporters cite this language for the proposition that the U.S. cannot retain, but must dispose of public lands.

Professor Kochan also attempted to downplay the Supreme Court’s broad reading of the Property Clause, noting that the Supreme Court has never resolved whether the Property Clause allows Congress to disregard a statutory obligation to dispose of lands. He then purported to distinguish precedents and to dismiss unfavorable language as dicta. For example, he interpreted the Supreme Court’s famous statement in United States v. Gratiot that congressional power under the Property Clause is “without limitation” as “valueless” dicta, asserting that Gratiot holds narrowly that “property rights created prior to statehood could not be upset by a new state.” Similarly, Professor Kochan construed Kleppe, which resolved a conflict between state and federal wildlife laws in favor of the U.S., as “simply [holding] that while the federal government is an owner, states have a type of ‘duty of non-interference’ with federally controlled lands.” He made the same argument about Gibson v. Choteau. He also argued that several other cases held merely that states can neither authorize trespasses nor impose easements on federal land, and that the U.S. may expel trespassers.

C. Constitutional Doctrines at Issue

Professor Kochan’s view of Supreme Court precedents was deeply misguided. This section explains why by examining Property Clause precedents and the Equal Footing Doctrine. It also explains why the

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177. *Pollard*, 44 U.S. at 212 (“[T]he United States never held any municipal sovereignty, jurisdiction or right of soil in and for the new territory... except for temporary purposes”); *Kochan*, supra note 6, at 25.


182. *Id.*

183. Kleppe, 426 U.S. at 540–41; See also Conable, supra note 84, at 1276–78 (discussing Kleppe in greater detail).


185. *Id.* at 21 (arguing that “Gibson demonstrates that a state may not interfere with U.S. ownership or interfere with disposal”); See also infra Pt. III(C)(3)(c) (discussing Gibson in greater detail).

186. *Kochan*, supra note 6, at 22–23 (construing Shannon v. United States, 160 F. 870, 874 (9th Cir. 1908); Utah Power & Light Co. v. United States, 230 F. 326, 339 (8th Cir. 1915); Light v. United States, 220 U.S. 523, 536 (1911)).
Enclave Clause is irrelevant to the TPLA’s legality, despite some argument to the contrary.\footnote{One argument for the relevance of the Enclave Clause is that Utah law allows assertion of eminent domain over any federal land not obtained under that Clause. \textit{Utah Code} § 78B-6-503.5 (2012); \textit{See also} 160 Cong. Rec. S319 (daily ed. Jan. 14, 2014) (statement of Senator Mike Lee linking the Enclave Clause to putatively inequitable federal ownership of land in Western States and praising Ken Ivory’s efforts to enact the TPLA); \textit{See also} Driscoll, \textit{supra}, note 78, at 1013 (“Utah must centrally assert that the federal government’s control of the contested lands is invalid, since it has neither obtained the land through the Enclave Clause nor claimed it through the exercise of eminent domain.”).}

1. The Property Clause

The Constitution’s Property Clause empowers Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”\footnote{\textit{Kleppe}, 426 U.S. at 539 (noting that “while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that the power over the public land thus entrusted to Congress is without limitation” and citing seven cases dating back to 1840); \textit{Leshy}, \textit{supra}, note 31, at 337 (“In none of these cases was there substantial disagreement by the Court on the extent of federal power, which the Court has consistently characterized as broadly as it has ever described any constitutional power.”).} The Supreme Court has read the Property Clause broadly in an unbroken line of cases, never finding any limit to congressional power over public lands.\footnote{\textit{Kleppe}, 426 U.S. at 540 (“Congress exercises the powers both of a proprietor and of a legislature over the public domain.”); \textit{Light}, 220 U.S. at 536; \textit{Utah Power \\& Light Co.}, 243 U.S. at 405 (“[T]he inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe the conditions upon which others may obtain rights in them . . . . A different rule . . . would place the public domain of the United States completely at the mercy of state legislation.”) (internal quotations and citations omitted).} The Court has made clear that the U.S. may own and regulate federal lands\footnote{\textit{Kleppe}, 426 U.S. at 543 (“where . . . state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede.”); \textit{Gibson v. Chouteau}, 80 U.S. 92, 99 (1871) (“No state legislation can interfere with this right [to regulate under the Property Clause] or embarrass its exercise.”).} and that state laws may not conflict with federal law.\footnote{\textit{Gratiot}, 39 U.S. at 537.} This law has been settled since at least 1840.\footnote{\textit{Kochan}, \textit{supra} note 6, at 20.}

Professor Kochan’s effort to downplay the Supreme Court’s broad view of the Property Clause will prove fruitless. Even if Professor Kochan were correct to construe precedents narrowly, some of the narrow holdings he described would remain fatal to the TPLA. For example, even if \textit{Gratiot} held only that “property rights created prior to statehood could not be upset by a new state,”\footnote{\textit{Kochan}, \textit{supra} note 6, at 20.} that holding would bar Utah from demanding lands the
U.S. has owned since long before statehood. More fundamentally, Professor Kochan is unwise to dismiss as “valueless” a century of Supreme Court reasoning. In fact, the Supreme Court’s approach to the Property Clause is important: instead of narrowly upholding individual laws, the Court routinely states that the Property Clause power is “without limits.” There is no reason to believe that the Supreme Court meant anything other than what it plainly and repeatedly stated. Finally, the Court has held that stare decisis “has peculiar force and relevance” in property disputes between the U.S. and the states, partly because a great deal of commerce relies on settled law. Thus, the attempt to downplay Property Clause precedents will likely fail.

2. The Equal Footing Doctrine

Invocation of the Equal Footing Doctrine in defense of the TPLA will prove equally unavailing. The Equal Footing Doctrine’s application to property is limited to submerged lands. Apart from these lands, the Equal Footing Doctrine applies only to political rights, guaranteeing states equal sovereignty. The Supreme Court has held that property ownership is not a question of sovereignty under the Equal Footing Doctrine, nor is the fact that federal land management affects western states more than eastern states. Given this weight of authority, as well as the importance of

194. Similarly, even if Kleppe held only that states have a duty of non-interference with federal lands, as Professor Kochan argued, supra note 6, at 20, that holding would still prevent Utah from interfering with federal lands by demanding that Congress give them to the state.

195. KOCHAN, supra note 6, at 20.

196. E.g., Kleppe, 426 U.S. at 539.

197. United States v. Maine, 420 U.S. 515, 528 (1975) (“We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity by calling into question, at this date, the constitutional premise of prior decisions.”).

198. Scott v. Lattig, 227 U.S. 229, 244 (1913) (holding that an island that existed at Idaho statehood “was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws”); Arizona, 373 U.S. at 597–98.

199. United States v. Texas, 339 U.S. 707, 716 (1950) (“The ‘equal footing’ clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders . . . . The requirement of equal footing was designed not to wipe out these diversities but to create parity as respects political standing and sovereignty.”).

200. Stearns v. Minnesota, 179 U.S. 223, 245 (1900) (“[A] state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no questions of equality or status.”).

201. In re Kan. Indians, 72 U.S. 737, 757 (1866); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876) (both holding that federal laws regulating tribes were constitutional despite the fact that not all states contain tribal reservations); see also Conable, supra note 84, at 1285 (“The
precedent in property disputes, no court will uphold the TPLA under the Equal Footing Doctrine.

3. The Enclave Clause

The Constitution’s Enclave Clause is also unlikely to aid the TPLA. The Enclave Clause allows the U.S. to purchase lands from states with their consent. However, because the U.S. acquired most public lands from foreign nations, it holds very little land under the Enclave Clause. The fact that the U.S. did not acquire lands in Utah with the state’s consent has played a role in criticisms of federal lands that led to the TPLA. In fact, Utah law allows use of eminent domain over federal lands not obtained under the Enclave Clause. However, the Enclave Clause cannot support the TPLA for a very simple reason. The Enclave Clause applies to lands that states once owned, but Utah has never owned the lands at issue under the TPLA. Instead, the U.S. has owned those lands since long before Utah statehood. Thus, the Enclave Clause, like the Property Clause and the Equal Footing Doctrine, cannot support the TPLA.

D. The Compact-Based Argument for the TPLA

The TPLA’s defenders did, however, raise a superficially credible argument for its constitutionality: that Congress broke a promise in the Utah Enabling Act by failing to dispose of public lands. However, this argument must fail because it utterly relies on the false notion that the Utah Enabling Act included a promise to dispose of federal lands.
1. Interpreting Federal Grants

Courts must interpret federal grants in the federal government’s favor. The Supreme Court stated in 1919 that “nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government.” Although federal grants in statehood acts bind both states and the U.S., the Court has consistently resolved ambiguities in such grants in the federal government’s favor. This has been a “settled” interpretive rule since at least 1859. Moreover, the Court has held that “the rules which govern in the interpretation of legislative grants . . . apply as well to grants of lands to States.” Thus, any federal court interpreting the Utah Enabling Act must resolve statutory ambiguities in the federal government’s favor.

This interpretive rule means the TPLA’s defenders must show that the Utah Enabling Act unambiguously obligates Congress to dispose of public lands. If a court finds the Act ambiguous, it must resolve ambiguities in the federal government’s favor by finding that it imposes no duty to dispose of public lands. A great weakness of Professor Kochan’s reading of the Enabling Act is that he ignored this canon of construction for federal grants. However, because this canon was “settled” before Utah statehood, Utah itself likely knew that a duty to dispose must be clearly stated. In fact, Utah did negotiate for other, unambiguous land grants, suggesting it knew this rule.

211. Caldwell v. United States, 250 U.S. 14, 20 (1919) (noting also that “statutes granting privileges or relinquishing rights are to be strictly construed”).

212. Stearns, 179 U.S. at 244 (holding it “evident” that the Minnesota statehood act “made a compact between the United States and the state”); Andrus, 446 U.S. at 519 (noting that a school land grant in the Utah Enabling Act “was a ‘solemn agreement’ which in some ways may be analogized to a contract between private parties”).

213. Stearns, 179 U.S. at 250 (noting that “provisions [of statehood acts] are not to be construed narrowly or technically, but as expressing a consent on the part of the state.” to the terms proposed by Congress) (emphasis added); Dubuque & P.R. Co. v. Litchfield, 64 U.S. 66, 88 (1859) (“All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied.”).

214. Dubuque & P.R. Co., 64 U.S. at 88 (describing this canon as “a settled rule of construction”); Wis. Cent. R.R. Co. v. United States, 164 U.S. 190, 202 (1896).


216. See KOCHAN, supra note 6, at 16–17 (applying ordinary principles of contract interpretation).

217. Dubuque & P.R. Co., 64 U.S. at 88.

218. E.g., Utah Enabling Act, § 6, 28 Stat. 107, 109 (1894) (making a specific grant of school lands).
The Utah Enabling Act’s text does not clearly obligate the U.S. to dispose of public lands. In fact, the Enabling Act’s more natural reading is that Congress granted only lands clearly and expressly described. This Section first discusses the disclaimer of rights to public lands in Section 3. Second, it explains why Section 9’s dedication of five percent of later land sale proceeds to state schools did not obligate the federal government to sell lands. Third, it contrasts the putative duty to dispose of public lands to the Enabling Act’s unambiguous land grants. Fourth, it notes that the Enabling Act in several sections acknowledged the federal government’s power to retain lands. Finally, the section concludes by arguing that when read as a whole, the Utah Enabling Act does not impose on Congress any duty to dispose of public lands.

a. Section 3 of the Utah Enabling Act

Section 3 of the Enabling Act required Utah to “forever disclaim all right and title to the unappropriated public lands” within its borders, which Utah did in its Constitution. This language unambiguously disavowed any right of Utah to claim federal lands. Professor Kochan, however, maintained that Section 3 embodied an expectation that the U.S. would dispose of public lands by allowing U.S. jurisdiction only “until the title thereto shall have been extinguished.” This reading, however, fits quite poorly with the fact that Utah, in the very same section, “forever” disclaimed its right to public lands. The more natural reading is simply that the U.S. was to retain discretion over disposal of the lands. Indeed, in Stearns v. Minnesota, the Supreme Court interpreted a similar clause in Minnesota’s statehood act to mean that “the full control of the disposition of the lands of the United States should be free from state interference.” Thus, a federal court would likely read the Utah Enabling Act’s disclaimer to prohibit the state from interfering with federal lands.

219. Id. § 3.
220. Utah Const. art. 3.
221. Utah Enabling Act, § 3, 28 Stat. 108 (1894) (emphasis added); See also Kochan, supra note 6, at 12.
223. Stearns, 179 U.S. at 250 (“Whether Congress should sell or donate; what terms it should impose upon the sale or donation; what arrangements it should make for securing title to the beneficiaries—were all matters withdrawn from state interference by the terms of the enabling act and the Constitution.”).
b. Section 9 of the Utah Enabling Act

Section 9 of the Utah Enabling Act provided that if the U.S. sold public lands in Utah, it would contribute five percent of proceeds to fund State schools.\footnote{224} Professor Kochan relied on Section 9’s description of “public lands . . . which shall be sold”\footnote{225} to argue that the section embodied a duty to dispose of public lands.\footnote{226} However, the more natural reading of Section 9’s language—“which shall be sold”—is that it simply identified the lands at issue. In other words, Section 9 obligated the U.S. to pay five percent of the proceeds from land sales after statehood, but not from sales when Utah was a territory, nor from grants in the Enabling Act itself. At most, this phrase is ambiguous.\footnote{227} A court would resolve the ambiguity in favor of the U.S. by determining that Section 9 did not obligate Congress to dispose of federal lands in the state.

c. Contrast Between the Putative Duty to Dispose and Other Unambiguous Grants

The ostensible duty to dispose of public lands that the TPLA’s defenders found in Sections 3 and 9 of the Utah Enabling Act\footnote{228} stands in stark contrast to the Enabling Act’s actual grants. Where Congress intended to make a grant, it used clear terms. For example, Section 6 grants the State “sections numbered two, sixteen, thirty-two, and thirty-six in every township . . . for the support of public schools,”\footnote{229} clearly identifying both the granted lands and the grant’s purpose. Section 6 also detailed which lands Utah could choose if the U.S. had already disposed of lands it promised to grant, and Section 13 subjected state choices to the Secretary of the Interior’s approval.\footnote{230} Sections 7, 8, and 12 were also quite specific

\footnotesize{\begin{flushleft}
225. Id. § 12.
226. KOCHAN, supra note 6, at 14.
227. Although courts have often found that the word “shall” imposes an obligation, it is not always so. Recent amendments to the Federal Rules of Civil Procedure sought to eliminate “shall” utterly because of its ambiguity. See Edward H. Cooper, Restyling the Civil Rules: Clarity Without Change, 79 NOTRE DAME L. REV. 1761, 1766, 1776–79 (2004) (“Ambiguity nowhere presents a more pervasive problem than arises from ‘shall.’”); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939–40 (2d. ed. 1995). Thus, a federal court would be well within reason to find “shall” ambiguous in Section 9.
228. KOCHAN, supra note 6, at 13.
230. Id. §§ 6, 13.
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about the extent and purpose of grants. These detailed terms show that Congress knew how to make unambiguous land grants.

That the Utah Enabling Act did not expressly describe a congressional duty to dispose of public lands is telling. Examples of other, more clearly expressed grants from Congress suggest that if it had intended to oblige the U.S. to dispose of public lands, it would have made that duty similarly clear, rather than leaving it implicit in the ambiguities of Sections 3 and 9. In fact, when Congress intended a grant, it wrote that grant in its own statutory section. Congress would not likely have concealed an obligation as important as the duty to dispose of all public lands in statutory sections that have other distinct purposes. It is also unlikely that Congress would have expressly acknowledged the federal right to reserve public lands, but the next section shows it did so repeatedly.

d. The Utah Enabling Act’s Recognition of the Federal Right to Retain Public Lands

The Utah Enabling Act recognizes federal authority to retain public lands in several provisions. Both Sections 3 and 6 expressly contemplate federal reservations. Thus, the Enabling Act’s drafters knew the U.S. could indefinitely reserve land for any purpose. If Congress intended the Utah Enabling Act to oblige the U.S. to dispose of lands, it would not likely have provided for reservations. The more natural reading is that Congress was maintaining a prerogative to retain and manage public lands as it saw fit.

Section 12 is both the strongest and the most overlooked evidence that the Utah Enabling Act recognizes a federal right to retain lands. Section 12 states that “Utah shall not be entitled to any further or other

231. Section 7 granted 100 sections of land for public buildings, Section 8 specified a grant of lands for state universities, and Section 12 gave a series of grants for various purposes, including an unprecedented grant of half a million acres for water reservations for irrigation. Id. at §§ 7, 8, 12; See also GATES, supra note 19, at 314 (noting that Congress had never before given such a grant for irrigation).

232. Utah Enabling Act §§ 6, 7, 8, 12, 28 Stat. at 109–110.

233. See id. § 3 (requiring important guarantees from the new state, including a constitution “republican in form,” a ban on polygamous marriages, and—as relevant here—a permanent disclaimer of state rights to federal public lands); Id. § 9 (providing that later federal land sales would partially fund state schools).

234. Id. § 3 (prohibiting state taxation of lands “which may hereafter be . . . reserved for [federal] use”); Id. § 6 (granting the state four sections of each township, but not lands in “reservations of any character”).

235. See supra Pt. I (describing how Congress consistently preserved its power over public lands).

236. In fact, neither the TPLA nor any of its defenders discuss Section 12 at all.
grants of land for any purpose than as expressly provided in this Act.”

The TPLA obliquely follows this limitation by purporting to benefit Utah schools, which was Section 9’s purpose. But the TPLA does not actually follow Section 9’s purpose. Section 9 put public lands in federal control before sale, but the TPLA would put the lands in state control. Thus, the TPLA would give the State a massive grant of 30 million acres that neither the Utah Enabling Act, nor any other statehood act, ever envisioned. That outcome would defy Section 12’s plain meaning.

Section 12 also shows that Section 9 did not require Congress to sell lands. In fact, if Section 9 had required the U.S. to sell all federal lands in Utah, it would have been meaningless for Congress to write Section 12; if the U.S. were obligated to sell all its lands, it could not have retained land from which to give “further or other grants.” Thus, Section 12 is strong evidence that Congress made no promise in the Utah Enabling Act to sell public lands, but instead envisioned a system of federal land ownership.

e. Reading the Utah Enabling Act as a Whole

The same natural reading of the Utah Enabling Act, guarding the congressional prerogative over public lands, emerges when reading the Act in its entirety. The TPLA’s defenders correctly insist that a proper interpretation of the Enabling Act must consider its full context. However, the most natural reading of the entire Act is that it preserved the congressional prerogative over public lands rather than imposing a duty to dispose of them. The Enabling Act not only required Utah to disclaim any right to public lands, it also stated that Utah would not be entitled to any further grants and allowed the U.S. to reserve lands for any purpose. Where the Act allowed Utah to choose lands, it subjected that choice to federal approval. And where the Act gave Utah lands, it used very

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238. KOCHAN, supra note 6, at 7 (“[T]he division of the proceeds will replicate the same division and school trust commitment that would exist according to the terms of the Utah Enabling Act had (and as if) the United States had sold the property itself.”).
240. UTAH CODE § 63L-6-103(3) (2012).
241. GATES, supra note 19, at 288–313 (describing terms and grants in various statehood acts).
243. E.g., KOCHAN, supra note 6, at 12–13.
245. Id. § 12.
246. Id. §§ 3, 6.
247. Id. § 13.
specific terms. Against these many provisions guarding federal ownership of public lands, the TPLA’s defenders offer only snippets of text in Sections 3 and 9 to suggest a duty to dispose of public lands. Thus, reading the Enabling Act as a whole, the notion that it created a federal duty to dispose of public lands strains credulity.

3. The Utah Enabling Act’s Historical Context

The Utah Enabling Act’s historical context confirms that Congress intended to preserve its prerogative over public lands, not to impose a duty to dispose of them. Section I of this paper described how Congress historically guarded that prerogative. This section argues that prior statehood acts, in particular, suggest that the Enabling Act’s drafters did not intend it to obligate Congress to dispose of lands.

a. Illinois and United States v. Gratiot

In 1818, the U.S. created the State of Illinois from the Northwest Territory. The Northwest Ordinance, which regulated the Northwest Territory, disclaimed state rights to public lands. In a dispute over federal power to lease minerals in Illinois after statehood, the Supreme Court noted in United States v. Gratiot that “disposal must be left to the discretion of Congress,” and that “Illinois . . . surely cannot claim a right to the public lands within her limits.” The Supreme Court made this statement despite the Illinois Statehood Act referencing lands “which shall be sold by Congress” without a disclaimer of rights to public lands. Thus, the Court rejected the proposition that a state could claim federal lands even where an enabling act did not expressly disclaim rights to public lands. A fortiori, Utah, which did forever disclaim “all right and title to public lands,” cannot demand public lands now. The Supreme Court decided Gratiot more than 50 years before Utah’s statehood, suggesting that Utah knew well that it would not be entitled to public lands.

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248. Id. §§ 6, 7, 8, 10, 12.
249. See KOCHAN, supra note 6, at 12–13 (basing his argument on the phrase “until the title thereto shall have been extinguished” in Section 3 and the phrase “which shall be sold” in Section 9).
250. GATES, supra note 19, at 292–93.
251. COGGINS ET AL., supra note 9, at 67.
252. 39 U.S. at 538.
b. California and Congressional Intent in Disclaimers

In 1850, the United States granted California statehood with a disclaimer of rights to public lands, much like the Utah Enabling Act’s.\(^{255}\) Congress required a disclaimer after considering that the new state might try to assume ownership of public lands within its borders.\(^{256}\) That Congress required a disclaimer after considering the loss of public lands strongly suggests it intended disclaimers to retain lands in federal control.

c. Missouri and *Gibson v. Choteau*

Missouri’s history is relevant because of *Gibson v. Choteau*, which in 1871 pitted a landowner with title descending from the U.S. against an adverse possessor under Missouri law.\(^{257}\) The facts of the case were complex,\(^{258}\) but the Supreme Court’s holding was simple: Missouri adverse possession law could not apply because it would frustrate congressional power over disposal of lands.\(^{259}\) The Court held that Congress has “the absolute right” to dispose of lands as it sees fit and that “[n]o state legislation can interfere with this right.”\(^{260}\) The Court relied in part on the fact that several statehood acts, including Missouri’s, featured disclaimers of state rights to public lands.\(^{261}\) The Court decided *Gibson* more than 20 years before Utah’s statehood.\(^{262}\) Thus, Congress and Utah likely knew the Court would read Section 3’s disclaimer of public lands to place those lands beyond the control of state legislation.\(^{263}\)

\(^{255}\) See generally, GATES, supra note 19, at 301–04.

\(^{256}\) Id.

\(^{257}\) Gibson, 80 U.S. at 103.

\(^{258}\) See id. at 93–96 (describing many links in the land’s chain of title).

\(^{259}\) Id. at 104.

\(^{260}\) Id. at 99 (“With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise . . . ”).

\(^{261}\) Id. (“[T]o prevent the possibility of any attempted interference with [the absolute congressional right to dispose of lands], a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.”).

\(^{262}\) See id. at 93.

\(^{263}\) The Utah legislature was certainly aware of this case, which appeared prominently in a critical review note appended to the legislation. H.B. 148, 59th Leg., Reg. Sess. Legis. Review Note (Utah 2012).
d. Stearns v. Minnesota

In 1900, the Court again made clear its approach to disclaimers of public lands in Stearns v. Minnesota, which involved taxation of railroad lands. The U.S. granted Minnesota lands in trust for railroad construction. As trustee, Minnesota granted land to the railroad with specific terms for taxation. Later, the State wanted to change the tax system, and the railroad objected. The Court decided that Minnesota could not alter taxation terms it had set forth as a federal trustee, because that alteration would frustrate absolute congressional power over disposal of trust lands. Relying partly on a disclaimer of rights to public lands in the Minnesota Enabling Act, which it declared to be a “full reservation of power in Congress,” the Court held that “[t]hese provisions are not to be construed narrowly or technically, but as expressing a consent on the part of the state . . . that the full control of the disposition of the lands of the United States should be free from state action.” Stearns v. Minnesota suggests that a court would likewise interpret the Utah Enabling Act to place federal lands in exclusive federal control.

e. The Utah Enabling Act in Light of Prior Statehood Acts

Utah was the 45th state, which suggests that interpretation of prior statehood acts can illuminate the Utah Enabling Act’s meaning. The chief relevant similarity to prior statehood acts is Section 3’s disclaimer of rights to public lands. Many prior statehood acts contain similar disclaimers. The fact that the careful negotiation of statehood acts nearly always yielded such disclaimers shows that Congress never intended to promise disposal of public lands. The Utah Enabling Act’s disclaimer—very similar to those the Supreme Court interpreted in Gibson and Stearns—shows that Congress intended to put public lands fully in federal control.

264. 179 U.S. at 231.
265. Id.
266. Id.
267. Id.
268. Id. at 253.
269. Id. at 250.
271. GATES, supra note 19, at 317. (describing “complicated and lengthy political disputes”).
Moreover, the differences between the Utah Enabling Act and prior statehood acts suggest that Congress struck a deliberate bargain that did not include a duty to dispose of public lands. Congress gave Utah more land than it had given prior states: other states had received two sections in each township for school lands, but Utah received four.\textsuperscript{272} Further, Congress gave Utah an unprecedented grant of half a million acres for “permanent water reserves for irrigation.”\textsuperscript{273} That Utah negotiated for and received these more generous terms suggests it knew how to bargain for clear land grants. That it did not receive a clear congressional promise to dispose of public lands suggests that when drafting the Utah Enabling Act, Congress never intended to make one.

4. Text and History Together

Considering the whole of the Utah Enabling Act’s text and historical context, the most natural reading is that the Act never obligated Congress to dispose of federal lands. Quite the contrary, it followed the regular pattern of statehood acts by expressly preserving exclusive federal power over public lands. The argument that the Utah Enabling Act imposed a duty to dispose of public lands ignores fundamental rules about how courts interpret federal land grants. The TPLA’s defense resolved ambiguities to favor the State rather than the federal government. It relied on a strained reading of a few sections of the Utah Enabling Act while ignoring the plain meaning of most. No court is likely to be persuaded. The far more likely outcome is that a federal court would find that the Enabling Act never obligated Congress to dispose of federal public lands in Utah.

E. The Upshot of Unconstitutionality

In the absence of a congressional duty to dispose of public lands, the TPLA is almost certainly unconstitutional. The claim that Congress had broken a promise in the Utah Enabling Act was the only credible argument for constitutionality, but that argument is far too weak to succeed. Professor Kochan’s argument that Utah may receive the benefit of the Enabling Act’s bargain only by enforcing a federal duty to dispose of lands ignores the fact that Utah already received the benefits of that bargain. Benefits include more generous land grants than any prior state had received,\textsuperscript{274} as well as

\textsuperscript{272} Id. at 314.
\textsuperscript{273} Id.
\textsuperscript{274} See supra Pt. III(D)(3)(e).
concurrent jurisdiction over federal public lands. 275 Similarly, the argument that Utah is reliant on land sales to fund its schools ignores the fact that the state has many other options for school funding. 276 The TPLA broadly purports to dictate which lands Congress must dispose of, and when. The Property Clause, however, grants Congress primary power over federal lands, 277 and the Supremacy Clause puts the decisions Congress makes beyond state interference. 278 Thus, the TPLA is beyond Utah’s power.

IV. THE TPLA AND POLITICS

The near certainty that the TPLA is unconstitutional raises the question as to why Utah would pass it and appropriate millions of dollars to enforce it. The answer is that, like prior efforts to take over federal lands, the TPLA is more about politics than law. 279 In Utah, the TPLA woos the popular Tea Party, which criticizes the federal government generally and federal land ownership particularly. 280 Governor Gary Herbert faced a Tea Party challenger in 2012 281 and may have signed the TPLA to prevent a challenge in 2016. Ken Ivory, the TPLA’s sponsor, won his Utah House seat in 2010 promising to fight the federal government. 282 Mike Lee won his U.S. Senate seat championing eminent domain over federal lands. 283 Mr. Ivory may have set his sights on federal office as well.

Certainly, the TPLA aims to provoke federal reaction. Indeed, it demands a congressional land grant. But even Governor Herbert acknowledges that another goal is simply to provoke discussion of federal

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275. See Kleppe, 426 U.S. at 543 (“Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory.”).


277. E.g., Kleppe, 426 U.S. at 543.

278. Id.

279. See supra Pt. I(D) (describing the Sagebrush Rebellion and County Supremacy movement).


land ownership in the West. 284 This goal is much more attainable than receiving federal lands. In fact, because the TPLA will very likely fail in court, Utah’s only chance at gaining control over public lands is through Congress.

In the past, states have gained control of public lands from Congress where legal actions have failed. Five states that argued against federal control of public lands between 1828 and 1833 gained those lands by petitioning Congress, not through legal action. 285 Utah seemingly learned this lesson by 1934, when its Governor admitted to Congress that the State’s claim to public lands was “equitably true,” while “not legally true.” 286 More recent history can remind Utah that its recourse is through Congress, not the courts. In 1953, after the Supreme Court held that the U.S., rather than states, owned the continental shelf within three miles of shore, Congress granted the states that area. 287 And while the Sagebrush Rebellion failed in court, it did increase local influence over federal land use decisions. 288 The TPLA may also fail in court but achieve some of its goals in Congress.

But Congress should not bow to the TPLA’s bluster. In addition to being unconstitutional, the TPLA is also a bad idea. It would regress U.S. public lands policy to the archaic view that lands are primarily sources of revenue, leaving public lands vulnerable to the same overuse that led Congress to manage them in the first place. 289 Although the TPLA’s backers claim it would fix problems from underfunded schools to forest fires, 290 the TPLA would more likely harm both the economy and the environment. Utah is putatively pursuing public lands to raise tax revenue, 291 but the TPLA would actually eliminate revenue. The U.S. pays

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284. Loftin, supra note 5 (quoting Gov. Herbert saying the TPLA is “the first step in a long journey”).
286. Id. at 320–21 (quoting Utah Governor Dern in a 1934 congressional hearing).
289. See supra Pt. I(B)–(C) (describing how Congress responded to abuse of disposal policies through increased federal control of public lands).
290. CDC, supra note 13, at 4–5.
291. See Paul Oelerich, Switchback- Utah House Bill 148- Good Or Bad For Outdoor Recreation?, UTAH ADVENTURE JOURNAL (Sept. 5, 2012), http://utahadvjournal.com/index.php/switchback-utah-house-bill-148-good-or-bad-for-outdoor-recreation (quoting Gov. Herbert on fossil fuel riches waiting to be tapped); See also supra note 125 and accompanying text (describing Utah’s pursuit of revenue).
states a portion of revenues from many activities on federal lands and compensates states for their inability to tax public lands through payments in lieu of taxes. The whole nation subsidizes Utah’s tourism industry by paying to preserve public lands. These benefits from federal lands are likely greater than revenues Utah could raise directly. Thus, far from bolstering revenues, the TPLA would likely harm the State’s economy.

The TPLA would also harm the environment. The most likely way for Utah to raise revenue is to open public lands to extractive uses: mining, logging, and most notably fossil fuel extraction. In fact, Utah will likely have to promote extractive uses on a large scale. Managing public lands in Utah costs the U.S. hundreds of millions of dollars each year. Without the U.S. to pay the bill, raising that much money—and further revenues—will require widespread exploitation of public lands. Drilling for oil and gas under the Grand Staircase Escalante National Monument is a particularly likely outcome. By creating an incentive for the State to allow exploitation of public lands on a broad scale, the TPLA would likely damage Utah’s environment.

The TPLA also subverts critical principles of federal land management. Although federal land management is far from perfect, it is a system that the Constitution designed, and that the American conservation movement has championed for over a century. A vast amount of economic activity relies on federal control, and a shift to state control would be very

292. See Tucker, supra note 11, at 5.
293. E.g., id. at 6 (“the federal government [in 2012] set aside $55 million for fire suppression in Utah”).
294. See id. at 5–6 (noting that Utah would have difficulty raising enough money to manage the lands and that indirect benefits of federal lands, which would be lost under the TPLA, “total well over $1 billion”).
295. Land sales would not raise general state revenues, because the TPLA requires 95% of proceeds to go to the United States, while devoting the remaining 5% to state schools. UTAH CODE § 63L-6-103(2) (2012). Thus, to raise revenues, the state would have to open the land to lucrative uses, likely through leases.
297. See Oelerich, supra note 283 (quoting the executive director of the Southern Utah Wilderness Alliance as saying that the TPLA would require the state “to lease to the drillers the best of Utah’s backcountry—and a lot of it, every year”).
298. Id.
299. E.g., John M. Broder, Undervalued Coal Leases Seen as Costing Taxpayers, N. Y. TIMES, Jun. 11, 2013, at A19 (describing how the BLM “improperly appl[ied] its own rules for assessing the fair market value of minerals beneath federally owned lands, shortchanging the government and providing a bonanza for a handful of large coal companies”).
300. U.S. CONST. art. IV, §3, cl. 2.
Most importantly, giving public lands to states would ignore the stake that all U.S. citizens have in public lands. As the Supreme Court explained in 1911, the United States holds public lands “in trust for the people of the whole country.” Congress should not violate that trust by passing 30 million acres of land out of federal control, as Utah demands. Indeed, the TPLA’s demand for federal lands would disrupt the economy, degrade the environment, and disregard the Constitution. Neither the courts nor Congress should pay the TPLA any heed.

302. See e.g., Maine, 420 U.S. at 527–28.
303. Light, 220 U.S. at 537.
ROCK-KOSHKONONG LAKE DISTRICT AND THE
SURPRISING NARROWING OF WISCONSIN’S PUBLIC TRUST
DOCTRINE

By Christian Eickelberg

In 2013, in Rock-Koshkonong v. Wisconsin Department of Natural Resources, the Wisconsin Supreme Court ruled in a 4-to-3 decision that the Department of Natural Resources could not consider damage to non-navigable wetlands above the ordinary high water mark under Wisconsin’s public trust doctrine when making a water level determination for Lake Koshkonong. According to the majority, the Department of Natural Resources could consider damage to adjacent wetlands only under statutory authority because Wisconsin’s constitutionally based public trust doctrine was confined to navigable waters below the ordinary high water mark.

This paper maintains that the Rock-Koshkonong majority made a number of analytical missteps in reaching its decision. The court failed to provide sufficient justification for confining the scope of Wisconsin’s public trust doctrine to navigable waters, mischaracterizing its precedents and silently narrowing the celebrated case of Just v. Marinette County, which interpreted Wisconsin’s public trust doctrine to include wetlands adjacent to and affecting navigable waters. The paper concludes that the court’s narrowing of the scope of Wisconsin’s public trust doctrine disregarded the history and purpose of the doctrine and unnecessarily curtailed public rights in favor of private property rights in the process.
INTRODUCTION

More than forty years ago, the Wisconsin Supreme Court decided what has become a celebrated case, *Just v. Marinette County*. 1 In sweeping language, the court held that the state of Wisconsin did not initiate a taking when it enacted a regulation requiring a landowner to apply for a permit to fill privately-owned wetlands. 2 Wetlands, the court asserted, were “part of the balance of nature,” essential to sustaining Wisconsin’s lakes, rivers, and streams. 3 The public trust duty of Wisconsin, as codified in the state’s constitution, required the state to promote navigation and to reduce pollution on navigable waters. 4 Because of the essential nature of lands near navigable bodies of water, Wisconsin could regulate these wetlands even if privately-owned. 5 The court claimed that the state of Wisconsin had an affirmative duty to protect and preserve these public trust lands in their natural state. 6

The *Just* court’s reasoning, that the state does not unconstitutionally take property when it restricts a landowner from altering the natural condition of wetlands adjacent to navigable waters, has stood as the law in

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2. *Id.* at 768.
3. *Id.*
4. As discussed *infra* notes 25–41 and accompanying text, Wisconsin’s public trust doctrine is constitutionally based.
6. *Just*, 201 N.W.2d at 768.
Wisconsin. The decision is notable for its recognition of the state’s duty to preserve public trust lands because of their ecological value in addition to the traditional rights that the public has in trust lands, such as access to water, fishing, and bathing. Commentators frequently cite the decision as an example of Wisconsin’s robust history of protecting public trust resources.

Despite Wisconsin’s rich history of preserving wetlands, the Wisconsin Supreme Court recently decided a case that narrowly interprets Just and has the potential to disrupt what appeared to be settled precedent. In Rock-Koshkonong Lake District v. State Department of Natural Resources, the lake District and other property owners (the District) challenged the Wisconsin Department of Natural Resources’ (DNR) decision to not raise the water level of Lake Koshkonong. The DNR based its decision on evidence that raising the water level would have a negative environmental effect on wetlands adjacent to and affecting Lake Koshkonong. The DNR asserted that it was constitutionally required to consider the damage to the wetlands near Lake Koshkonong because these wetlands were subject to Wisconsin’s public trust doctrine (PTD).

The District appealed the DNR’s decision and, after a contested hearing, an Administrative Law Judge (ALJ) upheld the DNR’s denial of the District’s petition. The ALJ was not convinced by the District’s argument that economic damage resulting from a lower water level outweighed the potential environmental harm that would result from a
higher water level. 14 The ALJ also agreed with the DNR that the wetlands were subject to Wisconsin’s PTD. 15

The District appealed to the courts, and the circuit court and court of appeals affirmed the decision on appeal. However, a divided Supreme Court of Wisconsin reversed, deciding that non-navigable wetlands above the ordinary high water mark (OHWM) were not within the scope of Wisconsin’s PTD. 16 Consequently, the court remanded the case, instructing the DNR to equally consider all property rights potentially affected by the water level and to refrain from giving the wetlands near the lake a constitutional preference over other property uses.17

This paper analyzes the Rock-Koshkonong decision and its potential repercussions for the PTD and wetlands regulation in Wisconsin. Under Just, the DNR had a duty to promote navigation in navigable waters as well as to protect and preserve those waters for fishing, recreation, and scenic beauty. 18 This duty extended to lands adjacent or near navigable bodies of water, which included wetlands. 19 But according to the Rock-Koshkonong court, lands that are not navigable or that are above the OHWM are excluded from this rule. 20 If the PTD does not apply to these lands, the state police power still may subject them to regulation. 21 Nevertheless, the distinction is important because the state has a complete defense to private landowners’ takings claims when the state enacts regulations on public trust land pursuant to its trust authority. 22 Further, the state, as trustee of the public trust, has an affirmative duty to maintain public trust lands for the public, which it can do through regulation. 23 In contrast, under the police power, the state can potentially be liable for taking private property when

14. See id. at 813.
15. Id. at 804.
16. Id. at 820–21.
17. Id. at 825.
18. See Just, 201 N.W.2d at 768 (“The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.”) (citing Muench v. Pub. Serv. Comm’n, 53 N.W.3d 514 (Wis. 1952)).
19. Just, 201 N.W.2d at 769 (“Lands adjacent to or near navigable waters exist in a special relationship to the state. They have been held to special taxation and are subject to the state public trust powers.”).
21. Id. at 822 (citing Just, 201 N.W.2d at 765).
22. See David C. Slade, The Public Trust Doctrine in Motion: Evolution of the Doctrine 47-49 (PDTIM LLC, 2008) (noting that when a state “acts under its public trust authority it is managing its own trust assets, and thus is sheltered from ‘takings’ claims because a state cannot unconstitutionally ‘take’ what it already owns in trust.”).
regulating non-trust land, and the state could rescind current wetlands regulation because it has no affirmative duty to preserve non-trust land.  

This paper maintains that Wisconsin’s ability to maintain wetlands adjacent to navigable waters has been significantly curtailed by the Rock-Koshkonong decision. Section I of this paper briefly surveys the development of the PTD and wetlands regulation in Wisconsin. Section II discusses the facts and reasoning of Just. Section III addresses the Rock-Koshkonong decision.

Section IV examines the effects of Rock-Koshkonong and argues that the court’s analysis was defective in at least three ways: 1) the court erred in not deferring to the DNR’s interpretation of the statute at issue because it was not clearly contrary to the law; 2) once the court engaged the merits of the case, it narrowed Just and the PTD in Wisconsin without stating that it was doing so by claiming that Just was only about the police power and not the PTD; and 3) the court overlooked both the history and the spirit of the PTD by narrowing the doctrine’s scope to navigability, which discounted the effect that wetlands have on navigable waters. 25 Ultimately, in its rush to criticize the deferential standard of review for agency determinations and the perceived damage that the constitutional status of wetlands caused to private property rights, the Wisconsin Supreme Court did not carefully analyze or remain consistent with its own precedents. This paper concludes that the Rock-Koshkonong opinion did a disservice to Wisconsin’s protection of public trust resources.

I. THE PUBLIC TRUST DOCTRINE IN WISCONSIN AND THE IMPORTANCE OF ADJACENT WETLANDS

The Just and Rock-Koshkonong decisions both involved Wisconsin’s PTD and the regulatory scheme that Wisconsin had developed to maintain the trust. This section provides a brief overview of the PTD in Wisconsin and is followed by a review of the state’s wetlands regulation.

24. See SLADE, supra note 21, at 48–49 (“[w]hen a state acts under its police powers, it is regulating private property, and thus opens itself to ‘takings’ claims.”).

25. As discussed infra note 177 and accompanying text, EPA, for example, has recently released a study demonstrating the interconnectedness of wetlands to larger bodies of water such as lakes, rivers, and streams.
A. Overview of the Wisconsin Public Trust Doctrine

The PTD originated in Roman law, evolved in medieval England, and has been discussed by United States (U.S.) courts since at least the early nineteenth century. At bottom, the PTD places the government as trustee of select natural resources and ensures that the government will manage those resources for the benefit of the public. The PTD is like other types of property-trusts, in which a trustee manages the trust and its assets for the benefit of another party—in the case of the PTD, the state acts as trustee and manages the trust assets for the public, as beneficiary. The PTD is an anti-monopolistic doctrine in that it favors diffuse public rights over particular private ownership.

Wisconsin derived its PTD from the Northwest Ordinance of 1787, which proclaimed that “navigable waters leading into the Mississippi and St. Lawrence, and carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States.” In 1848, Wisconsin recognized its dominion over navigable waters in the state by incorporating the same language from the ordinance into its constitution.

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26. The Institutes of Justinian are often cited as the origination of the recognition of public rights in natural resources. J. Inst., 2.1.1–2.1.6 at 55 (P. Birks & G. McLeod trans. 1987) (“The things which are naturally everybody’s are: air, flowing water, the sea, and the sea-shore.”).

27. The Magna Carta also features public trust elements. Magna Carta, 1225, chapter 23, available at http://www.constitution.org/eng/magnacar.htm (stating that the king cannot force the people to build bridges over rivers, demonstrating that the king does not hold complete fee in waterways).

28. One of the earliest cases relying on the public trust is Arnold v. Mundy, 6 N.J.L. 1, 1821 N.J. LEXIS 2 (1821), where the Supreme Court of New Jersey decided that a riparian landowner could not prevent the public from harvesting oysters that he had planted on the bed of a navigable river. The court stated that the public had a right to navigation in that river and thus the riparian owner could not prevent public access. In reaching its decision, the court consulted older public trust authorities such as Justinian and various sources from England. Twenty years after Arnold, the Supreme Court in Martin v. Waddell’s Lessee, 41 U.S. 367 (1842) followed much of the New Jersey Supreme Court’s reasoning.


31. Id. at 3.

32. See, e.g., Geer v. State of Connecticut, 161 U.S. 519, 529 (1896) overruled on other grounds by Hughes v. Oklahoma, 441 U.S. 322 (1979) (“...this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”).


34. The Wisconsin Constitution provides that the state:
subsequently codified in statutes, which delegated trust management duties largely to the Wisconsin DNR.\textsuperscript{35} The statutory and constitutional provisions provide the basis for Wisconsin’s administrative and judicial enforcement of the PTD.

Under the PTD, the state holds title to the beds of lakes, ponds, and rivers of navigable waters.\textsuperscript{36} The scope of the trust originally existed to protect commercial navigation,\textsuperscript{37} but Wisconsin courts long ago expanded the trust to protect the public’s rights for recreational purposes such as “boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty.”\textsuperscript{38} The Wisconsin Supreme Court first recognized the PTD’s presence in the Wisconsin Constitution in 1924, asserting that “by the organic law” of the Northwest Ordinance,\textsuperscript{39} the court was compelled to not diminish or abrogate the trust.\textsuperscript{40} The Wisconsin courts’ role in interpreting and expanding the trust has been the subject of commentators for years; indeed, as Professor Sax stated over forty years ago, the “Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state.”\textsuperscript{41} For most of Wisconsin’s history, the trend of the PTD in Wisconsin has been “to extend and protect the rights of the public” to navigable waters.\textsuperscript{42}

\textsuperscript{35} See \textit{WIS. STAT. ANN. § 23.11 (West 2009) (the DNR “shall have and take the general care, protection and supervision of all . . . lands owned by the state or in which it has any interests.”).}

\textsuperscript{36} \textit{R.W. Docks & Slips v. State}, 628 N.W.2d 781, 787 (Wis. 2001).

\textsuperscript{37} Although Wisconsin used to employ the “saw log” test to determine navigability, the test has been replaced by the standard of “navigable in fact for any purpose, which means that a body of water is navigable if it is capable of floating a boat, skiff, or canoe. See \textit{Whisler v. Wilkinson}, 22 Wis. 572, 574 (1868) (discussing Wisconsin’s old “saw log” test, which meant that a body of water was navigable if a log could float down it); \textit{Muench v. Pub. Serv. Comm’n}, 53 N.W.2d 514, 519 (Wis. 1952) (discussing Wisconsin’s current test for navigation).

\textsuperscript{38} \textit{R.W. Docks & Slips}, 628 N.W.2d at 788.

\textsuperscript{39} \textit{See supra notes 33–34 and accompanying text (explaining that the PTD language from the Northwest Ordinance was incorporated into Wisconsin’s constitution).}

\textsuperscript{40} \textit{In re Crawford Cnty. Levee & Drainage Dist. No. 1}, 196 N.W. 874, 876 (Wis. 1924).


\textsuperscript{42} \textit{Lake Beulah Mgmt. Dist. v. Dept’ of Natural Res.}, 799 N.W.2d 73, 83–84 (Wis. 2011) (citing \textit{Muench v. Pub. Serv. Comm’n}, 53 N.W.2d 514, 516–21 (Wis. 1952)).
B. Ecological Importance of Wetlands

For much of U.S. history, the public considered wetlands nuisances that served as impediments to productive land use. In land-grant programs like the Swamp Lands Act of 1850, the federal government actively encouraged draining or filling of wetlands. Moreover, unlike other types of aquatic environments, wetlands are capable of being privately owned, and often serve as appealing sites for development. Between 1780 and 1980, studies estimate that over 50% of wetlands in the U.S. were filled, drained, or flooded. In the latter part of the twentieth century, however, environmentalists and scientists began to appreciate that wetlands constituted a productive and invaluable public resource. Studies have shown that wetlands improve water quality and groundwater recharge, provide flood protection, and are centers of immense biodiversity. It is with this emerging awareness about the importance of wetlands that Wisconsin Supreme Court decided the Just case.

II. JUST V. MARINETTE COUNTY

In 1967, pursuant to shoreland regulations promulgated by the Wisconsin legislature, Marinette County implemented a shoreline-zoning ordinance. The ordinance’s purpose was to “protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands.” To achieve this purpose, the ordinance sought to restrict development of areas near

44. Id.
47. See id. at 2.
49. Just v. Marinette Cnty., 201 N.W.2d 761, 764. The Marinette county shoreland zoning ordinance followed a model ordinance published by the DNR and was designed to meet standards and criteria for shoreland regulation required by the legislature under Wisconsin Statute section 144.26, which stated that the “purpose of the regulation program is . . . to aid in the fulfillment of the state’s role as a trustee of its navigable waters and to promote public health, safety, convenience and general welfare.” Just, 201 N.W.2d at 764–65 (internal citations omitted).
50. See id. at 765 n. 2. The ordinance defined shorelands as lands “1,000 feet from a lake, pond, or flowage; 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater.” Wis. STAT. § 59.971(1).
navigable waters, providing only for certain “permitted” or “conditional” uses of shorelands. Accordingly, the ordinance required an individual whose land fell within the zone to apply for a permit to “fill, drain, or dredge” wetland areas.

The Justs’ land was located within 1,000 feet of the normal high-water elevation of Lake Noquebay, a navigable body of water, and the U.S. Geographical Survey Map designated the land as swamp or marshland. As a result, the Justs’ land fell within the zone covered by the ordinance that required them to apply for a permit to fill, drain, or dredge wetlands. Ignoring the permit requirement, the Justs hauled sand onto their property and filled more than 500 square feet of wetlands.

The county sought an injunction to restrain the Justs from placing fill without a permit, and also sought a fine for the fill that the Justs had already placed. In response, the Justs claimed that the conservancy and wetlands filling restriction was unconstitutional because the laws amounted to a constructive taking of their land without compensation. The trial court upheld the ordinance, concluded the Justs had violated it, and fined them $100.

The Justs appealed the trial court’s ruling, and the court of appeals affirmed. The Justs petitioned and the Wisconsin Supreme Court granted certiorari, where the Justs again argued that the permit requirement was unconstitutional. Marinette County and the state of Wisconsin both argued that the zoning ordinance was a permissible exercise of the state’s police power. The Wisconsin Supreme Court, however, framed the issue in “more meaningful” terms: according to the court, the case represented the “conflict between the public interest in stopping the despoliation of natural resources, which our citizens until recently have taken as inevitable and for

51. Just, 201 N.W.2d at 765–66 (explaining that the ordinance required a conditional-use permit for any filling of “any area which is within three hundred feet horizontal distance of a navigable water and which has surface drainage toward the water.”) (quoting Marinette County Shoreland Zoning Ordinance § 5.42(2)(d) (Sept. 19, 1967)).

52. Id. The ordinance defined “wetlands” as areas “where ground water is at or near the surface much of the year or where any segment of plant cover is deemed an aquatic according to N. C. Fassett's ‘Manual of Aquatic Plants.’”

53. Id. at 766. Because the U.S. Geological Survey designated the Justs’ land as swamps or marshes and located within 1,000 feet of the normal high-water mark of the lake, their land was included in the conservancy District and classified as “wetlands” under the ordinance.

54. Id.

55. Id.

56. Id. The ordinance imposed a fine of $10 to $200 for each violation of the ordinance.

57. Id. at 767.

58. Id. at 764.

59. Id.

60. Id. at 767.
The court acknowledged, may be accomplished through the exercise of the police power, unless the deprivation to the property owner is too great and amounts to a confiscation without compensation. The court then noted that lakes and rivers in their natural state are unpolluted, and that Wisconsin’s PTD imposed a duty to eradicate existing pollution and prevent future pollution in its navigable waters. The court stated, “what makes this case different from other condemnation or police power zoning cases is the interrelationship of the wetlands . . . to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty.” While the people of Wisconsin had for years viewed wetlands as undesirable, the people were coming to a greater appreciation for the essential nature of wetlands to the purity of water in Wisconsin’s lakes and streams.

The court clarified that this was a case in which an owner’s use caused harm to the general public, not a case in which the state was depriving an owner from using land for natural and indigenous uses. Affirming the lower courts, the court ultimately upheld the ordinance for two reasons. First, Wisconsin had previously held that regulations to prevent pollution and to protect waters from degradation were valid police-power enactments. Second, Wisconsin’s active public trust duty required the state to promote navigation and to protect and preserve navigable waters for fishing, recreation, and scenic beauty. Further, the court made clear that this was not:

[A] case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm in public rights. Lands adjacent to or near navigable waters exist in a special

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61.  **Id.** at 767.
62.  **Id.**
63.  **Id.** at 768 (“[t]he state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters.”).
64.  **Id.**
65.  **Id.**
66.  **Id.** at 768.
67.  *See id.* at 768. (“Wisconsin has long held that laws and regulations to prevent pollution and to protect the waters of this state from degradation are valid police-power enactments.”).
68.  **Id.** (“[t]he active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but to protect and preserve those waters for fishing, recreation, and scenic beauty.”).
relationship to the state. They have been held to special taxation and are subject to the state public trust powers.\textsuperscript{69} Because of this special trust relationship, and the fact that the wetlands were not isolated and were adjacent to the navigable body of water, the Marinette County ordinance was neither confiscatory nor unreasonable.\textsuperscript{70} Moreover, the ordinance did not deprive the Justs of the natural uses of their land, only speculative economic ones.\textsuperscript{71} The Justs had a wetland before the ordinance; they still had a wetland after the ordinance; thus, there was no taking. The court declared that the zoning ordinance regulating wetlands within 1,000 feet of Lake Noquebay was constitutional and did not deprive the Justs of any natural use of their land.\textsuperscript{72}

The court’s reasoning in upholding the regulation followed from the fact that the state, as trustee of the public trust, was constitutionally required to maintain Wisconsin’s navigable waters.\textsuperscript{73} Because the Justs’ wetlands lay within 1,000 feet of Lake Noquebay and activities such as filling wetlands affected the cleanliness of the wetlands, it followed that the cleanliness of Lake Noquebay was affected. Thus, it was not a far step for the court to agree with the DNR that the ordinance’s requirement to apply for a permit to fill wetlands adjacent to Lake Noquebay effectuated the public benefit of reduction in pollution in the lake. In effect, the Just court ruled that the public’s right to reduced levels of pollution in navigable waters outweighed the Justs’ right to fill their wetlands.

In the years following the decision, courts and commentators celebrated Just for its extension of the public trust to lands adjacent to navigable waters and for the decision’s broad language supporting the protection of the environment, tempering unfettered private ownership, and development of land. While some faulted the decision for its broad language and for glossing over specific factual details,\textsuperscript{74} the majority of commentators celebrated the decision.\textsuperscript{75} Wisconsin courts also cited Just with approval in

\begin{itemize}
  \item \textsuperscript{69} Id. at 769 (internal citation omitted).
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id. at 771.
  \item \textsuperscript{72} Id. at 771–72. The Justs argued that the ordinance deprived them of the ability to develop their land, but the court held that the issue was whether the ordinance denied them the “natural use” of their land. The court ultimately concluded the ordinance did not deprive the Justs of the natural use of their land.
  \item \textsuperscript{73} Id. at 768.
  \item \textsuperscript{74} See David P. Bryden, \textit{A Phantom Doctrine: The Origins and Effects of Just v. Marinette County}, 1978 AM. B. FOUND. RES. J. 397, 407–08 (1978) (asserting that the Just decision was “fuzzy” about certain details of the case such as the scope of the conservancy zoning District or how often property values have been destroyed by conservancy Districts).
  \item \textsuperscript{75} See RICHARD E. WARNER, KATHLEEN M. HENDRIX, \textit{CALIFORNIA RIPARIAN SYSTEMS: ECOLOGY, CONSERVATION, AND PRODUCTIVE MANAGEMENT} 271 (University of California Press, 1984)
\end{itemize}
Wisconsin public trust cases.\textsuperscript{76} It is no understatement to say that \emph{Just} left an indelible mark on the public trust and environmental protection in Wisconsin.

**III. ROCK-KOSHKONONG LAKE DISTRICT V. DEPARTMENT OF NATURAL RESOURCES**

Lake Koshkonong is the sixth largest inland lake in Wisconsin, featuring 27 miles of shoreline, ten miles of which have been developed for residential and commercial use.\textsuperscript{77} The lake also contains about 12 miles of wetland shoreline.\textsuperscript{78} Water levels on Lake Koshkonong are controlled by the Indianford Dam, which was originally built in 1853, and reconstructed in 1917.\textsuperscript{79} Between 1932 and 2002, water levels on the lake rose due to faulty operation and maintenance of the dam.\textsuperscript{80} Because the dam did not operate correctly, it could not effectively regulate water levels on Lake Koshkonong until 2002 when the dam was rehabilitated.\textsuperscript{81} Once the dam was rehabilitated, the DNR implemented a water level order it had issued in 1991 which set the average depth for the lake at five to seven feet.\textsuperscript{82}

In April 2003, the Rock-Koshkonong Lake District (the District) petitioned the DNR to amend the 1991 water level order.\textsuperscript{83} The District maintained that the DNR’s proposed water level was “not consistent with the public interest because lower water levels on [the Lake] led to severe

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  \item \textsuperscript{76} See Patrick O. Dunphy, \textit{The Public Trust Doctrine}, 59 MARQ. L. REV. 787, 807–08 (1976) (arguing that, even though \emph{Just} has not been applied beyond public trust situations, \emph{Just} was still an important decision for its recognition of the interrelationship of the land and water and for extending the trust to Wisconsin shorelands); See also M & I Marshall & Ilsley Bank v. Town of Somers, 414 N.W.2d 824, 830 (1987) (noting that \emph{Just} discussed Wisconsin’s public trust duties, but also that \emph{Just} was not limited to only public trust cases); \textit{Zealy}, 548 N.W.2d at 534 (agreeing with \emph{Just}).
  \item \textsuperscript{77} Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res., 833 N.W.2d 800, 805 (Wis. 2013).
  \item \textsuperscript{78} \textit{Id.} at 806.
  \item \textsuperscript{79} \textit{Id.}
  \item \textsuperscript{80} \textit{Id.} at 806–07; See also Appellate Brief of Respondent at 7, \textit{Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res.}, 833 N.W.2d 800 (2013) (No. 08-AP-1523), 2012 WL 1570525 at *19 (discussing the background of the Indianford Dam).
  \item \textsuperscript{81} \textit{Id.} at 806.
  \item \textsuperscript{82} \textit{Id.} at 805.
  \item \textsuperscript{83} \textit{Id.} at 807 n. 11. (noting that Rock County established the District to “undertake a program of . . . protection and rehabilitation for Lake Koshkonong.”).
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restrictions on recreational boating” and would force landowners to pay to extend their piers. 84 In response, the DNR conducted an environmental assessment of the District’s proposed water level; based on this assessment, the DNR denied the District’s petition. 85 The District requested a hearing on the DNR’s denial of the petition, and the DNR granted the request and initiated a hearing before an ALJ. 86

At a contested hearing, the DNR submitted evidence demonstrating the adverse effects of increased water levels on adjacent wetlands and water quality of Lake Koshkonong. 87 In addition to erosion, loss of wildlife and fish habitat, and reduced recreational activities for hunters and fishermen, the DNR also claimed that losing the wetlands around the lake would exacerbate the continued loss of other, more removed wetlands. 88 The District countered with evidence showing that the low water levels negatively affected navigation, water quality, and fish and wildlife habitat. 89 The District also provided extensive evidence on the predicted economic effect from lower lake water levels, including lower property values and reduced commercial activity related to the lake. 90

Affirming the DNR’s order rejecting the District’s petition and upholding the DNR’s water level proposal, the ALJ issued 120 findings of fact. 91 Factors considered by the ALJ included the lake’s historical water levels, the wetlands near the lake, water quality of the lake, riparian access, and navigability of the lake. 92 The ALJ determined that the evidence regarding damage to the environment and water quality of the lake itself were valid reasons to reject the proposal to raise water levels and outweighed enhancements to navigation and access. 93 Noting that the DNR had objected to admitted evidence relating to the effect of water levels on real estate values, business income, and public income, the ALJ also struck

84.  Rock-Koshkonong, 833 N.W.2d at 807–08 (internal quotations omitted).
85.  Id. at 808.
86.  Id. at 808 n. 13 (identifying parties that included the District’s petition to include Rock River-Koshkonong Association and the Lake Koshkonong Recreation Association).
87.  Id. at 808–09.
88.  See id. (explaining that the DNR also provided evidence demonstrating that the high water level from before the dam’s rehabilitation in 2002 damaged numerous wetlands around Lake Koshkonong because the wetlands had been flooded).
89.  Id. at 809.
90.  Id. at 809–10 (including predictions that reduced water levels from the pre-2002 level would cause a “decline of $9 million in gross sales” supporting “an estimated 150 total jobs” for the water-tourism industry on the lake, and a belief that a “real” or “perceived” drop in water level would lead to a softening of demand for lake property and, in consequence, a reduction in property value around the lake).
91.  Id. at 810.
92.  Id. at 810–12.
93.  Id. at 812.
the economic testimony as mere “secondary or indirect economic impact” that did not bear on the statutory standard. The ALJ acknowledged that the DNR was required by statute to balance conflicting interests when making a water level determination, and that the DNR had done so in the situation. The ALJ concluded that “the DNR’s decision . . . is necessary to protect the public rights in navigable waters and reasonably balances and accommodates public and private rights, the promotion of safety, and the protection of life, health, and property.” The DNR adopted the ALJ’s decision as its own, as prescribed by Wisconsin statute.

The District appealed the decision, and both the circuit court and court of appeals affirmed the ALJ’s ruling. The District appealed to the Wisconsin Supreme Court, alleging that the DNR had exceeded its scope of authority under Wisconsin statutes by focusing on wetlands above the OHWM. According to the District, the DNR misinterpreted its statutory directive to “protect . . . property” and improperly objected to relevant evidence of economic damage.

A. The Majority Decision

The Wisconsin Supreme Court granted certiorari, and Justice David Prosser wrote for a bare four-member majority of the court. As a threshold matter, the court stated it would set aside or modify the agency action only

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94. Id. (considering riparian access—and not certain secondary economic impacts—as “comprehended at least one component of these asserted secondary impacts”).

95. Id.

96. Id. at 813.

97. Id. (noting that the DNR adopted the ALJ’s decision per Wis. Stat. § 227.46(3)(a) (2003–04) and Wis. Admin. Code § NR 2.155(1) (2004)).

98. Id. Addressing the District’s contention that the DNR improperly considered wetlands, the court of appeals articulated why it believed that Just disposed of the District’s appeal. The court stated:

[the Just] court’s discussion of lands adjacent to or near navigable waters did not distinguish between those lying below the ordinary high water mark, and those lying above this mark. While it is the existence of navigable water that triggers the DNR’s jurisdiction under Wis. Stat. § 31.02(1) and the [PTD] ... Just establishes that the DNR is not restricted to consideration of impacts below the [OHWM] when evaluating public rights in navigable waters.

Rock-Koshkonong Lake Dist. v. Dep’t of Natural Res., 803 N.W.2d 853, 863 (Wis. Ct. App. 2009) review granted, 810 N.W.2d 221 (Wis. 2012) and rev’d, 833 N.W.2d 800 (2013) (citing State v. Trudeau, 408 N.W.2d 337 (Wis. 1987) for the assertion that the DNR’s jurisdiction is triggered when a navigable body of water is at issue).

99. See Wis. Stat. § 31.02(1) (2014) (“The [DNR], in the interest of public rights in navigable waters or to promote safety and protect life, health, and property may regulate and control the level and flow of water in all navigable waters. . . .”) (emphasis added).

100. Rock-Koshkonong, 833 N.W.2d at 814.
if the agency had “erroneously interpreted a provision of law.” Next, the court determined the level of deference to give to the DNR’s interpretation, deciding that the DNR’s decision was entitled to no deference because the DNR’s decision was an erroneous interpretation of law that went beyond the scope of the Wisconsin Constitution and decisions of the Wisconsin Supreme Court. Further, the DNR had improperly disregarded evidence regarding economic damage to property, which also worked against the court giving deference to the agency.

The court then addressed the District’s argument that the DNR improperly applied the PTD to the wetlands at issue. The court framed the issue as one of overreach by the DNR—according to the majority, the DNR’s application of the PTD to wetlands was an attempt to extend public trust jurisdiction beyond navigable waters. The court asserted that the Wisconsin public trust applied only to navigable waters below the OHWM because the state’s title under the PTD only included the beds of navigable waters, and that the PTD had always been confined to a limited geographic area. According to the court, the DNR’s position sought to extend the DNR’s public trust jurisdiction beyond navigable waters to non-navigable waters and land. This extension to non-navigable land would eliminate the navigability element of the PTD, which is one of the prerequisites for the DNR’s constitutional basis for regulating and controlling water and land. The DNR’s application of the PTD to non-navigable wetlands would abolish the narrow rationale for the PTD and

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101. Id. (citing Wis. Stat. § 227.57(5) for the statutory standard of review when determining agency interpretations of law).
102. Id. at 814–15 (citing Racine Harley-Davidson, Inc. v. Wis. Div. of Hearings & Appeals, 717 N.W.2d 184, 190 (Wis. 2006)) (noting that the DNR had given new interpretation to Wis. Const. Art. IX, §1, the article of Wisconsin’s constitution incorporating the PTD).
103. Id. at 816 (citation omitted).
104. Id. (explaining the District’s contention that DNR “exceeded its authority when it considered impacts on private wetlands adjacent to Lake Koshkonong” that were above the OHWM).
105. Id. at 818.
106. Id. at 819 (citation omitted); See State v. McDonald Lumber Co., 118 N.W.2d 152, 153 (Wis. 1962) (noting that Wisconsin owns the lakebeds of navigable waters; “[T]he state’s title to the lake bed runs to a line which is called the ‘ordinary high-water mark.’”); See Wisconsin’s Envtl. Decade, Inc. v. Dep’t of Natural Res., 271 N.W.2d 69, 72 (Wis. 1978) (“Title to the navigable waters of the state and to the beds of navigable waters is vested and continues in the state of Wisconsin in trust for the use of the public.”); See State v. Trudeau, 408 N.W.2d 337, 342 (stating that “public ownership of the bed applies whether the water is deep or shallow” so long as the bed is below OHWM).
107. Id. at 821–22 (“Lake Superior is navigable and if the non-navigable site is a part of the lake, then the land below the OHWM is held in trust for the public.”) (citing Trudeau, 408 N.W.2d at 343) (“[T]he OHWM marks the boundary between lake bed titled in the state, which is subject to state regulation in the public interest, and property titled in private owners.”) (citing Houslet v. Dep’t of Natural Res., 329 N.W.2d 219, 223 (Wis. Ct. App. 1982).
108 Id. at 819.
109 Id. at 818.
have significant ramifications for private property owners.\textsuperscript{110} The court clarified that the PTD in Wisconsin gives the public rights in navigable waters, and that it is the state’s duty to promote navigation and to preserve those waters for fishing, hunting, recreation, and scenic beauty.\textsuperscript{111} However, the scope of these public rights applied only to navigable waters.\textsuperscript{112} Thus, the DNR could not cite the PTD as a reason for considering non-navigable wetlands above the OHWM in its water-level determination.\textsuperscript{113} The court indicated that the DNR could still protect water resources using its police powers.\textsuperscript{114} The majority also claimed that \textit{Just v. Marinette County} was a textbook example of the DNR acting under its police powers,\textsuperscript{115} noting that \textit{Just} emphasized the DNR’s police power to enact zoning ordinances and regulations to prevent pollution.\textsuperscript{116} Further, the court explained that the ordinance in \textit{Just} dealt with lands within 1,000 feet of the normal high-water elevation, and that “it should be obvious…that the state does not have constitutional public trust jurisdiction to regulate land a distance of more than three football fields away from a navigable lake or pond.”\textsuperscript{117} The court concluded its analysis by stating that the DNR must consider “all property rights” and not afford non-navigable land or water above the OHWM a constitutional preference over other property uses.\textsuperscript{118} The court ultimately remanded the case to the circuit court for further proceedings consistent with the opinion.\textsuperscript{119}

\textsuperscript{110.} \textit{Id.} at 819 (failing to elaborate on possible ramifications, likely referring to the fact that PTD lands are insulated from takings claims and noting that the state can invoke the PTD as a shield to private takings claims; moreover, even if a landowner experiences a complete deprivation of the economic use of his land, he is precluded from a taking claim if his land is subject to the PTD because the PTD is a “background principle” of state law). See \textit{Lucas v. S.C. Coastal Council}, 505 U.S. 1003, 1029 (1992) (asserting that any limitation on private property so severe so as to effectuate an economic wipeout “cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”); See also \textit{McQueen v. S.C. Coastal Council}, 580 S.E.2d 116, 119–20 (S.C. 2003) (holding that the landowner’s property rights did not include the right to backfill tidelands because of South Carolina’s public trust, and rejecting the landowner’s takings claim because the public trust doctrine was a background principle of state law).

\textsuperscript{111.} \textit{Id.} at 821 (citation omitted).

\textsuperscript{112.} \textit{Id.} at 821 n. 32 (citation omitted).

\textsuperscript{113.} \textit{Id.} at 821–22.

\textsuperscript{114.} \textit{Id.} at 822.

\textsuperscript{115.} See \textit{id.} (stating that “[t]he \textit{Just} case is a textbook example of using the state’s police power to support legislation to protect navigable waters and the public rights therein . . .”).

\textsuperscript{116.} See \textit{id.} at 823–24.

\textsuperscript{117.} \textit{Id.} at 824.

\textsuperscript{118.} \textit{Id.} at 825.

\textsuperscript{119.} \textit{Id.} at 835.
The *Rock-Koshkonong* majority opinion prompted a vigorous dissent from Justice N. Patrick Crooks, who admonished the majority for undermining the court’s precedent, re-characterizing its holdings, and rewriting history. The dissent took issue with majority’s willingness to not defer to the DNR’s determination, maintaining that all of the parties in the dispute agreed that the DNR could consider private wetlands as “property” affected by a water level change, and that the wetlands were “property.” In Justice Crooks’ opinion, the court should have simply affirmed the ALJ’s decision.

According to the dissent, the majority’s conclusion stripped “the state, trustee of the [PTD], of the ability to regulate anything” that is not below the OHWM pursuant to the PTD. Even though long-settled PTD precedent supported the DNR’s consideration of the effect of higher water levels on wetlands adjacent to Lake Koshkonong, the majority disrupted this precedent by reinterpreting *Just* as only a police-power decision. The dissent noted that the majority only cited language from *Just* concerning the police power, ignoring the public trust language in the decision.

Moreover, the dissent alleged that the majority misunderstood the DNR’s argument as a claim of state ownership of private wetlands, when actually the DNR’s argument was that the PTD required the DNR to consider the effect on wetlands. The dissent also took issue with the majority’s expansion of the evidence that the DNR could exclude in its determinations. Id. at 846.
IV. ANALYZING THE ROCK-KOSHKONONG DECISION

The Rock-Koshkonong decision reflects a disagreement over the purpose and the scope of the PTD in Wisconsin. The majority ultimately carried the day with its conclusion that non-navigable land above the OHWM is not subject to the PTD. But the majority’s analysis contained a number of missteps, particularly in not deferring to the DNR’s analysis, in being opaque in its analysis of Just and other precedents, and in exhibiting little recognition for the interrelatedness of ecosystems adjacent to navigable waters.

A. Failing to Defer to the Agency’s Determination

At the outset of its analysis, the Rock-Koshkonong majority determined that it could perform a de novo review of the legal issues before it without affording any deference to the DNR’s interpretation of the Wisconsin Constitution and statutes. The majority determined that the DNR’s consideration of the damage to wetlands in light of the PTD and its rejection of evidence of economic damage to certain property were new interpretations of both the Wisconsin Constitution and Wisconsin statutes. Despite the majority’s claim, the court’s lack of deference to the DNR determination was novel and inconsistent with its precedents.

For over 100 years, Wisconsin courts have been called on to determine whether the state has acted in conformity with its “special obligation to maintain the public trust.” When confronted by riparian landowners challenging a DNR action protecting the public trust, Wisconsin courts have deferred to the DNR’s policy and scientific judgment. These types of cases are in contrast to those in which the DNR has decided to not exert its authority, or where public land is being conveyed into private hands because the danger of private interests exerting undue influence on the

126. Id. at 815 (footnote omitted).
127. Id.
129. Scanlan, supra note 128, at 147. See also, Hixon v. Pub. Serv. Comm’n, 146 N.W.2d 577, 578, 589 (Wis. 1966) (deferring to the agency’s findings of fact in protecting the public trust in a navigable river by denying a permit to maintain a riparian landowner’s breakwall).
administration of the trust looms large. In these situations, the court has employed a “hard look” review because the DNR, as trustee, has an obligation to protect the public trust. But Wisconsin courts have been deferential to a trustee’s decision when the state weighs all relevant policy considerations previously outlined by the court.

In the past, the Wisconsin Supreme Court had declared that the DNR was entitled to great deference when it applied its specialized expertise and technical knowledge in balancing public and private rights in navigable waters. For example, in Hilton v. Department of Natural Resources, a homeowners association challenged the DNR’s decision to not allow the association to have more than 11 boat slips on a pier. Because the pier was on a navigable body of water, the PTD required the DNR to determine “reasonable use” of the pier while also protecting public access rights. The DNR considered, among other factors, the environmental effects, natural scenic beauty, history of use, and safety in determining that having more than 11 slips was not a reasonable use. After a contested hearing and appeal by the association, the circuit court adjusted the number of slips to 17; however, the DNR appealed, and the court of appeals reinstated the 11-slip ruling. The association again appealed, and the Wisconsin Supreme Court affirmed, deferring to the DNR’s decision and holding that its decision was reasonable, supported by substantial evidence in the record, and consistent with applicable law.

Rock-Koshkonong featured a similar fact pattern of private property interests challenging the DNR’s consideration and protection of public trust

130. Scanlan, supra note 128, at 147. Professor Sax identified this principle in his discussion of the U.S. Supreme Court’s skepticism about the Illinois legislature’s conveyance of public trust property; See Sax, supra note 40, at 490 (discussing Ill. Cent. R.R. Co. v. Ill., 146 U.S. 387 (1892)) [hereinafter Ill. Central].
132. Dawson, supra note 126, at 7. Policy considerations vary, See, e.g., Just, 201 N.W.2d at 768-69 (the preservation of natural beauty); Hixon, 146 N.W.2d at 583 (securing the greatest public use); Sterlingworth Condo. Ass’n, Inc. v. Dep’t of Natural Res., 556 N.W.2d 791, 796 (Wis. Ct. App. 1996) (accommodating the convenience of riparian owners).
133. Hilton v. Dep’t of Natural Res., 717 N.W.2d 166, 169 (Wis. 2006).
134. Id. at 172–74 (“Reasonable use” is the common law standard for water rights of riparian owners, determined by “the extent and capacity of the lake, the uses to which it has been put, and the rights that other riparian owners on the [lake] also have.”); Id. at 177 (citing Sterlingworth, 556 N.W.2d at 797) (internal quotations omitted).
135. Id. at 174.
136. Id. at 171.
137. Id. at 174 (indeed, the Hilton court even went so far as to say that “there [was] ample evidence in the record that the ALJ considered the relevant factors in this case and weighed them appropriately in light of the public trust doctrine”).
rights. Based on Hilton and other cases in which Wisconsin courts deferred to the DNR’s scientific expertise and its interpretation of the public’s trust, prior to Rock-Koshkonong, the DNR would have enjoyed considerable judicial deference. But the Rock-Koshkonong majority silently broke from its precedents and gave no deference to the DNR’s scientific expertise. The majority worked around its prior case law by characterizing the DNR’s consideration of wetlands near Lake Koshkonong as an attempt to extend PTD jurisdiction and create a “new interpretation” of the Wisconsin Constitution. Therefore, the court claimed it owed no deference to the DNR’s “novel” interpretation. But as discussed in the next section of this paper, the DNR’s action was hardly novel or inconsistent with Just, a case in which the court had 40 years earlier held that the PTD extended to wetlands adjacent to a navigable body of water.

B. Misinterpreting and Narrowing Just v. Marinette County

After the Rock-Koshkonong court refused to afford deference to the DNR, the court turned to the issue of whether the wetlands near the lake were within the scope of the PTD. The Rock-Koshkonong majority asserted that the statute relied upon by the DNR had been an exercise of Wisconsin’s police power, and that the Just case concerned the exercise of this power to regulate wetlands. But this interpretation did not square with the once-settled understanding of Just.

138. See, e.g., Sterlingworth, 556 N.W.2d at 798–99 (upholding DNR’s denial of requested number of boat slips because the record demonstrated that the action was reasonable, had a rational basis, and was not the result of an unconsidered, willful, and irrational choice of conduct); Hixon, 146 N.W.2d at 588 (stating that the court must have compelling reasons for reversal where DNR’s conclusion is based on a highly discretionary determination that rests on its finding as to what is necessary and convenient in the public interest and under the PTD).

139. This paper does not assert that the Wisconsin Supreme Court could not reinterpret, narrow, or overrule its prior decisions, if it wished to do so. The paper does contend, however, that the majority was opaque in its reasoning and could have analyzed its own precedents in a more clear and direct way, so that the public would have a clearer idea what the court decided.

140. Rock-Koshkonong, 833 N.W.2d at 815 (stating that Wisconsin courts “are not bound by an agency’s decision concerning the scope of its own power”) (citing Wis. Citizens Concerned for Cranes & Doves v. Dep’t of Natural Res., 677 N.W.2d 612 (Wis. 2004)).

141. Id. (footnote omitted).

142. Id. at 822.

143. See supra notes 49–73 and accompanying text (discussing the factual and legal basis of the Just decision).
As evidence that *Just* was a police-power decision, the *Rock-Koshkonong* majority pointed out that *Just* had supposedly been silent on the specific location of the wetlands in relation to the OHWM. Based on this lack of specificity, the majority asserted “[t]here is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream.” But the language of *Just* rebuts this conclusion. *Just* declared that “[l]andsc adjacent to or near navigable waters exist in a special relationship to the state” and are “subject to state public trust powers . . . .” *Just* distinguished adjacent wetlands from isolated ones—the opinion clearly stated that “[t]his is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm in public rights.” The *Just* opinion contemplated any land adjacent to a navigable body of water without narrowing the scope to only lands below the OHWM. But instead of addressing this aspect of *Just*, the *Rock-Koshkonong* majority quoted *Just* only for the proposition that lands adjacent to a body of water can be regulated through Wisconsin’s police power. The majority’s interpretation was inconsistent with *Just*’s explicit statement that lands “adjacent” to navigable bodies of water are subject to Wisconsin’s public trust. The *Rock-Koshkonong* majority also attempted to distinguish the location of the wetlands in *Just* by asserting that the PTD could not possibly have been the justification for the ordinance because it extended to lands “within 1000 feet” of a navigable body of water. As the *Rock-Koshkonong* majority pointed out that *Just* had supposedly been silent on the specific location of the wetlands in relation to the OHWM. Based on this lack of specificity, the majority asserted “[t]here is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream.” But the language of *Just* rebuts this conclusion. *Just* declared that “[l]andsc adjacent to or near navigable waters exist in a special relationship to the state” and are “subject to state public trust powers . . . .” *Just* distinguished adjacent wetlands from isolated ones—the opinion clearly stated that “[t]his is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm in public rights.” The *Just* opinion contemplated any land adjacent to a navigable body of water without narrowing the scope to only lands below the OHWM. But instead of addressing this aspect of *Just*, the *Rock-Koshkonong* majority quoted *Just* only for the proposition that lands adjacent to a body of water can be regulated through Wisconsin’s police power. The majority’s interpretation was inconsistent with *Just*’s explicit statement that lands “adjacent” to navigable bodies of water are subject to Wisconsin’s public trust. The *Rock-Koshkonong* majority also attempted to distinguish the location of the wetlands in *Just* by asserting that the PTD could not possibly have been the justification for the ordinance because it extended to lands “within 1000 feet” of a navigable body of water.

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144. See supra notes 49–73 and accompanying text (explaining why the Justs’ land fell within the ordinance); id. (failing to specifically state the actual distance of the Justs’ land from Lake Noquebay, nor the height of the Just’s land). One reason *Just* may have been silent on the height of the wetlands at issue is that wetlands can exist either above or below the OHWM, and the court was not concerned with creating a distinction between the two. Wis. Dep’t Of Natural Res., Waterway and Wetland Permits: Ordinary High Water Mark, http://dnr.wi.gov/topic/waterways/general_info/o/ohwm.htm (last revised Oct. 31, 2013).


146. *Just*, 201 N.W.2d at 761.

147. Id.

148. Id. at 769.

149. *Rock-Koshkonong*, 833 N.W.2d at 822 (“[T]he DNR has broad statutory authority grounded in the state’s police power to protect wetlands and other water resources . . . . Moreover, the agency has explicit statutory authority in this case to consider the impact of water levels of Lake Koshkonong on public and private wetlands adjacent to the lake . . . . because it has police power authority to ‘protect . . . property,’” (citing *Just*, 201 N.W.2d at 765 ).

150. *Just*, 201 N.W.2d at 769.

151. *Rock-Koshkonong*, 833 N.W.2d at 824 (asserting that the Marinette County ordinance’s “dimensions far exceed[ed] the geographic limitations of public trust jurisdiction.”).
Koshkonong dissent pointed out, it is not clear how the majority arrived at this conclusion regarding the dimensions of the PTD because the majority cited no case for this proposition. Instead, the majority seemed to rely only on its own earlier characterization of the PTD as applying only to navigable waters. But the Just decision did not tie its analysis of the PTD to a specific distance from a navigable body of water. Further, the statute in Just that authorized Marinette County to enact the shoreland ordinance specifically stated that its purpose was to aid in the fulfillment of the state’s role as trustee of its navigable waters. This language calls into question the Rock-Koshkonong majority’s characterization of Just as being a “textbook example” of the state utilizing its police power to enact regulation.

Both the Rock-Koshkonong majority and Just decision agreed that Wisconsin’s PTD did not apply to all land or wetlands. Both decisions noted that the PTD’s scope was not unlimited. But while the Rock-Koshkonong majority asserted that the trust applied only to navigable waters, Just stated that only “isolated” or “unrelated” lands were not within this special relationship with the state, and that lands adjacent to bodies of water were within the PTD’s scope.

The key aspect of Just that was missed by the Rock-Koshkonong majority was Just’s discussion of the relatedness of land adjacent to bodies of water. Just’s focus on “relatedness” was effectively an “effects test”; that is, lands adjacent to a body of water that have an effect on that body of water are subject to the state’s PTD because of the land’s effect on trust.

152. Id. at 841 (Crooks, J., dissenting) (“In an attempt to circumvent the clear language of the Just case, the majority makes a circular argument. The majority imports its conclusion from earlier in the opinion—that the public trust does not extend beyond the ordinary high water mark—and applies it to support its subsequent conclusion.”).
153. See supra notes 104–13 and accompanying text (discussing the Rock-Koshkonong majority’s analysis of the scope of Wisconsin’s PTD).
154. Just, 201 N.W.2d at 769 (stating only that the case was not about an isolated swamp unrelated to a navigable lake or stream).
155. Id. 764–65 (citing Wis. Stat. § 144.26) (the purpose of the state’s shoreland regulation program is to “aid in the fulfillment of the state’s role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare.”).
156. Rock-Koshkonong, 833 N.W.2d at 822.
157. Compare Just, 201 N.W.2d at 769 (clarifying that the case was not about isolated swamps, “the change of which would cause no harm to public rights”) with Rock-Koshkonong, 833 N.W.2d at 821 (noting that the PTD “has always been confined to a limited geographic area”).
158. Just, 201 N.W.2d at 769.
159. Id. Although the Just decision did not explicitly label its test as an “effects” test, the basis for the test was evident in the court’s reasoning. The Just court was concerned with lands adjacent to navigable waters, not isolated lands because the altering of isolated lands “cause no harm to public rights.” Id. It follows, then, that the altering of adjacent lands does cause harm to public rights. Id. Moreover, the ordinance in Just was concerned with pollution in lands adjacent to a body of water because of the effect that nearby pollution would have on that navigable body of water.
resources.\textsuperscript{160} This seemed to be settled reasoning in Wisconsin because \textit{Just} was not the only decision in Wisconsin to apply an “effects test” to determine the scope of the PTD. For example, in its 2011 \textit{Lake Beulah} decision concerning a permit for an underground well—a type of water-fixture apparently even less connected to navigable waters than wetlands because a well deals with unseen water underground\textsuperscript{161}—the Wisconsin Supreme Court upheld the permit, reasoning that “[w]hen considering actions that affect navigable waters in the state, one must start with the [PTD]. . . .”\textsuperscript{162} Significantly, the \textit{Lake Beulah} decision was silent on the exact distance from a navigable body of water in which the trust would apply. The court, agreeing with the DNR and the petitioners that the PTD applied to the well, analyzed only whether the well would affect the nearby navigable body of water.\textsuperscript{163}

Under \textit{Just} and cases like \textit{Lake Beulah}, the Wisconsin courts had not delineated a specific distance where the PTD did not apply; the touchstone was whether the area at issue affected navigable bodies of water, a fact DNR intensively determined. Thus, under its precedents the \textit{Rock-Koshkonong} court should have ruled the wetlands near Lake Koshkonong were within the PTD’s scope. Instead, the majority engaged in a strained analysis of these cases and re-characterized its holdings in a way that seemed inconsistent with prior case law.

ii. Narrowing the Scope of the Public Trust Doctrine

The \textit{Rock-Koshkonong} majority declared that the DNR may not give non-navigable land or water above the OHWM a constitutional preference as trust land over other property.\textsuperscript{164} Moreover, the majority claimed that the scope of the PTD in Wisconsin had always been limited to navigable waters.\textsuperscript{165} But the plain language of previous Wisconsin Supreme Court cases contradicts this assertion—Wisconsin had at least a 40 year history of


\textsuperscript{161} Lake Beulah Mgmt. Dist. v. Dep’t of Natural Res., 79 N.W.2d 73, 82 (Wis. 2011).

\textsuperscript{162} \textit{Id.} at 83 (citing Hilton ex rel. Pages Homeowners’ Ass’n v. Dep’t of Natural Res., 717 N.W.2d 166, 173 (Wis. 2006)) (emphasis added).

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Rock-Koshkonong}, 833 N.W.2d at 825.

\textsuperscript{165} \textit{See id.} at 820–21 (“There is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream.”).
regulating lands near bodies of water under the PTD. Further, the Wisconsin Supreme Court had recognized Just was based on the PTD. It is puzzling why the Rock-Koshkonong majority would narrow its precedents, especially without explaining its reasoning.

One possible reason for the majority’s opacity may lie in a Wisconsin Supreme Court opinion decided a few years before Rock-Koshkonong. In Hilton v. Department of Natural Resources, Justice Prosser, the author of the majority opinion in Rock-Koshkonong, concurred in the result but wrote separately because he believed the case epitomized the growth of agency power, the decline of judicial power, and the “tenuous state of property rights in the 21st Century.” Justice Prosser argued that the Wisconsin Supreme Court’s precedent of deferring to state agency determinations stripped the court of its province and duty to “say what the law is.” He asserted that courts must serve as protectors of the people’s rights to life, liberty, and property, but both the legislature and the courts had been diluting the role of courts in this goal. Justice Prosser noted that property

166. See Just, 201 N.W.2d at 769 (finding that lands adjacent to navigable bodies of water lie in a special relationship to the state and are subject to the PTD); See also, M & I Marshall & Ilsley Bank v. Town of Somers, 414 N.W.2d 824, 830 (Wis. 1987) (stating that in determining whether the taking of an area of shoreland is compensable depends on whether an ordinance prohibits a public harm or provides a public benefit, not the distance of the shoreland from a body of water); Lake Beulah, 799 N.W.2d at 83 (holding that an underground well of water was subject to the PTD because it was adjacent to and affected a navigable body of water).

167. See Wisconsin’s Envtl. Decade Inc., 271 N.W.2d at 72 (citing Just, 201 N.W.2d at 761) (asserting that the public trust duty “requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty.”); M & I Marshall & Ilsley Bank, 414 N.W.2d at 830 (noting that the PTD was a factor in the Just decision).

168. Under the statute at issue in Rock-Koshkonong, the DNR could still consider the wetlands in its decision to “protect . . . property,” but this consideration will only be pursuant to the police power, not the constitutional PTD. When the DNR balances the damage to wetlands and the potential economic harm to other property, the DNR cannot afford greater or constitutional weight to the wetlands. Moreover, the DNR could chose to not consider the wetlands near the lake for two reasons: 1) it would have no affirmative duty to regulate, and 2) the statute does not specifically order the DNR to consider wetlands; instead, it only states that the DNR “protect . . . property,” leaving the DNR to decide what property means within the confines of the Wisconsin law.

169. Although critics commonly accuse courts for overruling their own precedent because of a change in the makeup of a court, a change in the makeup of the Wisconsin Supreme Court does not explain the Rock-Koshkonong decision. See, e.g., Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 414 (2010) (Stevens, J., dissenting) (arguing that the only thing that had changed since the Supreme Court’s previous rulings was the composition of the Court). The Wisconsin Supreme Court, consisting of the same judges that decided the Rock-Koshkonong case, had previously and without dissent deferred to the DNR’s extension of the PTD to an underground well. Lake Beulah, 799 N.W.2d at 84.

170. See supra notes 133–37 for a discussion of the facts and holding of the Hilton decision.

171. Hilton, 717 N.W.2d at 178–79 (Prosser, J., concurring) (noting that while the case “epitomize[d] the growth of agency power,” he reluctantly joined the majority because he believed the court was bound to uphold the decision of the ALJ under the current law).

172. Id. at 180 (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).

173. Id. at 184.
rights become tenuous when subject to “unreviewable and ad hoc decision making.”

Justice Prosser’s concurrence endorsed the type of judicial activism where courts overrule their own precedent.175 Only a few years after Hilton, Justice Prosser used Rock-Koshkonong as a vehicle to curtail the Wisconsin Supreme Court’s deference to agency decisions, at least where the agency’s decision implicated private property rights.176 Ironically, the Wisconsin Supreme Court’s history of expanding the scope of the PTD in cases like Just, thereby insulating regulation from landowners’ claims of compensation, seems to have caused the justices in the Rock-Koshkonong majority to respond by narrowing the scope of the PTD.177 Perhaps the majority’s activism in narrowing its precedents is a negative environmental development, but the most regrettable aspect of the court’s tapering of the PTD to navigable waters below the OHWM was the majority’s failure to clarify its reasoning.

C. Disregarding the Purpose of the Public Trust Doctrine

The Rock-Koshkonong majority asserted that Wisconsin’s PTD applies only to navigable waters below the OHWM.178 Under the court’s reasoning, all lands above the OHWM are on equal footing regardless of their location.179 The majority based this conclusion on its concern that the burden on landowners would be too great to allow Wisconsin to regulate lands adjacent to bodies of water under the constitutional PTD.180

The majority’s decision was inconsistent with the history and purpose of Wisconsin’s PTD because it overlooked the relationship between wetlands and navigable waters. Just declared that the PTD extended to

174. Id.
175. Jack L. Landau, The Myth of Judicial Activism—No One Wants to Be a Judicial Activist, Right? Problem Is: No One Agrees What It Is, 70 OR. ST. BAR BULL. 26, 27 (2010) (identifying three different uses of the term judicial activism: (1) to describe cases in which courts invalidate legislation; (2) to describe cases in which courts fail to follow or overrule their own precedents; and (3) to explain cases in which courts “legislate from the bench”).
176. See Rock-Koshkonong, 833 N.W.2d at 816 n. 25 (stating that the court will not give deference to the DNR).
177. See supra notes 70–73 and accompanying text for a discussion of the Just case and how the Wisconsin Supreme Court included adjacent wetlands in the PTD’s scope.
179. See id. at 825 (claiming that the PTD applies only to navigable waters and asserting that the DNR may “not accord non-navigable land or water above the OHWM a constitutional preference as trust land over other property”).
180. Id. at 819 (asserting that the “ramifications for private property owners could be very significant” if the PTD was applied to non-navigable land above the OHWM).
lands that affected navigable waters and streams. The *Just* court’s application of the PTD to these lands was based on and related to the purpose of the trust, which was to preserve the natural condition of trust resources for the benefit of the public. Concerned with what had been a historic lack of appreciation for the interconnectedness of nature, the *Just* court specifically recognized that navigable waters are affected by their surroundings, and therefore emphasized that land adjacent to navigable waters should receive heightened protection because of its location. Indeed, this reasoning makes sense in light of present-day science, which has verified the interconnectedness of ecosystems.

The *Rock-Koshkonong* majority’s conclusion rejected *Just*’s reasoning that lands adjacent to bodies of water should have constitutional preference over other, non-PTD lands. The majority’s attempt to equate all land above the OHWM and to claim that the PTD did not extend to lands that affect navigable waters disregarded Wisconsin’s constitutional duty to promote and protect trust resources. Further, as Justice Crooks’ dissent noted, the majority’s concern about the ramifications for private property owners was actually irrelevant to the controversy before it. The majority’s reference to potential “ramifications” for property ownership was premised on a concern that if lands adjacent to Lake Koshkonong were trust lands, Wisconsin could regulate activity on those lands without concern for private takings claims. But the issue before the court was whether the DNR could use the PTD to give wetlands affecting navigable waters constitutional preference over other lands, regardless of land

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181. *Just*, 201 N.W.2d at 769.
182. *Id.* at 767–68.
183. *Id.*
185. See *Rock-Koshkonong*, 833 N.W.2d at 842 (Crooks, J., dissenting) (citing Wisconsin’s *Envtl. Decade*, 271 N.W.2d at 72) (“Allowing the trustee to discharge its public trust duties by considering things that affect navigable waters is consistent with our precedent. If it could not, how then would the state discharge its extensive duties ‘not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty’?”).
186. *Id.* at 841.
187. See *Slade*, *supra* note 22 at 49 (emphasizing that the state is sheltered from takings claims when acting pursuant to public trust authority) and *supra* note 107 (discussing the PTD as a bar to private takings claims).
ownership. The majority’s focus on the implications of property owners instead of on the interrelatedness of wetland-ecosystems runs counter to Wisconsin’s history of trust protection and maintenance for the benefit of the public.

CONCLUSION

The Rock-Koshkonong case on remand may end with the same result because the DNR could once again decide that the damage to the environment, and wetlands in particular, outweighs the economic damage that might result from a lower water level. Indeed, at least one commentator has asserted that the Rock-Koshkonong decision will not change Wisconsin’s protection of wetlands because the decision relied on an interpretation of statutory language, and not an interpretation of the Wisconsin Constitution. Under this reading, the Rock-Koshkonong majority’s discussion of the scope of Wisconsin’s PTD was unnecessary dicta to the outcome of the decision. Further, even though the Rock-Koshkonong majority might have signaled how it will handle future PTD cases, the majority did not call into question the DNR’s authority to protect Wisconsin’s wetlands.

Although the Wisconsin Supreme Court did not question the protection of wetlands in general, the court’s reasoning reflected skepticism about regulation of land above the OHWM, and a misplaced concern for the implications that regulation of land adjacent to navigable waters would have on private property ownership. Further, there is a strong indication

188. Rock-Koshkonong, 833 N.W.2d at 816.
189. See Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914) (noting that the trust should be interpreted in the “broad and beneficent spirit that gave rise to it,” in concluding that the public had the right to hunt on navigable waters); Muench, 53 N.W.2d at 522 (recognizing that citizens of Wisconsin have a right to the enjoyment of fishing, hunting, and scenic beauty, and that these rights therefore were threatened by a proposed dam); Wisconsin’s Envtl. Decade, 271 N.W.2d at 72–73 (citing Muench and Just for the proposition that Wisconsin’s public trust duty “requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty); Zealy, 548 N.W.2d at 535 (citing Just for the proposition that Wisconsin has a “long history of protecting its water resources, its lakes, rivers, and streams, which depend on wetlands for their proper survival”).
191. Id. at 819 (speculating that if wetlands adjacent to Lake Koshkonong were given constitutional preference over other land, the ramifications on private property owners could be significant).
that PTD language in the *Rock-Koshkonong* majority opinion was more than dicta because the majority was clear about its intent to confine the scope of the Wisconsin PTD to exclude adjacent wetlands. The most perplexing issue with *Rock-Koshkonong*, however, is the way the majority re-characterized its precedents, particularly the *Just* decision. The fact that the majority attempted to change or reinterpret its precedents is not the problem—indeed, courts can and should be able to correct past mistakes or change previous decisions that are no longer applicable. The problem with the *Rock-Koshkonong* majority decision is the court’s willingness to reinterpret without being forthright about what it was doing. The sort of judicial activism Justice Prosser endorsed in *Hilton* and put into practice in *Rock-Koshkonong* is problematic because it upsets settled expectations without clearly explaining why the court has apparently changed the law. In light of *Just*’s celebrated status as a decision recognizing the effect of human activity on lands adjacent to navigable bodies of water, the *Rock-Koshkonong* decision is troubling. The majority’s narrowing of the scope of Wisconsin’s PTD was inconsistent with the court’s precedents and did a disservice to Wisconsin’s protection of public trust resources.

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194. *Id.* at 821 (asserting that the PTD in Wisconsin “has always been confined to a limited geographic area”).

195. See supra note 41 and accompanying text. Recall that, writing some forty years ago, Professor Sax devoted an entire section in his seminal PTD article on Wisconsin and its “reasonable” interpretation of its PTD doctrine.
EB-5 AS AN INSTRUMENT OF SUSTAINABLE CAPITALISM

Howard Patrick Barry

This article proposes a targeted application of the EB-5 Immigrant Investor Program to solve a heretofore intractable national problem: "nonpoint source water pollution," which is the most significant single source of water pollution in the United States (U.S.). With this goal in mind, EB-5 can be cultivated and grown into a program, both ethical and pragmatic, that serves the public good via a mission to reclaim and restore a significant component of our environment.

The article provides the historic context, a legal précis, and an introduction to the process that is the EB-5 Program; explores the constitutional, ethical, and administrative dilemmas that plague the program; examines some notable successes; and proposes a systematic evolution of EB-5 for application in Vermont in the service of anticipatory regenerative environmental design, construction, and maintenance of sustainable development.

Thus matured, EB-5 becomes a financial “kick-start” for animating the laboratory of democracy that is Vermont, to begin a series of watershed specific research and development projects to conceive, design, and develop regenerative solutions to this perpetual problem.

A collateral virtue of this evolved EB-5 Program is that, while distinctly local to each watershed, the underlying concepts and best practices developed are eminently “scalable”—applicable throughout the United States and ultimately the world. Thus, investments made by immigrant investors in the U.S. may well end up serving the very countries from which their personal wealth was derived.

Introduction........................................................................................................68

I. EB-5 Background ........................................................................................70
   A. Context ....................................................................................................70
   B. Legal Précis ..........................................................................................74

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1. The Pilot Program and Regional Centers ......................... 75
2. TEA—High Unemployment or Rural Area ....................... 77
C. EB-5 Process ................................................................. 78

II. Problems with EB-5—Controlling/Shaping Issues and Themes ....... 80
A. Constitutional Issues—A Question of Subversion of Due Process
   Rights During the Green Card Conditional Phase .................. 80
B. Ethical Issues ................................................................. 83
   1. Citizenship for Sale ...................................................... 83
   2. Fraud—Gerrymandering the Investor Visa ........................ 88
C. Administrative Dilemmas ................................................ 89
   1. Ambiguity and Lack of Clear Guidance .......................... 89
   2. Uncertainty and Lack of Timeliness ............................... 90
   3. Underutilization .......................................................... 93

III. EB-5 Cons ........................................................................ 95
A. General Factors .............................................................. 95
B. Job Creation Paradox—The Number of Jobs Created by Immigrant
   Investors is Very Difficult to Estimate ............................... 96
C. Quantitative Input/Output Modeling of Economic Impact ...... 99
D. Time Frame ................................................................. 101

IV. EB-5 Pros ........................................................................ 102
A. General Factors .............................................................. 102
B. Program Growth ............................................................ 103
C. EB-5 is a Bargain ........................................................... 104
   1. Historic Pricing .......................................................... 104
   2. Present Value ............................................................. 105
   3. Price/Value Optimization .............................................. 105
   4. Equitable Division ....................................................... 106
D. EB-5 in Vermont ............................................................. 107

V. Sustainable Capitalism as Ecological Modernization .................. 108

VI. Public Private Partnerships (PPPs) ..................................... 111

VII. Vermont as Laboratory ................................................... 112

VIII. The Plan ........................................................................ 113
A. Phase I—Initiating .......................................................... 113
B. Phase II—Prototyping ...................................................... 114
C. Phase III—Scaling Up ..................................................... 115

Conclusion ............................................................................. 118
Law is a bailiff for the ruling power of the moment, lending to that power its authority. Like any obedient bailiff, it wants to be told by the present power (or, if for any reason they can utter no commands, then by the movers of some impending power) precisely what to do. Without such fresh commands that law will merely continue to pursue, with steadily less relevance to anything except rote tradition, whatever last orders were given it, however inappropriate altered circumstances have made them.²

E. F. Murphy

INTRODUCTION

The Employment Creation Immigrant Visa (“EB-5”) is a United States Customs and Immigration Services (“USCIS”) administered immigrant investor program that can and should mature into an optimized ethical financial instrument of sustainable capitalism.³ With this evolution, EB-5 can be used to kick-start domestic investment in anticipatory design and construction of resilient “green” infrastructure. It can do this via investment in the regeneration and maintenance of a healthy environment, while creating perpetual local employment. By identifying and prototyping best practices via this application of EB-5 to federally mandated nonpoint source storm water management, the State of Vermont could serve as a model for scaling up this application throughout the U.S.

The EB-5 program was conceived to grant citizenship to those with proven facility in turning capital into jobs.⁴ As envisaged by Congress, EB-5 permits these investors to provide this expertise by indirection via a requisite investment, cash, or its equivalent at risk with no hedging, and arms-length policy oversight.⁵ Though the program is of long standing, and well supported by Congress, it suffers from fundamental conflicts of opposing values, underutilization, and inefficiency due to lack of focus on what constitutes appropriate foreign investment in genuine domestic job growth; as well as how to measure that growth. In addition, it appears that the USCIS’ expertise in immigration—administered under the auspices of the Department of Homeland Security (“DHS”)—is matched by its inability to master the many, varied, and constantly evolving ways and means of commerce in general and secured transactions in particular.

². EARL FINBAR MURPHY, MAN AND HIS ENVIRONMENT: LAW 16 (Harper & Row 1971)
⁵. Id. at 3.
This article proceeds in nine parts. Part I provides the background information on USCIS Employment-Based Immigration. This background begins by setting the context, a brief legislative history of the program from inception to the present, within which subsequent analysis of the program will be based. This is followed by a legal précis of the Immigration and Nationality Act of 1990 section 203(b)(5), which established the class of immigrant visas known as EB-5. This background briefing concludes with an examination of the process for obtaining an EB-5 Investor Green Card.

Part II examines the problems manifested in the EB-5 program past and present; ranging from underlying constitutional and ethical issues through the broad systems based dilemmas that confront day-to-day administration of the program.

Part III explores, in detail, the factors within USCIS’ systems that conspire against effective and efficient administration of the program.

Part IV begins to find light at the end of the tunnel; examining aspects of EB-5 that have met, are meeting, or are on course to exceed Congress’ expectations for the program. Analysis of the two sides of the coin that is the price and value of an EB-5 visa is followed by a proposal for optimizing price/value and for its equitable distribution among the states. This part concludes with a synopsis of present EB-5 financed projects in Vermont.

Part V is the heart of the article, wherein the concept of ecological modernization under the umbrella of sustainable capitalism is introduced as a gateway concept upon which to base a mature application of EB-5 as an instrument of ethically financing sustainable capitalist development that will further stabilize and energize the program. This part concludes by suggesting that an ideal application of EB-5 would be to assist state and municipal government authorities in addressing federal environmental protection mandates, specifically the leading cause of water quality degradation and nonpoint source pollution via compliance with the nonpoint source water pollution component of Phase 2 of the National Pollutant Discharge Elimination System permit program for Municipal Separate Storm Sewer Systems.

Part VI lays the administrative foundation for leveraging EB-5 finance for these types of projects via application of Public Private Partnerships (“PPPs”). When properly administered, PPPs become ideal vehicles for ethical and pragmatic organization of relationships between public sector bodies, non-profit/not-for-profit organizations, and for-profit private entities.

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Part VII proposes Vermont as a “laboratory” in which to bench test and scale up best practices identified in application of the above concepts and administrative mechanisms to address a leading cause of water quality degradation: nonpoint source water pollution.

Part VIII lays out a multi-phase plan for addressing Vermont’s nonpoint source water pollution problems; beginning with pilot projects, developing prototypical applications, and identifying best practices to be optimized for scaling solutions up for state-wide application. This part closes with a range of options for the permanent financing of these projects, recognizing EB-5 as a source of seed monies to “kick-start” the process, not a sole source of perpetual capital.

Part IX ties together the various strands of the proposed evolution of EB-5 into an ethical program that leads by example, spearheading a pragmatic mission to tackle the ongoing and growing issue of nonpoint source pollution. This part concludes the article’s proposal for a systematic re-conceptualization of EB-5 for application in Vermont in the service of anticipatory environmentally regenerative design, construction, and maintenance of sustainable development.

I. EB-5 BACKGROUND

A. Context

In passing employment creation legislation, Congress sought to attract entrepreneurial immigrants to the U.S., reasoning that this class of immigrants could invest capital to create jobs for U.S. workers, thereby stimulating the economy.7 The Immigration and Nationality Act of 1990 (“INA” or “Act”) permits a non-citizen, who invests (or is actively in the process of investing) lawfully obtained capital in a new or existing commercial enterprise (in the U.S.), that creates or maintains full-time employment for qualified workers, to apply for permanent residency in the U.S. by filing a petition submitted under the Employment-Based Immigration Fifth Preference program, hence the moniker EB-5.8

In the U.S., “every fiscal year (October 1st – September 30th), approximately 140,000 employment based immigrant visas are made available to qualified applicants.”9 “Employment-based immigrant visas are

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7. USCIS POLICY MEMO, supra note 4, at 1.
divided into five preference categories."10 “The EB-5 category is allotted 7.1% of the yearly worldwide limit of employment-based immigrant visas.”11 “This translates to approximately 10,000 immigrant visas per year in the EB-5 category.”12 “The 10,000 visa figure include derivative visas for the spouses and minor children of investors.”13 Three thousand of these visas are reserved specifically for Regional Center based petitions; this is a minimum not a maximum number.14 “Likewise, of the 10,000 immigrant visas available for investors, 3,000 are set aside for EB-5 cases located in [T]argeted [E]mployment [A]reas.”15 Both Targeted Employment Areas and Regional Centers are defined below.

To obtain this “Employment Creation EB-5 Visa” individuals must invest $1,000,000 in an eligible project anywhere within the U.S., or at least $500,000 in a project located within a Targeted Employment Area (“TEA”)—a qualifying high unemployment or rural area.16 This investment must create or preserve at least ten jobs for U.S. workers excluding the investor and immediate family.17 If the investment takes place under the auspice of a “Regional Center,” accounting for job-creation can be done either directly or indirectly.18

The EB-5 program is based on the notion that we should give priority to people who are already successful in their native countries, and who have the interest and the capital to invest in the development of this nation.19 This is justified under the premise that EB-5 visa recipients are inherently law abiding and take no jobs from U.S. citizens. To the contrary, they are creating jobs that by law must go to citizens or legal residents.20 Rather than strain existing social safety services, these immigrants have the


11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. 8 C.F.R. § 204.6(f) (2014).
20. 8 C.F.R. § 204.6(c), (g)(2) (2014).
demonstrated wealth to afford a six or seven-figure investment, plus associated filing and legal fees. In addition to putting their capital at risk, they are willing to join us in a lifetime of paying federal, state, and local taxes.

Under the EB-5 program, the federal government does not guarantee a financial return on such foreign investment.21 The USCIS Ombudsman has expressed the opinion that those who engage in this type of investment accept little, if any, financial return in exchange for the possibility of securing American visas for themselves and their families.22 The U.S. Securities and Exchange Commission’s Office of Investor Education and Advocacy and USCIS jointly issued an Investor Alert echoing this opinion.23 Common sense—reinforced by the published fallout surrounding litigation resulting from failed Regional Centers,24 as well as from successful ongoing applications of the program25—indicates that this may not be the universal investor expectation.

The EB-5 program got off to a rocky start and has seen its share of ups and downs over the past twenty-four years due to a variety of factors. Among these are: an all-time low credit availability in a post-Great Recession U.S. commercial market begging for liquidity,26 and historic and expanding growth in foreign High Net Worth Individuals (“HNWI”) in search of investment opportunities—specifically Asian-Pacific wealth which is expected to become the largest wealth market by population as


Riding the coattails of these phenomena, EB-5 is experiencing an upsurge in interest and rapid growth in numbers of applications; turning EB-5 into a mainstay for financing major projects in New York, California, Texas, and Vermont.  

This growth has been paralleled by criticisms that the program, as currently administered, suffers from a poor reputation, complexity, and lack of regulatory oversight. Critics also claim that program underutilization is rooted in uncertainty and inefficiency due to the poor “casting” of an adjudicative authority with institutional biases regarding immigration and national security issues (USCIS acting under DHA) overseeing a program.
increasingly dominated by complex commercial/investment concerns.31

In addition, EB-5 program underutilization may be caused by a confluence of factors—including “program instability, the changing economic environment, and more inviting immigrant investor programs offered by other countries.”32

Finally, USCIS has been accused of inefficiency due to inconsistent administrative and adjudicative standards regarding what constitutes appropriate foreign investment in genuine domestic job growth—as well as how to measure that growth.33 This criticism focuses on how, if at all, USCIS measures and verifies the causal relationship between specific EB-5 investments and employment. In recognition of these factors and critiques, Congress and successive presidents have pressured USCIS into taking “all necessary and appropriate steps to facilitate a healthy, vigorous, and smooth-running employment creation immigrant visa program.”34

B. Legal Précis

“...will promote the initiation of new business in rural areas and the investment of foreign capital in our economy.”35

President George H. W. Bush, November 1990

INA section 203(b)(5) establishes a class of immigrant visas (EB-5) for individuals who invest either $500,000 or $1,000,000 (depending on the specific investment location relative to the existing local unemployment rate) in a new (or to preserve/revive an existing) qualifying commercial enterprise located within the U.S..36 This investment must create (and/or preserve) full-time employment for not fewer than 10 qualified employees.37

The program requires the investor to: (1) invest the requisite funds from lawful sources; (2) in a new business, a substantially restructured existing business, or in a business in which the foreign investment will result in a material change in the capital of the company; (3) create at least ten full-

32. OMBUDSMAN RECOMMENDATIONS, supra note 22, at 1.
33. Id. at 5–12.
34. Id. at 1.
37  Id. at (b)(5)(A)(ii).
time jobs within two years; (4) engage in a management role in the business (either through the exercise of day-to-day managerial responsibility or through policy formulation); and (5) operate the business for at least two years. 38 EB-5 has two distinct pathways for a foreign investor to gain lawful permanent residence: the Basic Program and the Immigrant Investor Pilot Program, which was created by section 610 of Public Law Number 102-395, 39 and has been extended through September 30, 2015. 40

1. The Pilot Program and Regional Centers

EB-5 requirements for an investor under the Pilot Program are essentially the same as in the Basic Program, except the Pilot Program provides for investments that are affiliated with an economic unit known as a Regional Center. 41 A Regional Center is any qualified public or private economic unit that is involved with the promotion of economic growth, including “increased export sales, improved regional productivity, job creation, and increased domestic capital investment.” 42

This change was made to the EB-5 visa program to add flexibility to how the employment requirements were satisfied. 43 A business may be qualified as a Regional Center if it is expected to have an employment and business effect in a specified geographic area. 44 Making investments through Regional Centers allows for the possible advantage of a larger concept of job creation, including both “direct” and “indirect” jobs. 45 For these reasons, in a Regional Center, it is easier for the investor to meet the employment requirements. Further, if more jobs are counted in the...
business, more EB-5 investors can participate in the project, resulting in more funding for the developer.

As of June 2014, USCIS has approved approximately 579 Regional Centers nation-wide.46 “A range of different real estate projects have qualified for Regional Center status, including shopping malls, hotels, mixed use developments, warehouse distribution centers, manufacturing facilities, and business incubators.”47 Because the primary objective of Regional Centers is to create jobs, Regional Centers often choose to work closely with local governments to form PPP’s.48

Locations of EB-5 Visa Regional Centers in the U.S.49

Typically, Regional Centers are privately held not-for-profits, or are considered international business institutes organized under the umbrella of a state university run through a governor’s office of economic development.50 The Vermont EB-5 Regional Center is the only USCIS Designated Regional Center in the U.S. owned, controlled, and supervised directly by a state government.51 As of March 2013, there were seven EB-5 projects in various stages of development in the state.52

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47. Eng, supra note 24, at 10.
48. Id.
In addition to their initial investment, each investor pays a subscription fee to the Regional Center ($1,500 in Vermont\textsuperscript{53} to more than $30,000 in California).\textsuperscript{54} Further, each investor will need to hire an experienced immigration attorney and perhaps other professionals (economist, business and securities attorney, business plan writer, etc.) to assist with the investor’s individual visa application, which must include or reference a detailed business plan.\textsuperscript{55}

Total fees associated with EB-5 investments are difficult to determine. However, a 2013 Securities Exchange Commission (“SEC”) charge against a fraudulent Chicago based EB-5 investment scheme indicates that investors paid over 7.5\% of their gross Immigrant Investor funds in “fees” ($11,000,000 in “fees” on a total of $145,000,000 in securities from more than 250 investors—or approximately $44,000 per investor).\textsuperscript{56} Given the early stages of this project, these “fees” were likely for development of the detailed business plan that must accompany all I-526 petitioner applications, for which attorneys charge from $5,000 to $25,000.\textsuperscript{57} These fees generally do not include the work to be done in the filing of the subsequent I-829 petition that must be submitted to, and approved by, USCIS to remove the two-year conditional limitation for green cards.\textsuperscript{58}

2. TEA—High Unemployment or Rural Area

The laws governing the EB-5 program define a TEA as, “at the time of investment, a rural area or an area that has experienced unemployment...
of at least 150 percent of the national average rate.” 59  

The definition of “rural area” is “any area not within either a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).”60 “In other words, a rural area must be both outside of a metropolitan statistical area and outside of a city or town having a population of 20,000 or more.”61

Vermont’s Agency of Commerce and Community Development (“ACCD”) operates the Vermont EB-5 Regional Center.62 This Regional Center operates within a TEA that encompasses the entire state, with the exception of Chittenden County (the cities of Burlington and South Burlington).63

C. EB-5 Process

For a potential investor, the EB-5 Green Card process can be relatively easy to follow.64 The investor submits a Petition by Foreign Entrepreneur (Form I-526), usually prepared by an immigration attorney, which includes five years of investment returns to substantiate the source of investment funds.65 The funds can be: (1) the investor’s own money; (2) a loan not secured by the EB-5 investment; or (3) a gift, which would allow a parent to gift the funds to a dependent.66 If required by the investor’s home country, any gift taxes must be paid.67 The investor must also demonstrate that the invested capital is coming directly from the investor and is being applied to the EB-5 enterprise (via bank transfers and other financial documentation).68

Once an investor has ensured the financial viability of an EB-5 project, the investor’s I-526 petition is filed with USCIS, which must certify that the investment is eligible for EB-5 status.69 This certification process (an

59. 8 C.F.R. § 204.6(e) (2014); USCIS POLICY MEMO, supra note 4, at 7.
60. USCIS POLICY MEMO, supra note 4, at 7; 8 C.F.R. § 204.6(e) (2014); 8 U.S.C. § 1153(b)(5)(B)(iii) (2012).
61. USCIS POLICY MEMO, supra note 4, at 7.
62. VT. AGENCY OF COMMERCE & CMTY. DEV., supra note 51.
63. Id.
64. MARK A. IVENER & DAVID R. FULLMER, HANDBOOK OF IMMIGRATION LAW 98 (4th ed. 2009).
65. Id.
66. Id.
67. Id.
68. Id.
69. Id. at 98–99.
“adjudication” in USCIS/DHS parlance) takes approximately four to six months for Regional Center cases and usually longer for regular program cases.70

Once the Form I-526 petition is approved, an Immigrant Investor must either file a Form I-485 (Application to Register Permanent Resident or Adjust Status) with USCIS to adjust their immigration status to a conditional permanent resident in the U.S., or file a DS-230 (Application for Immigrant Visa and Foreign Registration) with the Department of State to gain admission to the U.S. with an EB-5 visa.71

Once USCIS approves an investor’s Green Card, the Green Card remains conditional for two years.72 “Between 21-24 months after the conditional Green Card has been approved, the investor must reconfirm that the investment has been made or is still in place and that the employment requirement has been fulfilled or maintained.”73 Filing Form I-829, the Petition by Entrepreneur to Remove Conditions, accomplishes this.74 “If USCIS approves this petition, the conditions will be removed from the EB-5 applicant’s status and the EB-5 investor and derivative family members will be allowed to permanently live and work in the United States.”75 To then finally remove a conditional Green Card status, the immigrant investor must file an application with USCIS.76

When the condition has been removed, permanent resident status in the U.S. is granted with a full Green Card.77 USCIS suggests that it takes approximately four years from the time the immigrant investor applies for the conditional Green Card until USCIS approves the application to remove conditions—actual time for this process can be considerably longer.78

Subsequently, “in approved Regional Center programs . . . the investment may be sold, and the investor will still maintain the permanent Green Card.”79 After a conditional Green Card is awarded, U.S. citizenship is possible approximately five years after the residence criteria are

70. Id. at 99.
72. IVENER & FULLMER, supra note 64, at 99.
73. Id.
75. Process, supra note 71.
76. IVENER & FULLMER, supra note 64, at 99.
77. Id.
78. Id.
79. Id.
satisfied.80

II. PROBLEMS WITH EB-5—CONTROLLING/SHAPING ISSUES AND THEMES

A. Constitutional Issues—A Question of Subversion of Due Process Rights During the Green Card Conditional Phase

To what constitutional rights and freedoms are foreign nationals who invest in the EB-5 program entitled? The candid answer to that question is, “it depends.” The difficulty in providing a definitive answer is rooted in the historically ambivalent approach that the United States Supreme Court has taken towards non-citizens. This ambivalence is underscored by the historical seesaw of American attitudes toward immigrants, from hate to love and back again, which is reflected in state legislation and lower court proceedings.81

Regarding immigration, “(o)ver no conceivable subject is the legislative power of Congress more complete.”82 At the heart of that observation lies the “plenary power” doctrine, under which the Court has repeatedly declined to review federal immigration statutes for compliance with substantive constitutional restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.83

The Supreme Court has insisted for more than a century that foreign nationals living among us are “persons” within the meaning of the Constitution, and are protected by those rights that the Constitution does not expressly reserve to citizens alone (at least with regard to criminal prosecution).84 Because the Constitution expressly grants citizens only the rights to vote and to run for federal elective office, equality between non-nationals and citizens would appear to be the constitutional rule.85

80. Id.
82. Oloteo v. Immigration & Naturalization Serv., 643 F.2d 679, 680 (9th Cir. 1981) (showing that the implementation scheme for admission and deportation of aliens “has long been recognized by the judiciary as largely immune from court control”).
84. Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (regarding unlawful aliens, “[i]t is not consistent with the theories of our government that the Legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents”).
85. U.S. CONST. art. I, §§ 2, 3; U.S. CONST. art. II, § 1; U.S. CONST. amend. XV.
A plain reading of the Constitution could leave one with the impression that all other non-enumerated rights are applicable to both citizens and non-citizens without limitation. Per the text of the Fifth and Fourteenth Amendments, due process and equal protection guarantees extend to all “persons.”\textsuperscript{86} Further, the rights attaching to criminal trials, including the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses, all apply to “the accused.”\textsuperscript{87} And, both the First Amendment’s protections of political and religious freedoms and the Fourth Amendment’s protection of privacy and liberty apply to “the people.”

In 1971, the Court held that due process infringements for non-citizens as a group, a discrete and insular minority deserving of heightened judicial protection, were worthy of “strict scrutiny.”\textsuperscript{88} Subsequently, the Court has retreated from this, dividing non-citizen due process rights into two specific and much smaller spheres, (1) for persons seeking to enter the U.S. (either illegally or legally) there are no due process rights;\textsuperscript{89} and, (2) for undocumented persons already resident within the U.S. due process applies, at least with regard to criminal prosecution and/or deportation proceedings.\textsuperscript{90}

In its execution of Congress’ plenary authority, USCIS administers the EB-5 Program to attract only those foreign investors who are willing to invest their capital in the U.S. with merely the hope of obtaining a return on their investment while helping create American jobs. The invested capital needs to be “at risk” to some degree, meaning there must be a chance for loss or gain; however, the law does not specify exactly what the degree of risk must be.\textsuperscript{91} If the immigrant investor is promised to receive any amount of their original investment this negates the required element of risk.\textsuperscript{92}

The invested capital is not at risk when the immigrant investor is

\begin{itemize}
  \item \textsuperscript{86} U.S. CONST. amend. V; U.S. CONST. amend. XIV.
  \item \textsuperscript{87} U.S. CONST. amend. VI.
  \item \textsuperscript{88} Graham v. Richardson, 403 U.S. 365, 375–76 (1971) (holding that classifications based on citizenship are inherently suspect and are subject to strict judicial scrutiny whether or not a fundamental right is impaired).
  \item \textsuperscript{89} Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (establishing that Fourteenth Amendment protections extend to immigrants and the Equal Protection Clause applies to all citizens regardless of race or country of origin. The Court’s silence with regard to non-citizens and undocumented persons is deemed to underscore non-application to these “others”).
  \item \textsuperscript{90} Wong Wing, 163 U.S. at 237–38.
  \item \textsuperscript{91} USCIS POLICY MEMO, supra note 4, at 5.
  \item \textsuperscript{92} Id.
\end{itemize}
guaranteed the return of a portion or a rate of return on a portion of their investment.93 “Nothing, however, precludes an investor from receiving a return on his or her capital (i.e., a distribution of profits) during or after the conditional residency period, so long as prior to or during the two-year conditional residency period, and before the requisite jobs have been created, the return is not a portion of the investor’s principal investment and was not guaranteed to the investor.”94

Until the investor has obtained conditional, lawful permanent resident status, the investor’s money can be held in escrow.95 The release of the escrowed funds will be contingent only upon (1) approval of the investor’s Form I-526; (2) subsequent visa issuance; and (3) admission to the U.S. as a conditional permanent resident.96 In the case of a status adjustment, approval of the investor’s Form I-485 will be necessary.97 The investment monies may be held in escrow within the U.S. to avoid issues that might arise through major currency fluctuations or export restrictions on foreign capital.98 Foreign escrow accounts can be used “as long as the petition establishes that it is more likely than not that the minimum qualifying capital investment will be transferred to the new commercial enterprise in the United States upon the investor obtaining conditional lawful permanent resident status.”99 When it comes to completing the Form I-829, USCIS must have evidence verifying the escrowed funds were released and used to sustain the new commercial enterprise.100

If USCIS determines an EB-5 investment is deficient, that the investor’s money is not truly at risk, or that insufficient jobs (in quantity or quality) were created through the investment, then the investor’s petition for citizenship may be denied. These investments are not backed or guaranteed by the government. Thus, there are no guarantees that an investor may either recoup their capital or ultimately be granted unconditional permanent resident status through an EB-5 investment.101

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93. Id.
94. Id. at 6.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. See 8 C.F.R. § 204.6(j)(2) (demonstrating the requirements to meet “at risk” investment status); EB-5 Inquiries, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-inquiries (last visited Sept. 3, 2014) (explaining that Regional Center designation does not mean that the regional center’s capital investment projects are backed or guaranteed by the
If these deficiencies are the product of domestic negligence or fraud, then what protections does the Constitution offer? For a non-citizen (undocumented person) seeking to enter the country there are no constitutional due process rights (exclusion), and even if a person is already an undocumented resident of the U.S., these rights are presently limited to due process under criminal prosecution (deportation).  

Thus, with regard to the constitutional issues concerning immigration, fairness to those who enter the country is deemed the purview of the federal government. The history regarding the application of this fairness has not been pretty. At present, investors are warned that they should exercise “due diligence” when making an EB-5 investment—does this caveat emptor provide the protection upon which a future bona fide citizen applicant can rely?  

B. Ethical Issues

1. Citizenship for Sale

“[I]t sounds like an EB-5 visa is just that, a way for people to buy their way into this country.” Representative Louie Gohmert (R-TX), Texas  

Congress, expressing the will of the people through legislation passed over more than two decades, has established that in very limited circumstances citizenship can be “sold.” This majoritarian legislative expression invites two equally longstanding questions: (1) what is the value of this citizenship (and by inference, what should be its “price”), and (2) what governmental oversight is required regarding these transactions?

Congress’ rationally based but ambiguously expressed goals with regard to mining immigrant investors for both investment capital and entrepreneurial expertise for domestic job creation have sometimes been undermined. EB-5 critics have labeled the program a “cash-for-visas scheme,” which indiscriminately promotes projects (with little government and how there are no guarantees an investor will be granted unconditional permanent resident status using the EB-5 program).

102. See Wong Wing, 163 U.S. at 237–38 (1896) (limiting the protections afforded unlawful aliens to criminal prosecutions).


Critics point to fiscally impossible, irresponsible projects and marginal investment opportunities associated with EB-5.105 To some, the EB-5 program appears to be federal policy acting as a thumb on the scales (a not so “invisible hand”) promoting projects that would not stand financially without the program. From this perspective, EB-5 appears at best to foster marginal business opportunities that have trouble securing regular financing and at worst to serve as federal government cover for outright investment frauds and/or “fee mills.” Immigration firms can masquerade as developers, but actually be in the business of selling visas in exchange for “administrative fees.” 107

The following are recent examples of the EB-5 program appearing in this unfavorable light:

i. Mississippi, 2007–2013

Accusations of political favoritism and gaming of the employment based immigration program came to light when former Democratic National Committee chairman Terry McAuliffe purchased, renamed, and reorganized a Chinese “green” automobile manufacturing concern, GreenTech Automotive (“GTA”)108 and relocated it to Tunica, Mississippi.

GTA was charged with receiving preferential treatment from then USCIS head Alejandro Mayorkas, who was in charge of the EB-5 program.109 GTA was accused of obtaining unfair access to immigrant investor startup capital via Gulf Coast Funds Management, Ltd., a TEA approved by Mayorkas in 2008.110

In 2009, the Virginia Economic Development Partnership (“VEDP”)—the state’s business-recruitment agency—passed on an opportunity to host

106. Id.
107. See id. (describing ventures that raked in millions of dollars in “fees”).
110. Id. at 5, 7, 18.
this venture. The VEDP executive director sent the Virginia Secretary of Commerce and Labor a letter in which he wrote, “we have grave doubts about the business model presented to us” by GTA. He mentioned several times that the company had not answered key questions that had been raised by VEDP. Suspecting a “visa-for-sale scheme,” he warned that Virginia could be sullied by linking a new EB-5 program to the fortunes of such a startup company.

Subsequently, McAuliffe resigned as chairman of GTA and went on to become the 72nd Governor of Virginia. In December 2013, Mayorkas became the Deputy Secretary of Homeland Security, overseeing USCIS as well as 21 other agencies charged with protecting the U.S. from terrorism, man-made accidents, and natural disasters.

ii. Texas, 2013

In October 2013, SEC brought fraud charges against a husband and wife for stealing funds from foreign investors via misapplication and mismanagement of the EB-5 program. The SEC charged Marco and Bebe Ramirez with fraudulently raising at least $5,000,000 from investors by falsely promising that the money would be invested as part of the EB-5 Immigrant Investor Pilot Program into a company named “USA Now.” The money received by the Ramirezes from investors was not invested in the EB-5 program but instead was funneled into unidentified businesses and personal use. “In at least one instance, they used new investor funds to

113. Id.
118. Id.
119. Id.
make Ponzi-like payments to an existing investor.”

The SEC’s complaint described how the Ramirezes originally targeted Mexican investors, but then went on to solicit investors in Egypt and Nigeria. In 2010, the Ramirezes desired to register their EB-5 project USA Now, with USCIS as an EB-5 Regional Center. This would allow USA Now to accept money from foreign investors and direct it towards investment opportunities in order to satisfy the EB-5 visa requirements. Allegedly, the Ramirezes told investors that USA Now would hold the investment capital in escrow until USCIS approved USA Now. The Ramirezes further told investors that once the funds were released from escrow, they would be used for legitimate EB-5 approved business purposes. In reality, the Ramirezes never held the funds in escrow and diverted the funds for other uses, in some instances on the same day they were received.

### iii. Chicago, 2013

The SEC announced charges and froze the assets of a company that planned on building the “World’s First Zero Carbon Emission Platinum LEED certified” hotel and conference center near O’Hare International Airport. The agency alleged that the developer fraudulently sold more than $145,000,000 in securities and charged $11,000,000 in fees to more than 250 investors, most of whom are Chinese.

This SEC prosecution was even reported by the largest TV network in China, and the Chinese government has issued warnings to investors about fraud in the EB-5 program. “It is very rare for the Chinese Ministry of

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120. Id.
122. SEC Halts Texas-Based Scheme Targeting Foreign Investors Seeking U.S. Residency Through EB-5 Visa Program, supra note 117.
123. Id.
124. Id.
125. Id.
126. Id.
127. SEC Halts $150 Million Investment Scheme to Dupe Foreign Investors and Exploit Immigration Program, supra note 56.
128. Id.
iv. Vermont, 2012

The Vermont ACCD cancelled an agreement with American Dream, a wholly owned subsidiary of DreamLife, a Canada-based self-styled “EB5 Green Card Facilitator” and developer of DreamLife Retirement Resorts, based on “material misrepresentations.” DreamLife proposed up to six $24,000,000 senior living facilities in Montpelier, Rutland, White River Junction, and Newport. Each facility was to consist of a mix of independent and assisted living senior units, with underground parking, health spas, hair salons, bank services, convenience stores, bowling alleys, bistros, and dining rooms.

ACCD based the termination of EB-5 certification on confirmation that DreamLife’s project leaders falsely claimed to have retained licensed attorneys and listed people as project partners without their knowledge or consent. In addition, DreamLife listed construction team members on its website that state officials determined were not aware of their roles in the project; they did not have contracts with the company. Finally, former DreamLife employees indicated the company reneged on numerous business commitments.

As if to illustrate critics’ continued concern regarding administrative opacity and subsequent uncertainty, ACCD reopened negotiations in 2013 with DreamLife’s successor. Its EB-5 certification has since been reinstated.

133. Rudarakanchana, supra note 129.
134. Id.
135. Id.
136. Id.
137. Id.
140. Id.
These four examples of conspicuous failure described above contribute to EB-5’s poor reputation. They also represent to the casual observer a program of inherent complexity suffering from an apparent lack of reciprocal regulatory oversight. Combined with other factors, these failures manifest in the appearance of an unstable program that undermines the citizenship, investment, and employment goals set by Congress.

2. Fraud—Gerrymandering the Investor Visa

In 2011, a New York Times investigation into the EB-5 financing of a Manhattan high-rise development found evidence of “gerrymandering,” and stated how “developers and state officials are stretching the rules to qualify projects for this foreign financing.” Two years later an investigative reporter using federal rules for TEAs, federal government supplied census tract maps and unemployment data, a helpful how-to article by an immigration lawyer, and guidance from the California Governor’s Office was able to carve out a properly depressed TEA that included the White House. Apparently the whole process, once the basic data was in hand, took only several minutes.

Because the ultimate determination of a TEA “may” be made with “a letter from the state government designating a geographic or political subdivision located outside a rural area but within its own boundaries as a

141. Senate History: Elbridge Gerry, 5th Vice President (1813-1814), U.S. SENATE http://www.senate.gov/artandhistory/history/common/generic/VP_Elbridge_Gerry.htm (last visited Aug. 13, 2014) (explaining that the term “gerrymander” was first used in 1812 to describe the shape of an election district concocted for political advantage by then Governor of Massachusetts Governor (and future Vice President) Elbridge Gerry (Gerry + salamander = gerrymander)).


143. 8 U.S.C. §§ 1153(b)(5)(B)(ii)-(iii); 8 C.F.R. § 204.6(e)(ii).


149. Id.
high unemployment area,” the American tradition of gerrymandering appears alive and well in the administration of EB-5.150

C. Administrative Dilemmas

A Congressional Research Service report to Congress identified several areas of administrative weakness in the EB-5 program:

the rigorous nature of the LPR [Lawful Permanent Resident] investor application process and qualifying requirements; the lack of expertise among adjudicators; uncertainty regarding adjudication outcomes; negative media attention on the LPR investor program; lack of clear statutory guidance; and the lack of timely application processing and adjudication.151

A 2005 U.S. Government Accountability Office (“GAO”) report laid out succinctly the enduring problems that have plagued the EB-5 program from the outset, and noted the primary areas of deficiency as: (1) ambiguity and lack of clear guidance, (2) uncertainty and lack of timeliness, and (3) underutilization.152

1. Ambiguity and Lack of Clear Guidance

Ambiguity thrives in the evolving and at times disjointed adjudication policy articulated in periodic USCIS attempts to synchronize its regulations with the employment-based immigration statute.153 This less than steady hand on the tiller has manifested itself in the application of evolving job creation determination methodologies,154 the wholesale revision of

150. 8 C.F.R. § 204.6(j)(6).
previously published guidance,\textsuperscript{155} and oscillating instructions to its own staff on issues ranging from the definition of “full-time” employment\textsuperscript{156} to the establishment of “uniform standards governing all aspects of EB-5 matters.”\textsuperscript{157} Overlay on this meandering adjudication a rigorous application process “designed” to regulate complex business and tax issues—applied at times retroactively. The result is an unsurprising, yet significant, deterrent to participation in EB-5 by potential immigrant entrepreneurs.

In addition, lack of clear guidance manifests itself notably in subjective criteria appearing in parts of the statute and subsequent USCIS Policy Memoranda. For example, USCIS states that one EB-5 requirement is that the business must benefit the U.S. economy.\textsuperscript{158} However, the statute provides no guidance on what types of investments meet this criterion. Thus, adjudicators are generally left to their own judgment as to the value, or benefit, of the proposed investment.

2. Uncertainty and Lack of Timeliness

Since its inception, delay in the issuance of EB-5 rules, followed by dramatic and somewhat inconsistent changes in the interpretation of those rules, has led to uncertainty in the EB-5 program. Another substantial source of uncertainty with regard to the outcome of EB-5 adjudications is a result of the limited expertise of adjudicators, who lack experience with and knowledge of complex business and tax issues. At least the USCIS, operating under the mantle of DHS, appears well suited to oversee the immigration and national security components of EB-5.


\textsuperscript{158} USCIS POLICY MEMO, supra note 4, at 3.
But, critics note that with regard to issues of loans, mortgages, secured transactions, and other investments, USCIS has demonstrably less competence. 159 They note the increasing presence of SEC in the administration of EB-5 related sanctions, and they suggest the Department of Commerce or the Department of the Treasury might provide necessary expertise to vet and supervise the financial aspects of the program.160

The uncertainty surrounding EB-5 adjudications is further exacerbated by a lack of timeliness that negatively impacts both the processing and adjudication of EB-5 related applications. Immigration lawyers have testified that, in their experience, “it takes from 5 to 7 years for their clients to complete a program that is often advertised as a 2-year conditional residency program.”161

INS General Counsel’s interpretive guidance in the mid-1990s permitted investors to obtain status without actually committing their entire investment amount to the business.162 This early guidance was received favorably by the private sector and the number of EB-5 immigrant visas that were issued increased from 583 in Fiscal Year 1993 to 1,361 visas in Fiscal Year 1997.163

Concern regarding insider access, suspicions of abuse, misrepresentation, and fraud began to surface in the mid-1990s at the same time that the EB-5 program was experiencing this significant expansion in use.164 Some of these concerns were later proven in a federal court case leading to convictions for immigration fraud, wire fraud, money laundering, and conspiracy against the principals and officers of an EB-5 investment business.165

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160. Id. (Interview with Mr. David North where he suggests the SEC as the “correct institutional home” for the EB-5 Program).
161. GAO, supra note 152, at 11.
162. Memorandum from the Office of Gen. Counsel, Immigration and Naturalization Serv., to Paul W. Virtue, Executive Associate Commissioner, Office of Programs, Sections 203(b)(5) (EB-5) and 216(A) of the Immigration and Nationality Act (Dec. 19, 1997), available at http://www.horitsu.com/html/docs/geeb5d.html#anchor (providing guidance disallowing such practices). As part of a major government reorganization following the September 11 attacks of 2001, the Homeland Security Act of 2002 (HSA) dismantled the former INS and most of its functions were transferred from the Department of Justice (DOJ) to three new entities—U.S. Bureau of Citizenship and Immigration Services (BCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP)—within the newly created Department of Homeland Security (DHS).
163. OMBUDSMAN RECOMMENDATIONS, supra note 22, at 7.
164. Id.
165. United States v. O’Connor, 158 F. Supp. 2d 697, 723–38 (E.D. Va. 2001) The Interbank scandal: defendants attracted $21 million in investment funds from foreign investors who were seeking to lawfully obtain green card status through the EB-5 program. The fraudulent investment
In 1998, the USCIS Administrative Appeals Office ("AAO")\(^\text{166}\) issued four new guidance documents.\(^\text{167}\) These "precedent decisions" altered the previously issued guidance and substituted new and more restrictive interpretations of the law.\(^\text{168}\) These changes caused concern among EB-5 investors, and introduced new and significant uncertainties into the program.\(^\text{169}\)

scheme involved the juggling of funds through an offshore financial institution, and the production and use of fake bank statements used in connection with underlying I-526 petitions filings. None of the individual 216 EB-5 investors were found complicit in the fraud. Most of these investors suffered a total loss of their funds and were not granted green cards.


\(^{168}\) Precedent Decisions, U.S. CITIZENSHIP AND IMMIGRATION SERVS., http://www.uscis.gov/laws/precedent-decisions (last visited Apr. 12, 2014) “‘Precedent decisions’ are administrative decisions of the AAO, the Board of Immigration Appeals (‘BIA’), and the Attorney General, which are selected and designated as precedent by the Secretary of the DHS, the BIA, and the Attorney General, respectively. The Department of Justice Executive Office for Immigration Review (‘EOIR’) publishes precedent decisions in bound volumes entitled ‘Administrative Decisions Under Immigration and Nationality Laws of the United States.’ Precedent decisions are legally binding on the DHS components responsible for enforcing immigration laws in all proceedings involving the same issue or issues. However, precedent decisions may be modified or overruled by: the Attorney General, Federal Courts, later precedent decisions, and changes in the law.”

\(^{169}\) OMBUDSMAN RECOMMENDATIONS, supra note 22, at 8.
Changes in Selected EB-5 Legal Guidance

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<tr>
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<tbody>
<tr>
<td>Establishment of “new” enterprise</td>
<td>Business must be created after November 1990</td>
<td>Investor must personally be involved in the establishment of business(^C) &amp; (^{171})</td>
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<tr>
<td>Source of funds</td>
<td>General representation and proof of legal generation of funds accepted</td>
<td>Legal generation of funds must be traced with particularity(^A),(^C),(^D)</td>
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<tr>
<td>Promissory notes</td>
<td>Considered at face value; no limit on duration; need not be perfected; foreign collateral accepted</td>
<td>Must prove fair market value;(^C) Duration generally restricted to two years;(^C) must be perfected;(^B) foreign collateral must be seizable and marketable(^C)</td>
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<tr>
<td>Guaranteed returns</td>
<td>Permitted generally</td>
<td>Prohibited</td>
</tr>
<tr>
<td>Redemption provisions</td>
<td>Permissible but may not exercise until after two year conditions lifted</td>
<td>Impermissible to enter redemption agreement within two year conditional period</td>
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3. Underutilization

After these four AAO precedent decisions, EB-5 visa applications and subsequent approvals significantly decreased. “Between [Fiscal Year] 1998 and [Fiscal Year] 2008, USCIS had an average EB-5 approval rate of approximately 44%.**\(^{172}\)
Many potential foreign investors withdrew their EB-5 applications. USCIS even took action to remove some investors from the U.S. by retroactively applying the principles set forth in the four AAO precedent decisions. “While most investors lost legal challenges, one group of affected investors did successfully challenge the retroactive application of these decisions in one federal court.” In reversing the USCIS decisions, the court held:

[Investors] relied on their understanding that their business and investment plans conformed to the requirements of EB-5. They sold businesses, uprooted from their homelands, and moved to the U.S. . . . [They] sought no guarantee of success, but a contingent promise that, if they held up their end of the bargain . . . they would obtain LPR status promised by the EB-5 program. This was not unreasonable . . . . The reputation and integrity of the EB-5 program is ill-served by the proposition that INS approval of an I-526 petition as satisfying EB-5’s requirements cannot be relied

173. Id. at 9.
174. Id.
175. Id.
176. Id.
In 2002 President George W. Bush—and President Barack Obama again in 2011—sought to rectify the EB-5 situation with special legislation. Despite these efforts, new regulations are needed to implement this legislation. “As a result, approximately 700 investors, most of whom are at the condition removal stage, had their immigration status placed on hold.” This delay has negatively affected investors (and their family members) and likely contributed to the poor perception of the EB-5 program by other foreign investors.

Meanwhile, in spite of its endemic deficiencies, EB-5 has attracted more interest and is once again experiencing a significant uptick in applications. As observed earlier in this article, the cause of this growth in utilizing the EB-5 program is in large part due to all time low commercial credit availability and unprecedented growth in the number of foreign HNWI.

III. EB-5 CONS

A. General Factors

Regardless of whose “jobs creation” expertise is fueled by EB-5 capital, USCIS efforts at program administration have proved vexing. As the SEC has learned in its own attempt to herd cunning financial cats, “past performance does not guarantee future results” and “current performance may be lower or higher than the performance data quoted.”

Accounting for immigrant investor money has proven relatively easy compared to the quantification of domestic job growth and maintenance

177. Chang v. United States, 327 F.3d 911, 928–29 (9th Cir. 2003).
178. 21st Century Department of Justice Appropriations Authorization Act §§ 11031–37, Pub. L. 107-273 (Nov. 2, 2002). “Immigrant investors affected by the retroactively applied 1998 AAO decisions were provided an additional two years to demonstrate that they made a supplemental investment, and in combination, that they met the minimum required qualifying investment and created and/or preserved ten jobs.” OMBUDSMAN RECOMMENDATIONS, supra note 22, at 10.
180. OMBUDSMAN RECOMMENDATIONS, supra note 22, at 10.
181. Id.
182. Id.
183. Id.
184. Id. at 11.
associated with that money. Both factors have been confounded by the creativity of the immigrant investors and their domestic entrepreneurial legal counsel. USCIS has remained gamely in the mix, casting and recasting its rules for measuring the immeasurable—refining procedures to implement Congress’ substantive goals.

B. Job Creation Paradox—The Number of Jobs Created by Immigrant Investors is Very Difficult to Estimate

Through the first fifteen years of the EB-5 program even GAO was unable to determine how many jobs immigrant investors had established because of the way USCIS credited the number of jobs created by an investor’s business and/or investment. This was despite the explicit charge from Congress that USCIS adjudicators ensure that each business create a minimum of at least 10 full-time jobs.

From the outset of the program there was an issue with direct and indirect job creation accounting. The problem presented itself early on in circumstances where a mix of EB-5 and non-EB-5 investors were involved, or where the investment was part of a greater overall business expansion. Initially, USCIS resolved this by crediting the EB-5 investors with the total of all jobs created, even though many of the jobs were not the result of their portion of the investment.

For example, USCIS credited a single immigrant investor with creating 1,143 jobs based on a $1,500,000 investment. While this investment did not create all these jobs, for adjudicative purposes (as the immigrant investor was the only one seeking the immigration benefit), all 1,143 jobs were attributed to the EB-5 investor. In this example, the immigrant investor’s capital infusion was only a small part of a multimillion-dollar expansion of an existing business involving multiple franchises and other non-EB-5 investors whose capital also fueled the enterprise.

This job accounting method led to abuse, forcing USCIS to modify its job creation verification methodology. In 2010, USCIS terminated the status of the Victorville Regional Center, which was sponsored by the city

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186. GAO, supra note 152, at 19.
188. GAO, supra note 152, at 19.
189. Id.
190. Id.
191. Id.
192. Id.
of Victorville, California. USCIS determined that most of the jobs being generated at the Regional Center, including jobs at a soft drink plant and a plastic packaging factory, could not be directly attributed to a $30,000,000 wastewater plant. This was the first time USCIS took action to address insufficient job creation.

Victorville collected about $7,500,000 from 15 EB-5 investors for the construction and operation of a waste treatment plant. The city and its Regional Center filed suit to prevent termination of its status but withdrew the suit after an administrative appeal affirmed USCIS’ decision. These investors likely failed to obtain their Green Cards, but the city refunded some of their EB-5 investment funds.

The El Monte Transit Village project suffered a fate similar to Victorville’s. This Regional Center was designed to develop a 65-acre mixed-use development at a bus station in the city of El Monte, California. In 2011, USCIS terminated the Regional Center status of this project when it determined that the project was “no longer promoting job creation or the kind of local economic development for which it was initially certified to do.” To further complicate the situation, the FBI arrested two principals of the LLCs formed to develop the project. The city has since moved on to a new developer and is advancing a scaled-down version of the project: El Monte Gateway.

California is not the only state to experience woes with the EB-5 program. The City of New Orleans sponsored a Regional Center that was operated by NobleReach-NOLA, LLC. The private placement issued in

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194. Eng, supra note 24, at 10.
195. Id.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id.
201. Id.
202. Id.
203. Id.
connection with this Regional Center investment claimed that a fund was being formed to invest in the reconstruction of New Orleans and the surrounding coastal areas devastated by Hurricanes Katrina and Rita. 206 EB-5 foreign investors for this venture included citizens from China, Jamaica, New Zealand, Saudi Arabia, Singapore, Turkey, and the United Kingdom. 207 A complaint filed in 2012 included claims of fraud and violations of fiduciary duties, including the diversion of funds to pay allegedly exorbitant consulting fees to the general partners. 208

In 2013, USCIS provided further guidance with regard to job creation evaluation via another Policy Memorandum (“PM”). These instructions state that a qualifying EB-5 commercial enterprise in a Regional Center context “may create jobs indirectly through multiple investments in corporate affiliates or in unrelated entities.” 209 However, an EB-5 investor cannot qualify by investing directly in those multiple entities. 210 “Rather, the investor’s capital must still be invested in a single commercial enterprise, which can then deploy that capital in multiple ways as long as one or more of the portfolio of businesses or projects can create the required number of jobs.” 211

In order to show that a new commercial enterprise will create not fewer than 10 full-time positions for qualifying employees, an immigrant investor must submit evidence such as: (1) documentation in the form of photocopies of relevant tax records, etc.; or (2) a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the requisite full-time employment that will result, including approximate dates, within the next two years, and when such employees will be hired. 212

USCIS reviews each business plan submission to determine whether, more likely than not, the plan is comprehensive and credible. 213

The more detailed the business plan, the more likely USCIS will consider the plan comprehensive and credible. Detailed defense of the direct or indirect job creation claims may be demonstrated by using reasonable methodologies such as quantitative input/output modeling, a form of
C. Quantitative Input/Output Modeling of Economic Impact

To project the number of jobs created by the investment a quantitative input/output model assessing economic impact must be created. USCIS requires that this model must clearly apply approved methodologies to the project-specific data.215 The model quantifies and calculates “the interdependencies between different industries in an economy.”216 These relationships are then used to estimate the ripple effects of EB-5 investments and determine the total economic impact of an activity—the number of direct and indirect jobs created.217

“Direct jobs are actual, identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital.” 218 “Indirect jobs are those jobs created collaterally or that result from capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor.”219

Among the economic impact models approved by USCIS to evaluate EB-5 financing, the top three are: RIMS-II (Regional Input-Output Modeling System)220; IMPLAN (Impact Analysis for Planning)221; and REMI (Regional Economic Models, Inc.).222

“Each model uses as a primary foundation the US Department of Commerce Input-Output Account tables, which were first developed in the 1970s.”223 “The simplest model is RIMS and the most complex is REMI, which layers econometric modeling techniques onto the basic input-output

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216. Id.
217. Id.
219. Id.
modeling, incorporating the IMPLAN system.”

The RIMS and IMPLAN are the two most popular models used for EB-5 studies. The U.S. Bureau of Economic Analysis, under the U.S. Department of Commerce, produces RIMS. “IMPLAN is an economic impact modeling system created and provided by MIG Inc., a private company.”

Economic impact models generate industry and geographic specific economic multipliers to apply to economic activity—output, employment, workers’ earnings, and so on. The two most influential factors that affect the size of the resulting impact are “impact area geography” and “NAICS code.” Impact area geography—Larger geographical areas or more populated areas tend to result in larger multipliers and therefore greater overall job creation. The urge to expand the geographical area must be balanced against the ability to provide justification for the impact area. The impact area must align with the geographical areas from which major inputs are purchased and/or where employees reside.

NAICS Code—The NAICS code refers to the North American Industry Classification System code, which classifies the economic activity with its corresponding direct/indirect job multiplier factor. Manufacturing industries tend to have larger multipliers than other industries, for example retail or food service. Ultimately, the business activity will dictate the appropriate NAICS code classification.

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224. Id.
225. Impact DataSource, supra note 215.
226. Id.
227. Id.
228. Id.
229. Id.
230. Id.
D. Time Frame

The EB-5 program requires that the jobs be created within two years.\textsuperscript{232} Even with a well-received economic impact analysis and expeditious USCIS adjudication, most conventional commercial development projects are hard pressed to put enough people to work quickly enough to satisfy the requirements of the EB-5 program. As we learned to our dismay in implementing the American Recovery and Reinvestment Act of 2009 ("ARRTA"),\textsuperscript{233} even "shovel-ready" projects—those that virtually everyone thought would put people to work right away—can take longer than expected to break ground.\textsuperscript{234} Investments in worthwhile long-term projects, on the other hand, were often rushed to meet arbitrary deadlines, resulting in shoddy outcomes that tarnished the projects’ image.\textsuperscript{235}

\textsuperscript{231} AKRF, Inc., supra note 223, at 4.
\textsuperscript{232} 8 C.F.R. § 204.6 (j)(4)(ii)(B) (2012).
\textsuperscript{233} American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (ARRTA is also known as Division B of the American Recovery and Reinvestment Act of 2009, which is commonly referred to as ARRA or "the Stimulus Bill").
IV. EB-5 PROS

A. General Factors

Though issued as an ex post response to the Hurricane Sandy disaster, President Obama’s November 1, 2013 Executive Order (“EO”) “Preparing the United States for the Impacts of Climate Change” dovetails well with the proposed ex ante renovation of EB-5 as an instrument of sustainable capitalism. Specifically, section 2 of the EO’s directive was to,

[M]oderniz(e) Federal Programs to Support Climate Resilient Investment. (a) To support the efforts of regions, States, local communities, and tribes, all agencies, consistent with their missions and in coordination with the Council on Climate Preparedness and Resilience (Council) established in section 6 of this order, shall:

(i) identify and seek to remove or reform barriers that discourage investments or other actions to increase the Nation’s resilience to climate change while ensuring continued protection of public health and the environment; . . .

(ii) identify opportunities to support and encourage smarter, more climate-resilient investments by States, local communities, and tribes, including by providing incentives through agency guidance, grants, technical assistance, performance measures, safety considerations, and other programs, including in the context of infrastructure development as reflected in Executive Order 12893 of January 26, 1994 (Principles for Federal Infrastructure Investments), my memorandum of August 31, 2011 (Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review), Executive Order 13604 of March 22, 2012 (Improving Performance of Federal Permitting and Review of Infrastructure Projects), and my memorandum of May 17, 2013 (Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures).
Other important positive factors that make EB-5 investments via a Regional Center program an ideal investment vehicle for foreign investors are: priority standing within the immigration process resulting in an accelerated path to Green Card procurement; freedom to live anywhere in the U.S. once a conditional Green Card has been granted; and the ability to make a passive investment with no required direct management responsibilities (other than a limited partner policy making role).  

B. Program Growth

Estimates for spending associated with EB-5 investor households for 2010-2011 indicated that these investors contributed over $2,600,000,000 to the U.S. economy and supported over 33,000 local jobs. In February 2014, a peer reviewed report, prepared for a national EB-5 trade association, estimated that spending associated with EB-5 investors contributed $3,390,000,000 to U.S. GDP and supported over 42,000 U.S. jobs during 2012. This represents a 30% increase in EB-5 investments and a 27% increase in jobs created in a single fiscal year. Based on preliminary data, program growth continues to accelerate, with 6,678 EB-5 visas issued by USCIS in Fiscal Year 2012 and 7,312 in Fiscal Year 2013. Thus, it appears that the program may soon reach its full congressionally authorized annual quota of 10,000 visas. At full utilization, it is estimated that the EB-5 program will contribute $6,600,000,000 to the U.S. economy annually and support 83,000 local jobs for U.S. citizens. Linear projections indicate that, if the government expands the program beyond the annual quota, it can anticipate proportionate growth in investment and jobs.

238. Ivener and Fullmer, supra note 64, at 99.
242. IMPLAN, supra note 221.
Projected Job Creation and Subsequent Raises in GDP

Common sense and life experience indicate that straight linear projections are of limited value in predicting future results. Below, the article will explore how an expanding EB-5 program might be managed to optimize both income and value.

C. EB-5 is a Bargain

1. Historic Pricing

Since its inception in 1990, the price associated with the EB-5 immigrant investor program has remained fixed at one million dollars, with a qualifying Regional Center at-risk investment set at $500,000. Based on Bureau of Labor Statistics inflation data, $500,000 in 2014 has the same buying power as $270,544 in 1990. Expressed another way, $500,000 in 1990 has the same buying power as $924,064 in 2014.

243. Id.
244. Inflation Calculator, DOLLARTIMES, http://www.dollartimes.com/calculators/inflation.htm (last visited Sept. 3, 2014) (showing annual inflation over this period was 2.59%).
245. Id.
Thus, at the $500,000 level, and given improving and more consistent adjudication, many investors appear to be concluding that an EB-5 Regional Center petition is an increasingly affordable option for obtaining permanent residence in the U.S.

2. Present Value

Among the western developed democracies that offer citizenship for sale, the U.S. appears at the lower end of the spectrum in terms of price per visa.

International Comparison of Visa Prices\textsuperscript{246}

<table>
<thead>
<tr>
<th>Nation</th>
<th>Euro</th>
<th>Pounds</th>
<th>Canada Dollars</th>
<th>US Dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States (TEA)</td>
<td></td>
<td></td>
<td>$500,000</td>
<td></td>
</tr>
<tr>
<td>Macedonia</td>
<td>€ 400,000</td>
<td></td>
<td>$548,600</td>
<td></td>
</tr>
<tr>
<td>Spain (EU)</td>
<td>€ 500,000</td>
<td></td>
<td>$685,75</td>
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</tr>
<tr>
<td>Canada (Canada suspended its national program in July 2012)</td>
<td></td>
<td>800,000CA$</td>
<td>$724,638</td>
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<tr>
<td>Malta (EU)</td>
<td>€ 546,000</td>
<td></td>
<td>$78,839</td>
<td></td>
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<tr>
<td>United Kingdom (EU)</td>
<td>£1,000,000</td>
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<td>$1,658,900</td>
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</tbody>
</table>

3. Price/Value Optimization

As the EB-5 program begins to reach optimal utilization at 10,000 visas per year, Congress will be confronted with another contentious, yet not altogether unpleasant, dilemma: whether to increase the number of visas in the EB-5 program and/or increase the price associated with participation in the program.

An alternative to either raising the bridge or lower the river is available via a “third way” of pricing the EB-5 program: an auction. This method would have two clear advantages: (1) the number of visas could be easily capped, and (2) they would sell for an optimal market-driven price. In the interest of revenue-maximization the federal government could institute an

auction based on single sealed bids. Under this approach a ceiling ("cap") of 10,000 visas would be auctioned off with a reserve price (a "floor") of $1,000,000 to $500,000 (based on existing program investment criteria) but with the winners paying a not-to-be-disclosed premium above that.

Under this scenario, optimal utilization based on rising demand and improving USCIS internal processes in effect guarantees the projected minimum of $6,600,00,000 associated with a fully implemented 10,000 annual visa program, plus whatever premium the bidders place on assuring their selection for participation in the program. This enables Congress to establish a mechanism for expanding the program as a function of immigration and economic policy that integrates market fluctuation.

4. Equitable Division

In the interest of fair and equitable distribution of the infusion of immigrant investor wealth, the initial distribution of these 10,000 visas among the states could be prorated based on population and/or economic activity. Regional Centers and private developers would still compete for these visas by providing the most attractive projects. Unused visas could be redistributed among the states via a national EB-5 Transfer Development Authority ("TDA"). This process is similar to those established by states and municipalities for the equitable distribution of Transferable Development Rights, and is used to provide effective and flexible land use control.247

For example, based on calculations using U.S. Department of Commerce, Bureau of Economic Analysis data, Vermont’s Real Total GDP was approximately .18% of the U.S.’ in 2012.248

<table>
<thead>
<tr>
<th>Vermont’s Percentage of the USA’s GDP</th>
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<tr>
<td>GDP (Millions of chained 2005 Dollars)</td>
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<tr>
<td>Vermont</td>
</tr>
<tr>
<td>U.S.</td>
</tr>
</tbody>
</table>


Thus, Vermont’s pro rata guaranteed share of the annual EB-5 visas would be 18 (0.018 x 10,000), with a conservative minimum annual value of $9,000,000 (18 x $500,000 minimum per EB-5 visa = $9,000,000). Based on total tax collections (federal and state) in Vermont for Fiscal Year 2013 of $2,878,930,000, this EB-5 revenue would represent a 3% increase in state revenue at no cost to taxpayers. As posited above, any unused Vermont EB-5 visas could be re-distributed through a national EB-5 TDA.

D. EB-5 in Vermont

In Fiscal Years 2012-2013 there were four EB-5 Regional Center projects certified by Vermont ACCD: (1) Jay Peak Resort: a $225,000,000 partnership, led by Bill Stenger and Ari Quiros, which includes a mixed use ski resort, water park, accommodations, and tourist amenities project; (2) AF Cell Medical: a $10,000,000 biotech company that provides amniotic tissue membrane for surgical use; (3) Trapp Family Lodge: an historic resort hotel; and (4) EB-5 American Dream Fund: the resurrection of DreamLife.

In addition to the projects listed above, in March 2013, the Burlington Free Press reported the following Regional Center projects utilizing EB-5 investments in Vermont: (1) Burke Mountain, a $150,000,000 Stenger-Quiros partnership investing in hotel accommodations and amenities; (2) Newton, a $160,000,000 downtown block including a hotel and conference center; (3) AnC Bio, a $110,000,000 biotech company; (4) Country Home Products (DR Power Equipment), which raised $12,000,000 in EB-5 investments over a three year period (2009-2012) as a qualified “troubled business,” and which manufactures log splitters, lawnmowers, brush mowers, chippers, stump grinders, power tillers, and more under the DR Power Equipment name brand; and (5) Sugarbush Resort, raised $20,000,000 in EB-5 investments over a three-year period (2009-2012) as another qualified “troubled business.”

To round out a report of EB-5 activity in Vermont, the following projects have previously expressed interest in, but have not yet availed themselves of the program: (1) Quechee Lakes, (2) Seldon Technologies,

251. D’Ambrosio, supra note 52.
and (3) WhistlePig.\textsuperscript{252}

Quechee Lakes is a multi-million dollar investment in high-end residential development by Taurus New England Investments, LLC, a privately held Boston real estate company that bought The Quechee Lakes Co. in 2005.\textsuperscript{253} Taurus plans to build 60 residential units as well as two 18-hole golf courses, 12 tennis courts, 35 miles of trails, and a polo field.\textsuperscript{254}

Seldon Technologies, operating out of Windsor, was approved for $20,000,000 in EB-5 financing to invest in research, development, and expansion.\textsuperscript{255} Seldon creates water purification systems for both military and residential use.\textsuperscript{256}

WhistlePig is a small whiskey company located on a 500-acre farm in Shoreham that grows grain and also raises livestock.\textsuperscript{257} Although the company has been approved as an EB-5 project, WhistlePig has not yet “pursued anything related to EB-5.”\textsuperscript{258}

On its state website, Vermont notes that, “[t]he ACCD Vermont Regional Center projects have shown great success to investors with a 100% petition approval to date.”\textsuperscript{259}

V. SUSTAINABLE CAPITALISM AS ECOLOGICAL MODERNIZATION\textsuperscript{260}

Ecological Modernization (“EM”) is a term of environmental academic discourse and policy strategy. EM manifests itself in a school of thought that argues regenerative engagement with the environment yields economic benefits.\textsuperscript{261} The underlying concepts of EM have their origins in the

\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{260} WILLIAM LITTLE ET AL., OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, 2205 (Onions, C.T. ed., 3rd ed. 1973) (explaining that the word sustainability is derived from the Latin sustinere. Tenere, which means “to hold”, sus means “up,” and sustain can mean “maintain,” “support,” or “endure”).
\textsuperscript{261} JOHN T. LYLE, REGENERATIVE DESIGN FOR SUSTAINABLE DEVELOPMENT 311 (John Wiley & Sons, Inc. ed. 1994) (explaining that “regenerative technologies tend to employ more people; that is, they involve more jobs for equal amounts of capital invested than do industrial technologies serving the same functions. This is especially so in the areas of energy, agriculture, and waste management. At the same time, being generally smaller in scale, regenerative technologies require lower levels of capital investment for each enterprise”—or more diffuse investment).
EM is an integral component of sustainable capitalism, which is “a long-term and responsible form of capitalism” that posits a pragmatic solution-driven approach to development. This strategy would encourage the construction of infrastructure to anticipate climate vulnerability. As such, it carries a positive message of the current institutional order being able to accommodate the challenge of ecological sustainability.

Capitalism’s strength is grounded in wealth creation based on efficient allocation of resources—matching supply and demand. This in turn unlocks human potential “with ubiquitous, organic incentives that reward hard work, ingenuity, and innovation.” Sustainable capitalism builds upon this foundation by modifying the system’s inherent weaknesses. These weaknesses include: (1) short-termism, (2) over-reliance on GDP growth as a primary metric of prosperity, and (3) diverting wealth into shadow banking and financial engineering and away from addressing real needs. Sustainable capitalism, integrating EM, and provides a framework for organizing economic activity. This structure maximizes long-term economic value by considering all costs and integrating Environmental Social Governance (“ESG”) criteria into economic decision-making processes.

In the U.S., two of sustainable capitalism’s most visible proponents are Michael Braungart and William McDonough. Their 2002 book, Cradle to
Cradle: Remaking the Way We Make Things, is widely acknowledged as one of the most important environmental manifestos of our time.271 Building upon this concept, this article proposes expanding EB-5 as an instrument of ethically financing sustainable capitalist development. This method provides access to an untapped reserve of foreign investors who might welcome the opportunity to secure their “green cards” via investment as an alternative to conventional private sector real estate development. These alternative projects would be rooted in environmental development policies that manifest in regenerative community based sustainable capitalism. Thus re-conceptualized, EB-5 becomes a financial engine for the application of sustainable capitalism; a model for application of domestic anticipatory design, rapid prototyping, and construction of green infrastructure in the United States. Set upon this bedrock ethical foundation, the reanimated program becomes one that privileges jobs per dollars invested, and redefines “return on investment.” A welcome by-product might be the elevation of EB-5 above the scrub of partisan politics, with the program becoming a beacon on the course towards a more enlightened immigration policy. This demonstrates that governance via rational policy making is possible.

An ideal application of this new EB-5 would be to assist state and municipal government authorities in fulfilling environmental protection mandates, specifically for compliance with Phase 2 of the National Pollutant Discharge Elimination System (“NPDES”) permit program for Municipal Separate Storm Sewer Systems (“MS4”).272 These MS4 permits require holders to implement storm water control and flow restoration practices by the end of the first permit term, which is typically a 5-year period.273 These are ideal EB-5 investor projects involving low cost, low technology storm water quantity, and quality installations to regenerate and sustain an ecologically healthy environment and create perpetual local employment. EPA states that there are approximately 6,700 Phase II MS4s spread throughout all fifty states.274 An additional benefit of this application is the development of a scalable suite of financing, implementation, and

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stewardship of Best Management Practices ("BMPs") for regenerative projects and sustainable development. This is discussed further below.

VI. PUBLIC PRIVATE PARTNERSHIPS ("PPPs")

For the purpose of administering the EB-5 program, USCIS defines a qualifying commercial enterprise as "any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to: a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, and business trust or other entity, which may be publicly or privately owned."275

"This definition includes a commercial enterprise consisting of a holding company and its wholly owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business."276

The proposed evolution of the EB-5 program as an instrument for sustainable capitalism requires the creation of ethically based, and pragmatically organized relationships between public sector bodies, non-profit/not-for-profit organizations, and for-profit private entities. PPPs are an ideal vehicle for bringing about this objective because they emphasize value for money over the lifetime of a project, rather than only the lowest first cost.277 This encourages a focus on the cost implications of a whole life cycle.278 Combining a mature EB-5 program with a green application of the PPP agenda has the potential to revolutionize the provision of public infrastructure throughout the nation.

In a PPP, design, construction, financing, operations, and maintenance are combined under one contractor, rather than as separate functions as occurs with traditional public procurements.279 This integration ("bundling") within a long-term PPP framework provides financial motivation for all stakeholder parties to think beyond the design stage and build energy-reducing and waste-minimizing/harvesting features.280 This methodology may cost more initially but can result in lower operating costs, delivering cost effectiveness and revenue over time.281

275. Investor, supra note 218.
276. Id.
278. Id.
279. Id.
280. Id.
281. Id.
PPPs are strongly incentive-compatible contracting arrangements that allow private parties to participate in, or provide support for, the provision of public infrastructure.282 A PPP project results in a contract for a private entity to deliver public infrastructure-based services. These contracts take the form of multi-year design-build-finance-operate (“DBFO”) agreements that are awarded to private sector entities in a long-term partnership arrangement.283

In the service of sustainable capitalism, this article proposes project-level partnerships focused on specific sites and/or situations, such as storm water quantity and quality control mechanisms, to assist communities in complying with EPA’s NPDES MS4 requirements.

VII. VERMONT AS LABORATORY

Nationally, nonpoint source pollution is the leading cause of water quality degradation.284 Vermont Department of Environmental Conservation (“DEC”)285 Commissioner David Mears regards water quality improvement as his department’s “highest priority.”286 In unparalleled government-speak, EPA defines nonpoint sources of pollution as “sources that do not meet the Clean Water Act’s legal definition of point source.”287 A more useful understanding of nonpoint source water pollution is provided via examples that include sheet runoff from developed areas, construction sites, and agricultural operations.

Many streams and rivers in Vermont’s urbanized areas (“UA’s”) suffer from polluted runoff from impervious surfaces such as buildings, parking lots, and roads, all of which contain metals, oil, grease, and nutrients. In addition, this runoff can cause serious erosion and cause damage to fish and wildlife living in and along streams. This culminates in negative impacts to recreational and fishing opportunities. The sediment and nutrients associated with this erosion wash downstream, and eventually much of this

282. Id. at 6.
283. Id. at 1.
285. Welcome to the DEC, VT. DEP’T OF ENVTL. CONSERVATION, http://www.anr.state.vt.us/dec/dec.htm (last visited Aug. 13, 2014) (discussing the DEC’s responsibilities of collecting and analyzing data, monitoring the quality of the air, as well as water and ecosystem health. It is also charged with preserving, enhancing, restoring and conserving Vermont’s natural resources, and protecting human health for the benefit of current and future generations.).
pollution impacts Vermont’s Lake Champlain Watershed.

In December 2012, the Vermont DEC issued an updated MS4 general permit requirement.288 This permit, designed to address pollution from storm water runoff, applies to thirteen municipalities and three institutional entities in the Lake Champlain Watershed.289 “Communities already subject to the MS4 permit include Burlington, Colchester, Essex, Essex Junction, Milton, Shelburne, South Burlington, Williston and Winooski, as well as the non-municipal entities of the Burlington International Airport, University of Vermont, and Vermont Agency of Transportation within the geographical boundaries of these municipalities.”290 “In addition to these communities, which will have to meet the new requirements of the updated permit, the DEC has designated Rutland town and city, and St. Albans town and city as new MS4s subject to the requirements of the permit.”291

A Water Quality Remediation, Implementation, and Funding Report, presented to Vermont’s DEC in January 2013, estimated the average annual cost of reducing nonpoint source pollution at $91,799,000 annually over ten years. By all evidence, this total exceeds normal expenditures for nonpoint source reduction.292 This same Report states that although storm water, drinking water, and wastewater infrastructures represent significant costs for municipalities, the annual costs associated with these systems are “unknown” and the current lack of information represents a “substantial planning challenge.”293

VIII. THE PLAN

A. Phase I—Initiating

To establish a pilot program for utilizing EB-5 investments to assist state and municipal government authorities in complying with federally mandated state NPDES MS4 Phase 2 Municipal Storm Water Permit

289. Id.
290. Id.
291. Id.
293. Id. at 23.
requirements, Vermont’s ACCD and DEC must closely cooperate. In addition, the program can capitalize on the inherently iterative PPP process to develop a suite of financing, implementation, and stewardship practices that can serve as a model for future application to regenerative projects and sustainable development nationwide.

B. Phase II—Prototyping

Developers should use projects kick-started by EB-5 financing to develop and fine tune prototypical PPP BMP mechanisms for implementation of “Structural” Low Impact Development (“LID”) solutions to meet mandated EPA requirements for “regulated small” MS4’s in compliance with Total Maximum Daily Load (“TMDL”) storm water management criteria.

To begin, developers should select a qualifying municipality/entity for prototypical design-build execution of high priority stormwater management projects. This includes adopting basin-wide stormwater flow management strategies, and protecting and restoring stream side vegetation via daylighting (restoring down-cut stretches of stream). These

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295. DEP’T OF DEF., UNIFIED FACILITIES CRITERIA (UFC): LOW IMPACT DEV., 6–7 (Nov. 15, 2010), available at http://www.wbdg.org/ceb/DOD/UFU/ufc_3_210_10.pdf; Water: Best Mgmt. Practices, Menu of BMP Background, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/polwaste/polwaste.green (last visited Aug. 13, 2014) [hereinafter LID] (defining Structural LID solutions, examples of which include: storage practices such as wet ponds and extended-detention outlet structures; filtration practices such as grassed swales, sand filters, and filter strips; and infiltration practices such as infiltration basins and infiltration trenches).

296. 40 C.F.R. § 122.34 (1999); OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, STORM WATER PHASE II COMPLIANCE ASSISTANCE GUIDE, REGULATED SMALL MS4s 4-1 to 4-49 (2000), available at http://nepis.epa.gov/Exe/ZyNET.exe/P10010KT.TXT?ZyActionD=ZyDocument&ClkCl=EPA&Index=2000+Thru+2005&Docs=&Query=&Time=&EndTime=&SearchMSSearch=1&To Restrict=n&To=0&cEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=0&IntQFieldOp=0&ExtQFieldExtQ=0&X mlQuery=&Field=D%3A%5Czycyit%5CIndex%20Data%5C000000023%5CP10 072KT.txt&UseU=ANONYMOUS&Password=anonymous&SortMethod=h%7C- &MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p%7CNoDefSeekPage=x&SearchBack=ZyActionL&Back=ZyActiZyA&BackDes=Results%20page& Maximize&1=1&SeekPage=x&ZyZyFU (last visited August 13, 2014).

297. RICHARD PINKHAM, ROCKY MOUNTAIN INSTITUTE, DAYLIGHTING: NEW LIFE FOR BURIED STREAMS iv–vi (2000), available at http://www.rmi.org/Store/1833/32-DaylightingNewLifeBuriedStreams. This report reviews the benefits, challenges, and costs of exposing formerly culverted or buried streams. Water quality specialists, engineers, and officials recommend recreating more natural channels for the streams by means of evolving methods for restoring streams via “daylighting,” or “puffing” buried culverts out of the ground. The suite of techniques includes meandering turns, natural pools for insects and fish, stabilized stream banks, small
procedures essentially rebuild floodplains. Further examples of such "shovel ready" projects could be planting trees along public rights-of-way, planting on other public lands, and by creating green belts and mini parks along stream, river, lake, and pond frontages. The list of simple acts that can solve watershed problems includes breaking up pavement, using decomposed granite and other porous surfaces, and planting site-appropriate trees. Design, installation, and maintenance of bioswales, rain/gravel gardens, infiltration galleries, and other low-impact BMPs help to reduce runoff, recharge the water table, and improve the quality of storm water entering local water bodies.

The MS4 permit mandates the generation and adoption of existing, as well as new, approaches to improve dry weather and storm water runoff.\textsuperscript{298} At their essence, the strategies suggested above incorporate naturalistic BMPs that mimic a site’s undeveloped hydrologic processes. These cost-effective ways to retrofit existing sites, engineer new solutions to reduce storm water runoff, and improve the water quality of run-off that does enter the watershed become the models upon which to base scaled up applications.

C. Phase III—Scaling Up

Next, developers should scale up and road test the PPP model via phased application to Vermont’s thirteen municipalities and three institutional entities, as defined above. The statewide design, implementation, and maintenance of these programs can and should be paid for on a "pay-as-you-go" ("PayGo") basis, with continued kick-start funding provided by the EB-5 program.\textsuperscript{299} This will enable the EB-5 program to fulfill Congress’ promulgating intent; further stimulating the U.S. economy through job creation and capital investment by foreign investors. The EPA endorses the PayGo concept and offers the following mechanisms as sources of “permanent financing” for stormwater management projects such as those contemplated in this article.\textsuperscript{300}
• Service Fees (including Stormwater Utilities)
• Property Taxes/General Fund (a Pigovian tax\textsuperscript{301} based on a unit charge approach for “municipal environmental services.”)\textsuperscript{302}
• Special Assessment Districts or Regional Funding Mechanisms
• System Development Charges (“SDCs”)
• No and Low-Interest Loans (under the current law, affected communities will be eligible to apply for zero interest loans to defray the costs of planning efforts.)\textsuperscript{303}
• Grants\textsuperscript{304}
• Tax Increment Financing (“TIF”)
• Stormwater Utilities

Highlighted for the purposes of this article are TIF and Stormwater Utilities. TIF is a method for financing the costs of development, primarily for the costs associated with public infrastructure.\textsuperscript{305} It relies upon future gains in the taxes of surrounding properties to subsidize current improvements.\textsuperscript{306} The Natural Resources Defense Council (“NRDC”) has determined that “green infrastructure,” and specifically stormwater management features such as those proposed in this article, creates economic value.\textsuperscript{307} The NRDC lists the benefits associated with this type of infrastructure for private and commercial property owners. This list includes increased rental and property values, increased retail sales, energy savings, and stormwater fee credits, along with other financial incentives.\textsuperscript{308}

\textsuperscript{301}. Pigovian Tax, INVESTOPEDIA, http://www.investopedia.com/terms/p/pigoviantax.asp (last visited Sept. 3, 2014) (“A special tax that is often levied on those that pollute the environment or negative externalities. In a true market economy, a Pigovian tax is the most efficient and effective way to correct negative externalities . . . Pigovian taxes are applicable only because market economies often fail to provide a proper incentive to reduce negative externalities.”).

\textsuperscript{302}. Robert N. Stavins, Experience with Market-Based Environmental Policy Instruments, in \textbf{1 HANDBOOK OF ENVIRONMENTAL ECONOMICS} 356, 379 (Karl-Göran Mäler & Jeffrey R. Vincent eds., Elsevier 2003).

\textsuperscript{303}. VTDIGGER, supra note 288.


\textsuperscript{306}. Id. at 2–4.


\textsuperscript{308}. Id.
Further benefits include increased mental health and worker productivity for office employees, as well as reductions in infrastructure costs, costs associated with flooding, water bills, and crime.\textsuperscript{309}

Thus, these gains in the values of surrounding properties will generate additional property tax revenues. This increased value is “captured” via tax increments and pays for the public project. TIF refers to the funding mechanism, Tax Increment Districts (“TIDs”) refer to the specific geographic areas in which the redevelopment using TIF is to occur.\textsuperscript{310}

As of December 2013, the Vermont General Assembly suspended the Vermont Economic Progress Council’s (“VEPC”) authority to approve any additional tax increment financing districts beyond the districts already established.\textsuperscript{311} This article proposes that this suspension be revisited in light of the concept presented: utilizing EB-5 financing to kick-start and underwrite required MS4 stormwater improvements. EB-5 backed TIF financing in designated TIDs will capture the tax revenues derived from the increase in underlying and surrounding property values associated with these projects. Vermont, in line with its historic New England traditions, may choose to use these revenues to pay back EB-5 immigrant investors over time. This will also fund future projects and associated maintenance. This perpetual maintenance, and by inference the employment associated with it, makes these projects sustainable.

There are three basic methods that stormwater utilities use to calculate service fees.\textsuperscript{312} These are sometimes modified slightly to meet unique billing requirements. Impervious area, the most important factor influencing stormwater runoff, is a major element in each method. The three basic methods are: Equivalent Residential Unit (“ERU”) or Equivalent Service Unit (“ESU”), Intensity of Development (“ID”), and Equivalent Hydraulic Area (“EHA”).

Of special note, the City of South Burlington (which is not eligible for EB-5 RC/TEA discounted funding, but qualified under the EB-5 program for $1,000,000 immigrant investor participation) adopted the first stormwater utility program in Vermont.\textsuperscript{313} This utility uses the ERU method.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{309} Id.
\item \textsuperscript{310} Dye & Merriman, supra note 305, at 2–7.
\end{itemize}
\end{footnotesize}
to calculate and bill for its service fees.

The following lists EPA’s recommendations include with a step-by-step outline of how to create a stormwater utility: develop a feasibility study, create a billing system, conduct a public meeting(s), roll out a public information program, and adopt an ordinance.\(^{314}\)

**CONCLUSION**

Focusing on quantities to the exclusion of qualities, the presently configured EB-5 program equates something of inestimable value, U.S. citizenship, with commerce. DHS through USCIS attempts to fulfill the will of Congress by initiating regulations directed at oversight and vetting of investors that manifest in extensive procedural requirements, application forms, and evidence submissions. This works to the exclusion of substantive requirements. Absent an ethical armature on which to hang its EB-5 adjudicative processes, these agencies appear as a dog attempting to catch its tail. Over that past 24 plus years, many of EB-5’s structural flaws have been corrected and immigrant investments have ebbed and flowed with a trend to growth that has finally exceeded Congress’ initial expectations.\(^{315}\) The circle is getting smaller but the dog is still spinning.

Missing is the larger goal of targeting these investments to assist in funding essential projects that serve communities, projects that can be readily funded with immigrant investor assistance. As a “proof of concept” this article proposes a specifically targeted application of EB-5 to solve an intractable national problem; nonpoint source water pollution (“NPSWP”), the most significant single source of water pollution in the U.S.\(^{316}\)

A recent report to the Vermont DEC on this issue estimates the average cost of reducing NPSWP for Vermont at $91,799,000 annually over ten years.

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315. Al Kamen, An Investment in American Citizenship: Immigration Program Invites Millionaires to Buy Their Way In, Wash. Post A1 (Sept. 29, 1991). The bill’s supporters predicted that about 4,000 millionaire investors, along with family members, would sign up, bringing in $4,000,000,000 in new investments and creating 40,000 jobs (annually).
years, a total that far exceeds normal state expenditures for NPSWP reduction. 318 Vermont’s real total GDP was approximately .18% of the nation’s total in 2013. 319 Assuming that this is a likely indicator of Vermont’s proportional NPSWP contribution, extrapolation from these data indicates that the national annual cost of NPSWP is $51,329,506,296, according to 2005 monetary rates. Projected annual capital inputs from immigrant investors associated with a fully subscribed EB-5 program would be $6,600,000,000.320

The calculations represented in the table below are based on U.S. Department of Commerce, Bureau of Economic Analysis data, and EB-5 2013 revenue estimates. The calculations indicate that the presently configured EB-5 (10,000 visas) is capable of financing approximately 13% of the expenditure required to clean up nonpoint source water pollution in the U.S.; a substantial “kick-start” towards manifesting a solution to this unavoidable problem. Revisiting “pricing” of the visa, or expanding the program upward from its present 10,000 visa cap only makes this proposed application of the EB-5 program more attractive.321

Vermont’s Percentage of the U.S.’s GDP and Costs of Nonpoint Source Water Pollution Remediation

<table>
<thead>
<tr>
<th></th>
<th>GDP (Chained 2005 Dollars)</th>
<th>Percent of Total GDP</th>
<th>Estimated Annual Cost of Nonpoint Source Water Pollution Remediation</th>
<th>Potential Percentage of EB-5 Contribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vermont</td>
<td>$27,723,000,000</td>
<td>0.18%</td>
<td>$91,649,000</td>
<td></td>
</tr>
<tr>
<td>U.S.</td>
<td>$15,526,715,000,000</td>
<td>100.00%</td>
<td>$51,329,506,296</td>
<td></td>
</tr>
<tr>
<td>Full Subscribed</td>
<td></td>
<td></td>
<td>$6,600,000,000</td>
<td>12.86%</td>
</tr>
<tr>
<td>EB-5</td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

Placing immigrant entrepreneur’s financial resources and commercial expertise in the service of American ingenuity provides the seed capital (and cunning) to fund the conception, design, construction, and maintenance of a nationwide system of regenerative sustainable storm water management and coastal/wetland protection and remediation projects. These projects are presently unfunded or underfunded, and, by their very

318. VT. DEP’T OF ENVT. CONSERVATION, supra note 285.
319. BUREAU OF ECON. ANALYSIS, supra note 248.
320. IMPLAN, supra note 221.
321. See V. EB-5 Pros, C.
nature, are local and labor intensive. In addition, these durable slow and low-technology constructs (green infrastructure), obedient servants to the law of entropy, have the virtue of requiring routine maintenance in perpetuity.

Thus reconceived EB-5 can become the financial element for animating the laboratories of democracy to begin a grand research and development project to conceive, design, and develop regenerative solutions to this perpetual problem. A collateral virtue of these technologies is that, while distinctly local to each watershed, their underlying concepts are eminently transportable throughout the world. The investments made by these entrepreneurs may well end up serving the very countries from which their personal wealth was derived.

A final, but in no way collateral, benefit of this new EB-5 could be to provide a model component to promote a rational and comprehensive overall U.S. immigration policy with Vermont taking the lead in developing and bench testing these ideas.

The challenge posited by this article is to refashion the EB-5 program into one that leads by example, spearheading a pragmatic mission to reclaim and restore a significant component of our environment. With the assistance of EB-5 immigrant investors citizens and those that desire citizenship will embark on our own Herculean “fifth” labor, applying human ingenuity and commerce through the effective administration of a pilot program begun in the U.S. to tackle the ongoing and growing issue of nonpoint source pollution.

While the dollar and job figures associated with this enterprise are not to be trifled at, they are in truth baby steps on the way to refashioning the world in a manner that achieves sustainability via regenerative development, redefining growth to meet “the needs of the present without compromising the ability of future generations to meet their own needs.”

322. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

323. The Augean Stables: Hercules Cleans Up, PERSEUS DIGITAL LIBRARY, http://www.perseus.tufts.edu/Herakles/stables.html (“For the fifth labor, Eurystheus ordered Hercules to clean up King Augeas' stables.”).

ADDING FUEL TO THE FLAMES: WHY EPA’S NEW SOURCE REVIEW PROGRAM UNDER THE CLEAN AIR ACT EXACERBATES LEAD POLLUTION IN LEAD NONATTAINMENT AREAS

By: Qian Meng

Introduction ........................................................................................................... 122

I. Lead Pollution’s Harmful Effects on Human Health................................. 124

II. The Clean Air Act’s Mandates on New Source Emissions Controls .. 126

III. EPA’s New Source Review Program..................................................... 129

IV. EPA’s Impermissible Interpretation of the Applicability of NNSR Permit Requirements in Nonattainment Areas................................................. 133
   A. Liberalized Plain Meaning Rule as a Tool for Statutory Interpretation .............................................................................................................. 133
   B. Applicability of PSD Permit Requirements in Nonattainment Areas .................................................................................................................. 136
   C. EPA’s Impermissible Interpretation of the Applicability of NNSR Permit Requirements in Nonattainment Areas ................................ 138
       1. The Statutory Text .................................................................. 138
       2. Legislative History ................................................................. 141
       3. Impermissible Interpretation under Chevron ...................... 145

V. A Proposed Test for Determining the Applicability of NNSR Permit Requirements in Lead Nonattainment Areas ........................................... 148

Conclusion ........................................................................................................... 150
INTRODUCTION

Lead pollution presents unique concerns for human health, especially the health of children. Once taken into the body, lead will distribute in the blood, damaging the nervous system, kidney function, immune system, reproductive and developmental systems, and the cardiovascular system. Children are especially sensitive to even low levels of lead exposure, which may seriously affect growth and damage the nervous system. To limit the harmful effects of lead pollution, the Environmental Protection Agency (EPA) launched a lead program in 1991, aiming to “reduce lead exposure to the fullest extent practicable, with particular emphasis on reducing the risk to children.” As a part of the lead program, EPA enforces the National Ambient Air Quality Standards (NAAQS) for lead under the Clean Air Act.

In 2011, Energy Answers Arecibo, LLC (the Company) applied for a Prevention of Significant Deterioration (PSD) permit under the Clean Air Act (the CAA) to construct and operate a municipal waste incinerator in Barrio Cambalache, Arecibo, Puerto Rico. EPA issued the Company a PSD permit without addressing its lead emissions. In response to public comments calling for lead pollution control, EPA asserted that “Arecibo is in a nonattainment area for lead, so EPA does not have authority to regulate it under the PSD program.” EPA also noted that “Energy Answers is not subject to the nonattainment permit regulations since it would have to emit 100 tons per year of lead.” EPA therefore declined to regulate the lead emissions.

5. Id. at 73.
8. Id. at 99.
2014] Adding Fuel to the Flames 123

emissions under any permit program, even though the Company’s proposed facility would be in an area that has already suffered severe lead pollution and exceeded NAAQS for lead.

Under the CAA, Congress requires EPA to promulgate NAAQS for lead as particulate matter.\(^9\) EPA may require a state to designate the status of each geographic area with respect to its compliance with NAAQS for lead.\(^10\) The state will designate an area as “nonattainment” for lead if it does not meet the national primary or secondary ambient air quality standard for lead.\(^11\) The state will designate an area as “attainment” for lead if it meets the national primary or secondary ambient air quality standard for lead.\(^12\) The state will designate an area as “unclassifiable” if available information is insufficient to classify the area as meeting or not meeting the national primary or secondary ambient air quality standard for lead.\(^13\) Under the CAA, EPA developed the New Source Review program (the NSR program) to regulate new and modified stationary sources.\(^14\) EPA’s NSR program requires all major and certain minor stationary sources to undergo preconstruction review and approval.\(^15\) The NSR program is composed of three different permit programs: the PSD program, the Nonattainment New Source Review (NNSR) program, and the Minor New Source Review (Minor NSR) program.\(^16\) The PSD program and NNSR program constitute major NSR programs because they regulate only major sources.\(^17\) An NNSR permit contains more stringent emission limits and higher technology standards than a PSD permit.\(^18\)

EPA limits the applicability of major NSR permit programs to certain geographic areas: the PSD permit program applies to new major sources in attainment areas, and the NNSR permit program applies to new major

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11. Id. § 7407(d).
12. Id.
13. Id.
15. Id.
16. Id. This Note does not discuss Minor NSR because this Note addresses lead pollution caused by new major sources, to which Minor NSR does not apply. See David R. Wooley & Elizabeth M. Morss, Clean Air Act Handbook: A Practical Guide to Compliance 205 (23d ed. 2013) (stating that Minor NSR applies to new sources that escape regulation under the major source PSD or NNSR program). As discussed below, major sources are sources that emit or have the potential to emit 100 tons per year of a regulated air pollutant.
17. Hawkins & Ternes, supra note 14, at 125.
18. Id. at 182–84.
sources in nonattainment areas. In nonattainment areas, EPA further limits the applicability of the NNSR permit program to new major sources whose emissions of nonattainment pollutants equal or exceed 100 tons per year. In the case of lead, the PSD permit program only regulates lead emissions from new major sources located in lead attainment areas. The NNSR permit program regulates lead emissions in lead nonattainment areas if the emissions come from a new major source that emits or has the potential to emit at least 100 tons of lead per year. Has EPA violated the CAA by limiting the applicability of the PSD and NNSR permit programs to certain geographic areas and further limiting the applicability of the NNSR program to certain levels of emissions of particular pollutants?

This Note examines EPA’s rule on the applicability of major NSR programs—including the PSD and NNSR permit programs—to new sources of lead emissions and proceeds in five parts. Part I of this Note discusses the harmful effects of lead pollution on human health, especially the health of children. Part II discusses the CAA’s mandates on the control of lead emissions from new stationary sources. Part III discusses EPA’s NSR program and EPA’s rules on the applicability of the PSD and NNSR permit programs. Part IV discusses EPA’s impermissible interpretation of the applicability of the NNSR permit program in lead nonattainment areas. Finally, in Part V this Note proposes a test for EPA or the states to determine the applicability of the NNSR permit program in lead nonattainment areas.

I. LEAD POLLUTION’S HARMFUL EFFECTS ON HUMAN HEALTH

Lead is a heavy metal with an atomic weight greater than that of sodium. Lead exists in two major forms: in metallic form and in chemical compounds. Airborne lead is particulate and comes from many anthropogenic sources, such as mining, lead smelting, primary lead production, primary non-ferrous production, iron and steel production, petrol combustion, and waste incineration. Emissions from those facilities are the primary causes of lead exposure in nearby communities.

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20. Id.
22. Id. at 4.
24. S HEA, supra note 9, at 29.
lead enters the human body through inhalation or ingestion of lead-contaminated food, water, paint, dust, and soil.25

Inhaled lead accounts for about 90% of the lead in the human body and thus is the primary way that people intake lead.26 Some inhaled lead will remain in the lungs and pass into the bloodstream.27 The human body absorbs lead compounds more easily than elemental lead.28 Once absorbed into the body, the blood lead level may increase in less than an hour.29 The increase in blood lead level may create acute symptoms, including colic, wrist drop, headaches, fatigue, bowel irregularity, and behavioral problems. Even low blood lead levels may result in an increased risk of cardiovascular disease.30 Lead reduces the oxygen carrying capacity of the blood by inhibiting the production of heme, which carries oxygen in red blood cells.31 Long-term excessive lead exposure can result in irreversible damage to the kidneys.32 Lead is especially damaging to the central nervous system and, in extreme cases, can cause encephalopathy.33 Early symptoms of encephalopathy include headaches and loss of memory; severe symptoms include paralysis, coma, and even death.34 Although an adult will excrete about 99% of the lead taken into the body within a few weeks, lead will accumulate in the body tissues, especially bone, under continued exposure.35

Children are especially vulnerable to lead emissions. Compared to adults, children absorb a greater percentage of lead taken into the body and are more susceptible to lead poisoning effects.36 The same symptoms may occur in children at lower blood lead levels.37 The increase of blood lead levels could result in long-term harms, including microcytic anemia,
reduced growth in stature, hearing and speech impairment, and retarded mental development. 38 In extreme circumstances, frank anemia, nephropathy, encephalopathy, and even death may occur. 39 Long-term lead exposure, even at low levels, can have a cumulative effect on a child’s health. 40 Studies of the long-term effects of low-level lead exposure found that children with higher dentin lead levels were more likely to drop out of school; suffer reading disabilities; have lower class ranks; have poor hand-eye coordination; and have deficits in IQ scores, attentiveness, and classroom performance. 41

To limit the harmful effects of lead pollution, EPA launched a lead program in 1991, aiming to “reduce lead exposure to the fullest extent practicable, with particular emphasis on reducing the risk to children.” 42 The NSR program under the CAA is one tool EPA uses to limit lead pollution. Under the NSR program, EPA enforces the NAAQS for lead by requiring new or modified sources of lead pollution to comply with permit requirements. 43 However, as I will demonstrate, some of EPA’s rules on the applicability of the permit requirements under the NSR program contradicts the plain language of the CAA and legislative intent and is not a permissible interpretation of the Act.

II. THE CLEAN AIR ACT’S MANDATES ON NEW SOURCE EMISSIONS CONTROLS

Section 109 of the CAA requires EPA to promulgate NAAQS for “each air pollutant for which air quality criteria have been issued” under Section 108. 44 EPA shall list an air pollutant and issue air quality criteria for such pollutant if (1) its emissions “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” and (2) the pollutant is emitted from “numerous or diverse mobile or stationary sources.” 45 In Natural Resources Defense Council v. Train, the United States Court of Appeals for the Second Circuit confirmed that Section 108 imposes a mandatory duty on EPA to list lead and issue air quality criteria after EPA determined that lead “has an adverse effect on public health and welfare, and that the presence of lead in the ambient air results from

38. Chang-Yen et al., supra note 36, at 63.
39. Id.
40. Casuccio et al., supra note 3, at 143.
41. EPA RISK ANALYSIS, supra note 33, at 2-13.
42. Carra, supra note 1, at 71–72.
43. Id. at 73.
44. 42 U.S.C. § 7409(a).
45. Id. § 7408(a); Ayres & Olson, supra note 25, at 14.
EPA listed lead in 1976 and issued air quality criteria in the following year. In 1978, EPA promulgated NAAQS for lead at a level of 1.5 µg Pb/m³ averaged over a calendar quarter. In 2008, EPA strengthened NAAQS from 1.5 µg Pb/m³ to 0.15 µg Pb/m³ based on new research on the impact of lead pollution.

NAAQS for lead aim to protect human health and the environment and indicate the acceptable maximum lead concentration in ambient air. EPA enforces NAAQS through the State Implementation Plans (SIPs), under which each state shall submit to EPA a plan for “implementation, maintenance, and enforcement” of NAAQS. Following the promulgation of NAAQS for any pollutant, the Governor of each state shall submit to EPA a list of all areas in the state, designating each area as (1) “nonattainment” if the area does not meet NAAQS for the pollutant or the area “contributes to ambient air quality in a nearby area” that does not meet NAAQS for the pollutant; (2) “attainment” if the area meets NAAQS for the pollutant; or (3) “unclassifiable” if the state cannot classify the area as meeting or not meeting NAAQS due to the lack of information.

A primary way to implement, maintain, and enforce NAAQS for lead is to impose preconstruction review and permitting requirements upon new sources of lead pollution. The CAA provides the preconstruction review of new major sources under Parts C and D of the Act. Part C, entitled “Prevention of Significant Deterioration of Air Quality,” aims to “protect public health and welfare from any actual or potential adverse effect” of air emissions, “notwithstanding attainment and maintenance” of NAAQS. Part D, entitled “Plan Requirements for Nonattainment Areas,” aims to reduce the air emissions in areas that fail to satisfy NAAQS and effectively enforces NAAQS in those areas.

Part C prohibits the construction of a new major emitting facility in attainment areas and unclassifiable areas unless EPA or the state has issued a PSD permit for such facility. Part C defines the term “major emitting facility” as any of the listed stationary sources of air pollutants that “emit, or have the potential to emit, one hundred tons per year or more of any air

47. Ayres & Olson, supra note 25, at 36.
48. Id.
49. Id. at 37.
50. Hawkins & Ternes, supra note 14, at 125.
52. Id. § 7407.
53. Hawkins & Ternes, supra note 14, at 125.
55. Id. §§ 7501–15.
56. Id. § 7475.
pollutant.”  A “stationary source” means “any building, structure, facility, or installation which emits or may emit any air pollutant.” A PSD permit includes conditions requiring the proposed facility (1) to comply with the emission limitations; (2) to control its emissions so that the emissions from facility construction or operation “will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year,” (B) NAAQS, or (C) any other emission or performance standard under the CAA; (3) to employ the best available control technology (BACT) for each pollutant; (4) to conduct necessary monitoring to determine the effects of air emissions on air quality; and (5) to comply with any other requirements of Part C.

Part D imposes requirements for new sources or modification of existing sources in nonattainment areas. Part D applies to areas designated as “nonattainment” with respect to any air pollutant. Part D requires EPA to establish a schedule specifying dates by which the states containing the nonattainment areas shall submit plans (State Attainment Plans) for implementing “all reasonably available control measures as expeditiously as practicable” to attain NAAQS. The attainment date for NAAQS “shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment . . . except that the Administrator may extend the attainment date . . . for a period no greater than 10 years.” State Attainment Plans “shall require [Nonattainment New Source Review] permits for the construction and operation of new or modified major stationary sources.

57. Id. § 7479. The listed stationary sources include fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input; coal cleaning plants (thermal dryers); kraft pulp mills; Portland Cement plants; primary zinc smelters; iron and steel mill plants; primary aluminum ore reduction plants; primary copper smelters; municipal incinerators capable of charging more than fifty tons of refuse per day; hydrofluoric, sulfuric, and nitric acid plants; petroleum refineries; lime plants; phosphate rock processing plants; coke oven batteries; sulfur recovery plants; carbon black plants (furnace process); primary lead smelters; fuel conversion plants; sintering plants; secondary metal production facilities; chemical process plants; fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input; petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels; taconite ore processing facilities; glass fiber processing plants; and charcoal production facilities. Id. The term “major emitting facility” also includes “any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant,” but it does not include “new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.” Id.

58. Id. § 7411 (a)(3).

59. Id. § 7475 (a)(3).

60. Id. § 7501.

61. Id. § 7502.

62. Id.
anywhere in the nonattainment area." A proposed facility can receive an NNSR permit only if: (1) the facility has obtained “sufficient offsetting emissions reductions” so that “total allowable emissions” from existing sources and new or modified sources will be less than total emissions from existing sources before the construction of the proposed facility; (2) the facility complies with the “lowest achievable emission rate” (LAER); and (3) the owner or operator of the facility has “demonstrated that all major stationary sources owned or operated by such person . . . in such State are subject to emission limitations” and comply with “all applicable emission limitations and standards” under the CAA.

Part D therefore prohibits “the construction and operation of new or modified major stationary sources anywhere in the nonattainment area” unless EPA or the state has issued an NNSR permit for such new source. Unlike the term “major emitting facility” under Part C, Congress does not specifically define the term “major stationary sources” under Part D. However, Congress provides a default definition of the term “major stationary sources” under Title II—General Provisions. Specifically, Section 302(j) declares that, unless otherwise expressly provided, the definition of “major stationary source” and “major emitting facility” is “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.”

III. EPA’S NEW SOURCE REVIEW PROGRAM

EPA implements the CAA’s mandates on preconstruction review of new major sources through its NSR program. The NSR program involves a case-by-case permitting process for individual sources before the owner or operator may commence construction or major modification. The NSR program has three components: (1) the PSD program established under Part C; (2) the NNSR program established under Part D; and (3) the individual

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63. Id.
64. Id. § 7503.
65. Id.
66. Id. § 7502.
67. Part D defines only the term “modification.” See id. § 7501 (“The terms ‘modifications’ and ‘modified’ mean the same as the term ‘modification’ as used in section 7411 (a)(4) of this title.”).
68. Id. § 7602.
69. Hawkins & Ternes, supra note 14, at 125.
70. Id. at 135. This Note only discusses new stationary sources constructed from scratch, not modifications.
state Minor NSR programs governing smaller sources of air pollution.\textsuperscript{71} The PSD program and the NNSR program apply to major sources of air pollution.\textsuperscript{72} Specifically, PSD permit requirements, the centerpiece of the PSD program, apply to “the construction of any new major stationary source or the major modification of any existing major stationary source” in attainment or unclassifiable areas.\textsuperscript{73} EPA defines the term “major stationary source” in the same way Congress defines “major emitting facility” in the CAA, except that “new major stationary source[s]” under EPA’s definition also include any physical modification that would constitute a major stationary source by itself even if the stationary source where the physical modification occurs does not qualify as a major stationary source.\textsuperscript{74} EPA defines “major modification” as “any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a regulated NSR pollutant . . . and a significant net emissions increase of that pollutant from the major stationary source.”\textsuperscript{75} As a key PSD permit condition, EPA requires a new major stationary source to apply the BACT “for each regulated NSR pollutant that it would have the potential to emit in significant amounts.”\textsuperscript{76} EPA limits the PSD permit requirements to major emitting facilities in attainment and unclassifiable areas, excluding major stationary sources in nonattainment areas from PSD permit requirements. EPA specified that “[t]he requirements of paragraphs (j) through (r) of this section [establishing PSD permit requirements] shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment.”\textsuperscript{77} The Environmental Appeals Board of EPA (the Board) confirmed EPA’s position regarding the applicability of PSD permits in a footnote within its

\textsuperscript{71} Id. at 125. This Note does not discuss Minor NSR. This Note only considers major sources.

\textsuperscript{72} Id.

\textsuperscript{73} 40 CFR § 52.21 (2002) (overruled by Utility Air Regulatory Group v. EPA, 134 S. Ct 2427 (2014)).

\textsuperscript{74} Id.

\textsuperscript{75} Id. Regarding lead emissions, “significant” means a rate of emission that would equal or exceed 0.6 tons per year. Id. The term “Regulated NSR pollutant” includes: (1) any pollutant for which NAAQS have been promulgated; (2) any pollutant that is subject to standards promulgated under Title I Section 111 of the CAA; (3) any class I or II substance subject to a standard under Title VI (Stratospheric Ozone Protection) of the CAA; and (4) any pollutant that is otherwise subject to regulation under the CAA. Id. NSR pollutants do not include hazardous air pollutants listed under Section 112 of the CAA unless the pollutant is also regulated as a “constituent or precursor of a general pollutant” listed under Section 108. Id.

\textsuperscript{76} Id.

\textsuperscript{77} Id.
Sutter Power Plant decision. 78 The Board stated that “[n]otably, a single geographic area may be designated as attainment or unclassifiable for one or more of the six pollutants and as nonattainment for one or more of the others . . . [T]he PSD program will apply in that geographic area, but only to the attainment/unclassifiable pollutants.”79

EPA requires each state’s SIP to adopt a “preconstruction review program” (NNSR permit program) for any new major stationary source or major modification in nonattainment areas. 80 EPA, however, limits the applicability of the NNSR permit program to “any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment.”81  EPA explained the statutory basis for this limited applicability of the NNSR permit program:

The basic rationale for these restrictions is that [CAA] section 110(a)(2)(I), which contains the construction moratorium, restricts the construction moratorium to pollutants for which the source is major and for which the area is designated nonattainment. Since there is no requirement similar to the one in section 165(a) [providing PSD permit requirements] that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant, preconstruction review under the Offset Ruling and section 173 is restricted in the same manner as the construction moratorium.82

Therefore, in addition to the geographical limit of nonattainment areas to the applicability of the NNSR permit program, EPA further limits the applicability of NNSR permit requirements to new major stationary sources or major modifications which emit a major amount of the pollutant for which the area is designated as nonattainment.

According to EPA’s limited application of NNSR permit requirements, emissions of nonattainment pollutants from new sources must meet the 100-ton-per-year threshold before triggering NNSR permit requirements, unless the CAA expressly specifies a lower threshold for the “major amount.” The only place where the CAA defines the word “major” is in the definition of the term “major emitting facility,” which designates any of the listed

79. Id.
81. Id. (emphasis added).
stationary sources that “emit, or have the potential to emit, one hundred tons per year or more of any air pollutant.” The CAA provides that the 100-ton-per-year threshold applies unless another provision of the CAA expressly requires a lower threshold. The CAA provides varied and lower “major amount” thresholds for ozone, carbon monoxide, and PM-10, depending on the severity of the nonattainment for the area in question. For example, Congress lowers the “major amount” threshold to 50 tons per year of volatile organic compounds (VOCs) in “serious” ozone nonattainment areas, 25 tons per year of VOCs in “severe” ozone nonattainment areas, and 10 tons per year of VOCs in “extreme” ozone nonattainment areas. Likewise, Congress lowers the “major amount” threshold to 50 tons per year or more of carbon monoxide in “serious” carbon monoxide nonattainment areas and to 70 tons per year of PM-10 in “serious” PM-10 nonattainment areas.

NNSR permit conditions are much stricter than PSD permit conditions because NNSR permits impose the LAER requirement and the emissions offsets requirement. LAER means (1) “the most stringent emissions limitation” under the SIP for such category of sources, unless the owner or operator “demonstrates that such limitations are not achievable”; or (2) “[t]he most stringent emissions limitation which is achieved in practice by such class or category of stationary sources.” Cost consideration plays a much smaller role in establishing the LAER requirement for NNSR permits than it does in establishing the BACT requirement for PSD permits. Accordingly, “cost alone may not be a valid justification for declining to use an otherwise available emissions control technique or technology.” The purposes of emissions offsets are (1) improving the air quality in nonattainment areas towards achieving NAAQS and (2) “providing a positive net air quality benefit in the affected area.” Emissions offsets consider actual, not potential, emissions of pollutants. Emissions offsets can be greater than a one-to-one ratio: the farther away from NAAQS compliance, the greater offsets ratios are. For example, in “severe” ozone

\[83. \text{ 42 U.S.C. § 7479.}\]
\[84. \text{ Id. § 7602.}\]
\[85. \text{ Id. § 7511(a).}\]
\[86. \text{ Id. § 7512(a).}\]
\[87. \text{ Id. § 7513(a).}\]
\[88. \text{ Hawkins & Ternes, supra note 14, at 182–83.}\]
\[89. \text{ 40 C.F.R. § 51.165 (2002).}\]
\[90. \text{ Hawkins & Ternes, supra note 14, at 183.}\]
\[91. \text{ Id.}\]
\[92. \text{ Id. at 184.}\]
\[93. \text{ Id.}\]
\[94. \text{ Id. at 183.}\]
nonattainment areas, the offset ratio for VOCs is 1.3 to 1; in “extreme” ozone nonattainment areas, the offset ratio for VOCs is 1.5 to 1, which means the proposed facility must reduce VOC emissions by 1.5 tons for every ton the facility emits.\textsuperscript{95}

IV. EPA’S IMPERMISSIBLE INTERPRETATION OF THE APPLICABILITY OF NNSR PERMIT REQUIREMENTS IN NONATTAINMENT AREAS

CAA Parts C and D grant EPA authority to regulate new source emissions under the NSR program. EPA’s rules and regulations under the NSR program, specifically its rules on the applicability of permit programs, must comply with statutory mandates. This section employs the tools of statutory interpretation to discern statutory mandates and legislative intent on the applicability of permit programs and further determine the validity of EPA’s rules.

A. Liberalized Plain Meaning Rule as a Tool for Statutory Interpretation

The theories of statutory interpretation prioritize the plain meaning construction of the statutory text over other methods of interpretation.\textsuperscript{96} To construe a statute, the United States Supreme Court always begins with the statutory language itself and determines whether the language is plain and unambiguous regarding the disputed issue.\textsuperscript{97} If the statutory language is plain and unambiguous, the Court generally interprets the statutory terms according to their ordinary meaning unless the statute defines the terms otherwise or the literal interpretation contradicts a “clearly expressed legislative intention.”\textsuperscript{98} The Court in \textit{Caminetti v. United States}, confronted with contrary evidence of legislative intent, reaffirmed the application of the plain meaning rule to determine legislative intent:

[I]t has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any

\textsuperscript{95} 42 U.S.C. § 7511(a).

\textsuperscript{96} William N. Eskridge, Jr. et al., \textit{Legislation and Statutory Interpretation} 257 (2d ed. 2006).


extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.99

In practice, however, the Supreme Court and lower federal courts use extrinsic aids, such as legislative history and administrative interpretations, to interpret statutes even under the plain meaning rule.100 In United States v. Oregon, the Court considered the legislative history after concluding that the statutory language was clear on its face.101 In Gemsco v. Walling, the Court based its holding on the plain meaning of the statutory language but still included a lengthy analysis of the legislative history.102 In TVA v. Hill, the Court examined the statutory language, the legislative history, and the structure of the statute although it concluded that the statutory language could hardly be any plainer.103 In numerous cases, the lower federal courts, as the Court did in Oregon, considered the legislative history after concluding that the statutory language was clear and that there was no need to resort to the legislative history.104 Furthermore, the United States Court of Appeals for the District of Columbia Circuit (the DC Circuit) concluded that unambiguous statutory language renders extrinsic aids unnecessary for statutory interpretation but does not prohibit the use of those aids. The court held that the plain meaning rule does not “preclude consideration of persuasive evidence if it exists.”105

The Court in United States v. American Trucking Associations justified the use of extrinsic sources together with the plain meaning rule for statutory interpretation, holding that when an extrinsic aid to statutory construction is available, “there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.”106 The Court further specified the circumstances when courts could look beyond the statutory words: “[w]hen that [plain] meaning has led to absurd or futile results . . . even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance

99. Caminetti v. United States, 242 U.S. 470, 490 (1917); see also Arthur W. Murphy, Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts, 75 Colum. L. Rev. 1299, 1300 (1975) (“A vintage example of the rule in operation is the famous decision of the United States Supreme Court in Caminetti v. United States.”).
100. Murphy, supra note 99, at 1300.
104. Murphy, supra note 99, at 1304.
with the policy of the legislation as a whole.”107 But the Court still acknowledged the priority of the plain meaning rule in statutory interpretation:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.108

The plain meaning of statutes is the starting point of statutory interpretation, but the plain meaning is not and should not be the end point. That is because of the evolving and contextual nature of legislation.109 When legislators draft a statute, just as when people write or speak, they have an audience in their mind and consider past statements and communications.110 The meaning of statutory language therefore depends on the legislators and their projected audience’s shared understanding and the evolved or evolving conversation between them.111 “[S]ometimes, Congress was engaged in an ongoing conversation about a particular topic and amended legislation in the context of that give-and-take, with statutory results that need to be construed with a sensitivity to the entire statutory history.”112 Moreover, Congress might sometimes deviate from the ordinary use of language because, except for the due process requirement under the Constitution, “nothing in the Constitution requires Congress to draft all legislation using the same presumptions of audience or to adhere to rigid standards of linguistic precision.”113

Therefore, this Note adopts a liberalized plain meaning rule to interpret the CAA. The liberalized rule still sets the plain meaning interpretation as the starting point and center of statutory construction. But the ascertainment of the plain meaning may not be the end of statutory construction even though the language is unambiguous. The liberalized rule allows a further step to consider extrinsic sources, especially if they are persuasive, such as legislative history, overall structure of the statute, congressional polices and

107. Id. at 543 (internal quotation marks omitted).
108. Id.
110. Id.
111. Id. at 998.
112. Id. at 999–1000.
113. Id. at 1039.
purposes, and agency interpretations. These extrinsic sources could help put statutory words in context and determine what the words should mean and how they should apply to specific situations. The essence of statutory construction is reading over the legislators’ shoulders and “striv[ing] to understand how Congress, administrative agencies, and regulated entities would rationally understand, in context, the words Congress chose to use.”

**B. Applicability of PSD Permit Requirements in Nonattainment Areas**

As stated above, EPA limits the PSD permit requirements to major emitting facilities in attainment and unclassifiable areas, excluding major stationary sources in nonattainment areas from PSD permit requirements. EPA’s interpretation is consistent with the plain meaning of CAA Part C for the following reasons. First, the express purpose of PSD requirements under Part C indicates Congress’ intent to limit the application of PSD permit requirements to attainment and unclassifiable areas. Under Part C, Congress has granted EPA the authority to promulgate regulations on PSD permit requirements. Part C aims to “protect public health and welfare from any actual or potential adverse effect” caused by air pollution sources, “notwithstanding attainment and maintenance of all national ambient air quality standards” in the areas where the pollution sources are located. Part C also aims to “prevent significant deterioration of air quality” and “preserve” “existing clean air resources” and air quality in national parks and other areas of special value. The words that Congress repeats in defining the objectives of Part C are “prevent” and “preserve.” The word “prevent” means “to keep from happening or existing.” The word “preserve” means to “maintain” and “to keep safe from injury, harm, or destruction.” Therefore, Congress’ intent in drafting Part C was to maintain the status quo in the areas where the air quality fulfills NAAQS. If Congress had intended Part C to apply in nonattainment areas, Congress would not have defined the objectives as to “prevent” or “preserve” the status quo but to change and improve the existing air quality.

Second, Congress used the phrase “any area to which this part applies” throughout Part C to indicate that Part C does not apply to all geographic

114. Id. at 979.
115. Id.
117. Id.
118. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 984 (11th ed. 2007).
119. Id. at 982.
areas but specific areas. For instance, Section 165 declares that no major emitting facility may be “constructed in any area to which this part applies” unless the proposed facility complies with the permit requirements under Part C. The DC Circuit, in *Alabama Power Co. v. Costle*, interpreted this language and held that “the phrase ‘constructed in any area to which this part applies’ limits the application of Section 165 [under Part C] to major emitting facilities to be constructed in certain locations . . . . Congress intended location to be the key determinant of the applicability of the PSD review requirements.” Congress, however, omitted the phrase “any area to which this part applies” in the provisions where it concerns the source rather than area. For example, Section 165(e)(1) requires the states or permit applicants to conduct an analysis of the ambient air quality “at the proposed site and in areas which may be affected by emissions from such facility.” Courts presume that Congress’ decision to include particular language in one section but omit it in another section of the same statute is intentional and purposeful. Therefore, the application of PSD permit requirements under Section 165 is limited to new sources in attainment or unclassified areas.

Third, Section 161 under Part C restricts the applicability of Part C and PSD permit requirements to attainment and unclassifiable areas by defining the PSD program’s geographical scope. Section 161 provides in general that states shall adopt necessary measures, including permit requirements, to prevent significant deterioration of air quality pursuant to the regulations promulgated under Part C. Specifically, Section 161 declares that “each applicable implementation plan shall contain emission limitations and such other measures . . . to prevent significant deterioration of air quality in each region . . . designated . . . as attainment or unclassifiable.” If Congress had intended the state PSD plans to apply to any geographic area, including nonattainment areas, it would not have included the language “in each region . . . designated . . . as attainment or unclassifiable.” Additionally, the enforcement section under Part C reinforces the geographical limit of PSD requirements by authorizing EPA and the states to take enforcement measures to prevent the construction or modification of a major emitting facility “which is not subject to an implementation plan” and “which is

120. 42 U.S.C. § 7475(a).
122.  *Id*.
123.  42 U.S.C. § 7475(e)(1).
127.  *Id* (emphasis added).
proposed to be constructed in any area designated . . . as attainment or unclassifiable."\textsuperscript{128}

Lastly, in the section that defines class I and class II areas to implement Part C, Congress defines class II areas as "all areas in such State designated . . . as attainment or unclassifiable which are not established as class I."\textsuperscript{129} Class I areas include all "international parks," "national wilderness areas which exceed 5,000 acres in size," "national memorial parks which exceed 5,000 acres in size," and "national parks which exceed 6,000 acres in size."\textsuperscript{130} The definition of class II areas uses "attainment or unclassifiable" areas to delineate the total areas considered under Part C and further divides the total areas into class I and class II areas. Therefore, the plain language that Congress uses to define class II areas reveals that the PSD permit requirements under Part C apply to attainment and unclassifiable areas, not nonattainment areas.

C. EPA’s Impermissible Interpretation of the Applicability of NNSR Permit Requirements in Nonattainment Areas

As discussed above, EPA limits the applicability of NNSR permit requirements to new sources that are major for the pollutants for which the area is designated as nonattainment. That is, under EPA’s interpretation, a proposed new stationary source in a nonattainment area will not require an NNSR permit if it is not a major source for the specific pollutants for which the area is designated as nonattainment. As discussed below, EPA’s restrictive rule on the applicability of NNSR permits in nonattainment areas contradicts the plain language of the CAA and congressional policy and thus is not a permissible construction of the CAA.

1. The Statutory Text

The NNSR permit program constitutes a part of nonattainment SIPs. Nonattainment SIPs must comply with (1) CAA Section 110(a)(2), which sets out requirements for both attainment SIPs and nonattainment SIPs; (2) general requirements for all nonattainment programs under section 172(c); and (3) pollutant-specific requirements under sections 110(a)(2), 172, 181, 186, and 188.\textsuperscript{131} Only Section 172(c) concerns the applicability of NNSR permits in nonattainment areas. Section 172(c)(5) provides that “such plan

\textsuperscript{128} Id. § 7477 (emphasis added).
\textsuperscript{129} Id. § 7472 (emphasis added).
\textsuperscript{130} Id. § 7472.
\textsuperscript{131} \textit{WOOLEY & MORSS, supra} note 16, at 53.
[SIP] provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with Section 7503 of this title.\textsuperscript{132}

The plain meaning of Section 172(c)(5) is that NNSR permit requirements apply when there is (1) construction and operation (2) of new or modified (3) major stationary sources (4) in the nonattainment area. As stated above, although the CAA does not provide any definition of the term “major stationary sources” under Part D—Nonattainment Areas—it defines the term “major stationary sources” under Title II—General Provisions. Specially, Section 302(j) declares that, unless otherwise expressly provided, the definition of “major stationary source” and “major emitting facility” is “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.”\textsuperscript{133} The definition under Section 302(j) governs because Part D does not expressly provide another definition. The definition of the word “any” in the Merriam-Webster Dictionary is “one or some indiscriminately of whatever kind.”\textsuperscript{134} “Any” is ordinarily used to indicate “one selected without restriction”\textsuperscript{135} and a person or thing that is not particular or specific. Therefore, the plain language of Section 172(c)(5) requires permits for the construction and operation of new stationary sources in nonattainment areas which directly emit or have the potential to emit at least 100 tons per year of any air pollutant, not specific nonattainment pollutants. Any contrary interpretation would contradict the plain meaning of the word “any.”

This interpretation of Section 172(c)(5) covering major sources of any air pollutant is consistent with the DC Circuit and EPA’s interpretation of the term “any air pollutant” under Part C of the CAA (the PSD program). Part C defines “major emitting facility” as any of the enumerated types of “stationary sources of air pollutants which emit, or have the potential to emit, 100 tons per year or more of any air pollutant.”\textsuperscript{136} In 1978, EPA interpreted the term “any air pollutant” as “any air pollutant regulated under the Clean Air Act.”\textsuperscript{137} EPA explained that the term “regulated under the Clean Air Act” or “subject to regulation under the Act” means “any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations [EPA’s Air Programs under the CAA] for any source type.”\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{132} 42 U.S.C. § 7502.
\item \textsuperscript{133} Id. § 7602 (emphasis added).
\item \textsuperscript{134} MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 56 (11th ed. 2007).
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. § 7479 (emphasis added).
\item \textsuperscript{137} Approval and Promulgation of State Implementation Plans; 1977 Clean Air Act Amendments to Prevent Significant Deterioration, 43 Fed. Reg. 26,388, 26,403 (June 19, 1978).
\item \textsuperscript{138} Id. at 26,397.
\end{itemize}
In a recent case, *Coalition for Responsible Regulation v. EPA*, EPA reaffirmed its broad interpretation that “any air pollutant” means any pollutants regulated. EPA rejected the industry’s pollutant-specific interpretation that PSD permit requirements only apply to new sources that emit a major amount of a pollutant for which the area is designated as attainment. The court upheld EPA’s 36-year old interpretation of “any air pollutant” under CAA Part C and concluded that the statute “compelled” EPA’s longstanding interpretation. “[T]he word ‘any’ has an expansive meaning that is, ‘one or some indiscriminately of whatever kind.’” Congress would not have intended different meanings regarding the same term in different sections of the Act without expressly saying so. Therefore, the term “any air pollutant” under Part D (nonattainment section) should have an expansive meaning, rather than being limited to specific nonattainment pollutants.

Congress’ choice of language in other provisions under Part D supports the interpretation of the applicability of NNSR permits to major sources for any air pollutant. Part D consists of six subparts: the first subpart provides general plan requirements of controlling new source emissions, implementing “all reasonably available control measures as expeditiously as practicable” and meeting deadlines for attaining NAAQS in nonattainment areas; Subparts 2 through 5 provide additional requirements for ozone, carbon monoxide, particulate matter, sulfur oxides, nitrogen dioxide, and lead nonattainment areas, respectively; Subpart 6 is a savings provision, preserving EPA’s rules and regulations promulgated under the CAA before November 15, 1990, unless they are inconsistent with any provision of the CAA. Subpart 2 provides additional plan requirements for ozone nonattainment areas and tailors the strictness of control measures to the severity of ozone pollution in different areas; specifically, it requires more stringent new source emissions control standards and measures in areas where ozone pollution is more severe. Subpart 2 begins by specifying the requirements in the least severe ozone pollution area, “marginal areas,” which require permits for the “construction and operation of each new or modified major stationary source (with respect to ozone) to be located in the area.” Congress would not have included the parenthetical “(with respect to ozone)” if it had intended for the term “new or modified major stationary

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140. *Id.* at 141.
141. *Id.* at 133.
142. *Id.* at 134.
144. *Id.* § 7511(a) (emphasis added).
source” to mean new or modified sources that are major only for the pollutant(s) for which the area is designated as nonattainment; the language “with respect to ozone” would be redundant and superfluous. In other parts of Subpart 2, Congress uses “major stationary sources of volatile organic compounds” or “major stationary sources of VOCs” when it especially refers to sources that are major for VOCs. Congress therefore intentionally and purposely included particular pollutants to refer to major sources of such pollutants. Thus, Congress intended the term “major stationary sources” under Part D to mean sources that are major for any pollutant, and Congress would have included language referring to a specific pollutant if Congress had intended the term “major stationary sources” to mean sources that are major for only such pollutants.

Furthermore, the structure of Part D also supports the applicability of NNSR permits to new sources that are major sources for any air pollutant. Part D first provides general plan requirements for new source emission controls in nonattainment areas and further imposes more stringent requirements for new sources in nonattainment areas for ozone, carbon monoxide, and particulate matter by lowering the threshold for “major stationary source” designation as to respective nonattainment pollutants. For example, Subpart 2, concerning ozone pollution in ozone nonattainment areas, declares that “[f]or any Serious Area, the terms ‘major source’ and ‘major stationary source’ include . . . any stationary source or group of sources . . . that emits, or has the potential to emit, at least 50 tons per year of volatile organic compounds.” This provision imposes more stringent requirements for new sources in ozone nonattainment areas by expanding the definition of “major stationary sources,” and thus the jurisdiction of permit requirements, to cover new sources that emit or have the potential to emit at least 50 tons per year of VOCs. Under the expanded definition of “major stationary sources,” new sources that are not major for any pollutant under the original definition would qualify as “major stationary sources” and trigger the permit requirements under Part D if they emit or have the potential to emit at least 50 tons per year of VOCs. Therefore, the applicability of NNSR permits to new sources that are major sources for any air pollutant is consistent with the structure of Part D. In conclusion, EPA’s restrictive interpretation of the applicability of NNSR permits contradicts the plain language of the CAA.

2. Legislative History

145. Id.
146. Id. (emphasis added).
The CAA’s legislative history also supports the interpretation that NNSR permit requirements apply to proposed new sources in nonattainment areas that are major for any air pollutant, not just for the nonattainment pollutants. As discussed below, the legislative history of the 1977 Amendment to the CAA puts the statutory language in context\textsuperscript{147} and suggests a case-by-case test in determining the applicability of NNSR permits.

The legislative history of the 1977 Amendment supports the interpretation of the plain language of Section 172(c)(5)\textsuperscript{148} that NNSR permit requirements apply to new major sources of any pollutants, not just nonattainment pollutants. In the 1977 Amendment of the CAA, Congress added Section 302(j),\textsuperscript{149} together with the PSD program and NNSR Program. Section 302(j) declares that, unless otherwise expressly provided, the definition of “major stationary source” and “major emitting facility” is “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, 100 tons per year or more of any air pollutant.”\textsuperscript{150} Unless otherwise provided, Section 302(j) governs the meaning of any term in the CAA that refers to major sources—either major stationary sources or major emitting facilities.\textsuperscript{151} Section 302(j)’s default definition does not apply in Part C because Congress narrows the definition of “major emitting facility” in Part C by specifying that only new sources that belong to certain categories are major emitting facilities.\textsuperscript{152} Part D, in contrast, does not specifically define “major stationary source.” Therefore, Section 302(j)’s definition should govern the interpretation of the term “major stationary sources” under Section 172(c)(5). As discussed above, the term “any air pollutant” under Section 302(j) has expansive meaning and does not refer to particular pollutants.

\textsuperscript{147} The plain language of Section 172(c)(5) discussed above seems to suggest that the only trigger for NNSR permit requirements is the emission of a major amount of any air pollutant from a new stationary source. However, as shown below, the legislative history indicates that Congress did not intend to set such a bright-line rule; rather, Congress intended to apply NNSR permit requirements to new major sources when emissions from those sources would prevent the attainment of NAAQS. See Clean Air Act § 172(c)(5); 42 U.S.C. § 7502.

\textsuperscript{148} As stated above, Section 172(c)(5) provides that “such plan [SIP] provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.” 42 U.S.C. § 7502.


\textsuperscript{150} 42 U.S.C. § 7602 (emphasis added).


\textsuperscript{152} Id.; see supra note 57 and accompanying text.
S. 252, the Senate bill that ultimately became a part of the 1977 Amendment, suggested a narrative and case-by-case test for the applicability of NNSR permit requirements. In 1976, at the 94th Congress, the Senate proposed to add provisions on new source emissions controls in nonattainment areas, whereas the House did not propose comparable provisions. 153 At the 95th Congress, the Senate Committee on Environment and Public Works reported to the Senate the bill, S. 252, which stated that “[n]o major emitting facility shall be constructed or modified in any air quality control region or portion thereof in which any national ambient air quality standard [NAAQS] is exceeded, if such facility will emit air pollutants subject to such standard so as to prevent the attainment or maintenance of such standard, unless” particular pollution control requirements, including NNSR permit requirements, are met. 154 According to the Senate bill, in nonattainment areas, a new source of nonattainment pollutants would trigger NNSR permit requirements if (1) it is a major emitting facility and (2) the emission of nonattainment pollutants from that source would prevent the attainment or maintenance of NAAQS. The Senate bill’s prevent-attainment-of-standard test is narrative, flexible, and case-specific.

At the 95th Congress, the Senate Committee on Environment and Public Works submitted a report to the Senate on S. 252. 155 The Committee report 156 accompanying the Senate bill affirmed the prevent-attainment-of-standard test in the section discussing legislative intent:

[T]he Act is amended by adding a new subsection which provides that unless certain conditions are met, a major facility may not receive a permit for construction or modification in an area which is exceeding an ambient air quality standard [NAAQS] if the new facility will emit pollutants which prevent attainment or maintenance of the ambient standard. 157

156. “Committee reports are perhaps the most valuable single element of the legislative history of a law. They are used by the courts, executive departments, and the public as a source of information regarding the purpose and meaning of the law.” OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 152 (4th ed. 2008).
A superficial reading of this paragraph may indicate that the report used the prevent-attainment-of-standard test as the test for permit approval rather than applicability. However, the report later referred to the term “certain conditions” as conditions for permit approval. Therefore, the above paragraph could be paraphrased as follows: a major facility or modification may not be built in an area which exceeds NAAQS if the new facility will emit pollutants that prevent attainment or maintenance of the ambient standard, unless certain NNSR permit requirements are met.

The Committee report also identified the fundamental purposes of reviewing new sources in nonattainment areas. Achieving the fundamental purposes demands the prevent-attainment-of-standard test for the applicability of NNSR permits. According to the Committee report, the fundamental purpose of the new source review in nonattainment areas under the 1977 Amendment was to address a “major weakness” of the implementation of the 1970 Act in assessing the impact of new source emissions on state plans to attain NAAQS by statutory deadlines. 158 States generously permitted new emissions and falsely assumed that the deadline was distant so that future reductions could offset current emissions. 159 The 1977 Amendment aimed to address this ineffective implementation by requiring states to “assure that before new or expanded facilities are permitted, a State demonstrate that these facilities can be accommodated [by, for example, emission offsetting] within its overall plan to provide for attainment of air quality standards.” 160 Therefore, the fundamental purpose of the nonattainment new source review under the 1977 Amendment demanded preconstruction review, including the permitting of a new source if the totality of the circumstances indicated that such source would prevent the attainment or maintenance of NAAQS by statutory deadlines.

Senator Muskie brought S. 252 before the Senate on behalf of the Committee 161 and embraced the prevent-attainment-of-standard test for the applicability of NNSR permits during the Senate floor debate. Senator Muskie stated that the procedure for preconstruction review of new sources

158. Id. at 1429. The 1977 Amendment extended the deadlines under the 1970 Act for nonattainment areas to attain NAAQS. Thomas O. McGarity, Missing Milestones: A Critical Look at the Clean Air Act's VOC Emissions Reduction Program in Nonattainment Areas, 18 VA. ENVTL. L.J. 41, 46 (1999). In general, the attainment date for a nonattainment area is the date by which the area can achieve attainment “as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment” except that EPA may extend the attainment date “for a period no greater than 10 years from the date of designation as nonattainment.” 42 U.S.C. § 7502.

159. Id.

160. Id.

in nonattainment areas must contain “adequate authority to prevent construction or modification of a new source which will prevent the attainment or maintenance of national ambient air quality standards.”\(^{162}\) In other words, if a construction or modification of a new source will prevent the attainment or maintenance of NAAQS, such new source will trigger the preconstruction review, including the permit process. Additionally, Senator Muskie embraced case-by-case scrutiny of new sources in nonattainment areas, which he said was the “only mechanism” that would assure the attainment of NAAQS by statutory deadlines unless the state could show that its State Attainment Plan would improve air quality and reduce emissions at a rate sufficient to attain NAAQS by statutory deadlines.\(^{163}\)

The Senate bill’s prevent-attainment-of-standard test is similar to EPA’s interpretation insofar as it applies NNSR permit requirements only to major stationary sources. However, EPA’s 100-ton-threshold test contradicts the Senate bill’s test in that EPA further limits major stationary sources to those of nonattainment pollutants. EPA’s test, unlike the Senate bill, is numerical, rigid, and arbitrary.

3. Impermissible Interpretation under *Chevron*

As stated above, not all major stationary sources in nonattainment areas trigger NNSR permit requirements. According to EPA, NNSR permit requirements only apply to the emissions of pollutants “for which the source is major and for which the area is in nonattainment.”\(^{164}\) Although EPA’s regulation on the applicability of PSD permits is reasonable, its regulation on the applicability of NNSR permits is not a permissible interpretation of the CAA.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court specified the standard of judicial review of an administrative agency’s interpretation of the statute it enforces:

> When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue . . . if the statute is silent or ambiguous with respect to the specific issue, the question

\(^{162}\). *Id.* at 713.
\(^{163}\). *Id.* at 716.
\(^{164}\). Hawkins & Temes, *supra* note 14, at 182.
for the court is whether the agency’s answer is based on a permissible construction of the statute.\textsuperscript{165}

EPA’s interpretation of NNSR permit requirements fails the \textit{Chevron} test because Congress’ intent is clear—NNSR permit requirements may apply to any new source that is major for \textit{any} air pollutant. Moreover, as demonstrated below, even assuming Congress’ intent was ambiguous, EPA’s narrow application of NNSR permit requirements to new sources that are major for nonattainment pollutants is not a permissible statutory construction.

Congress clearly intended for NNSR permit requirements to apply to nonattainment areas, as Part D is entitled “plan requirements for nonattainment areas.” Congress also intended for NNSR permit requirements to apply to any new source that is major for \textit{any} air pollutant. This intent is evident throughout the CAA: (1) Congress explicitly defined the term “major stationary sources” under Section 302(j) as sources that are major for \textit{any} air pollutant; (2) under Part D, Congress included language referring to specific pollutants when it especially concerned new sources that are major for such pollutants; (3) Congress imposed more stringent requirements under Part D for new sources in ozone, carbon monoxide, and particulate matter nonattainment areas by lowering the major source threshold as to those nonattainment pollutants to extend permit requirements to more new sources in those areas. Therefore, no inquiry into EPA’s interpretation is necessary if Congress’ intent is clear as to the applicability of NNSR permits.

Even assuming Congress’ intent was ambiguous, EPA’s regulation on the applicability of NNSR permit requirements is not a permissible interpretation of the CAA. Under EPA’s regulation, NNSR permit requirements apply to a new source only if (1) the new source is located in a nonattainment area, (2) the source emits the pollutants for which the area is designated as nonattainment, and (3) the source is a major emitting facility of such pollutants—that is, the source emits or has the potential to emit at least 100 tons per year of such pollutants. EPA’s regulations will result in a significant loophole in the control of new source emissions of lead in lead nonattainment areas. Unlike new sources in ozone, carbon monoxide, and particulate matter nonattainment areas, new sources in lead nonattainment areas are not subject to any lowered major source threshold for lead but are still subject to the 100-ton-per-year threshold. EPA’s regulation will allow a new source that is located in a lead nonattainment

area and emits or has potential to emit 99.9 tons per year of lead to escape NNSR permit requirements and exacerbate the lead pollution, further delaying the attainment for NAAQS. This is a result that the legislature could not have reasonably intended.\textsuperscript{166}

EPA may argue that the 100-ton threshold for the applicability of NNSR permit requirements is necessary in accommodating industrial development and economic growth in nonattainment areas. The legislative history of the 1977 Amendment regarding NNSR permit requirements reveals that Congress recognized the conflict between the economic interest in permitting the growth of industrial facilities and the environmental interest in attaining acceptable air quality.\textsuperscript{167} However, Congress made a policy choice under the CAA’s nonattainment provisions to give the environmental interest of improving air quality priority over the economic interest of growth. The Senate and House of Representatives agreed that the “protection of the public health must be the primary concern” in controlling new source emissions in nonattainment areas.\textsuperscript{168} During the Senate floor debate on the Senate bill proposing to control new source emissions in nonattainment areas, Senator Muskie explained the Committee’s opinions on the consideration of cost in defining technological standards of new sources: “New sources and modifications must employ systems which achieve the greatest emission reductions possible, even if such systems may be more costly than other less effective systems.”\textsuperscript{169} In the Senate Committee’s opinion, it was an “inappropriate policy” to weigh costs as heavily as the effectiveness in emission reduction in defining new source emissions control requirements in nonattainment areas.\textsuperscript{170} In establishing

\textsuperscript{166.} Congress could not have intended to delay the attainment for NAAQS because under CAA Part D, Congress expressly requires individual states to implement “all reasonably available control measures as expeditiously as practicable” to attain NAAQS. 42 U.S.C. § 7502. See also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 721 (1995) (Scalia, J., dissenting) (disagreeing with the Court that the interpretation of the word “take” under the Endangered Species Act is not permissible because “it produces a result that no legislature could reasonably be thought to have intended”); State of Ohio v. U.S. Dep’t of the Interior, 880 F. 2d 432, 441–59 (D.C. Circ. 1989) (holding that the Department of the Interior’s “lessor of” rule is an impermissible interpretation of the Comprehensive Environmental Response, Compensation and Liability Act because it directly contradicts the expressed intent of Congress).

\textsuperscript{167.} Chevron, 467 U.S. at 838; See also S. REP. NO. 95-127, supra note 151, at 1376 (stating that “one issue [that] occupied a majority of the attention of the committee” is the concern that “achievement of air quality standards required to protect public health may impose unacceptable constraints on the Nation’s capacity to achieve the kind of economic activity necessary to bring about full employment and a balanced Federal budget”).


\textsuperscript{169.} Id. at 717.

\textsuperscript{170.} Id.
control system requirements for new sources in nonattainment areas, EPA should consider the costs of such systems “only to a very limited extent.”

Moreover, EPA once agreed with Congress’ policy choice that “[s]ince a policy which simply precludes all industrial growth in these areas [nonattainment areas] would be unacceptable, we are in favor of a stringent policy which allows new emissions only if they will not make air quality worse.” Finally, according to Senator Muskie, economic growth and environmental interest are not mutually exclusive; on the contrary, environmental constraints may stimulate technological innovation and ultimately facilitate economic growth:

I believe that an economic growth policy which abandons environmental objectives would be a foolish course. The Nation must have clean growth. If the price of that clean growth is to restrain the size of particular activities pending the development of new pollution control technologies or new production procedures, then new technologies and processes can and will be developed in order to take advantage of the economies of scale.

V. A PROPOSED TEST FOR DETERMINING THE APPLICABILITY OF NNSR PERMIT REQUIREMENTS IN LEAD NONATTAINMENT AREAS

EPA and various stakeholders have been making proposals to reform EPA’s NSR program since 1992. Those proposals suggest two primary objectives of NSR reform: (1) industries, EPA, and some state agencies seek to simplify the NSR program, making it more flexible and less burdensome to the regulated community; and (2) environmental groups suggest that NSR reform should lead to enhanced environmental protection. The 1977 House of Representative’s Committee Report suggested that EPA’s NSR reform should achieve both objectives, stating that the sections on nonattainment areas were “proposed as a means of assuring realization of the dual goals of attaining air quality standards and providing for new economic growth.” Particularly, as discussed above,

171. Id.
172. Id. at 3549.
173. Id. at 710. According to Senator Muskie, the Senate Committee found that the CAA would not pose “unacceptable limits” on economic growth.
174. Id. at 4799.
176. Id. at 122–23.
Congress considered the protection of public health as the “paramount purpose and value” and the “overriding commitment” of the CAA. Therefore, the protection of public health and attaining NAAQS should be the primary concern in formulating suggestions for NSR reform.

EPA’s current rule restricts the applicability of PSD permit requirements to new sources in attainment and unclassified areas and NNSR permit requirements to new sources in nonattainment areas that emit a major amount (100 tons per year) of nonattainment pollutants. This rule creates a loophole in the control of major source emissions in nonattainment areas by exempting new sources that emit not major, but significant, amounts of nonattainment pollutants from both PSD and NNSR permit requirements. For example, such new sources may emit or have the potential to emit 99.9 tons per year of lead and major amounts of other pollutants. As discussed above, such an exemption contradicts the plain language of the CAA and legislative intent and is not a permissible interpretation of the Act under the *Chevron* test. Particularly, the test of the applicability of NNSR permit requirements under EPA’s policy is the 100-ton-per-year threshold of nonattainment pollutants emissions, which contradicts the narrative and case-by-case test under the Senate bill for the 1977 Amendment.

EPA should therefore adopt a case-by-case test to determine the applicability of NNSR permit requirements to new sources in nonattainment areas. Similar to the prevent-attainment-of-standard test under the Senate bill, EPA or the states should consider the totality of the circumstances for each new source proposed in nonattainment areas and determine the impact of its lead emissions on the state plan to attain NAAQS for lead. In assessing the impact, EPA or the states should be free to choose a method, which may be as simple as a numerical threshold or as complex as a detailed analytical framework containing both numerical and narrative criteria. But the assessment standard should be strict enough so that new sources that emit or have the potential to emit at least 100 tons per year of lead will trigger NNSR permit requirements. The key to this case-by-case determination of the applicability of NNSR permits is that EPA or the states must give at least some consideration to the impact of a new source of lead on the attainment of NAAQS. Under this case-by-case test, a new source in lead nonattainment areas that is major for pollutants other than lead may trigger NNSR permit requirements if, for example, the totality of the circumstances indicates that such source’s lead emissions will...

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prevent the implementation of the state plan from achieving NAAQS for lead.

This case-by-case test complies with CAA Section 172(c)(5), which imposes NNSR permit requirements on new sources that are major for any air pollutant, not just nonattainment pollutants. This case-by-case test will facilitate the legislative purposes of attaining air quality standards and protecting the public health. This test is also flexible enough to accommodate individual circumstances to allow economic growth. Moreover, the case-by-case test, substituting EPA’s 100-ton-per-year test, will fill the gap in EPA’s regulation of new sources in nonattainment areas by examining each major new source that emits not major, but a significant, amount of nonattainment pollutants and determining whether such source requires an NNSR permit. The case-by-case test therefore will prevent new sources of lead emissions from evading permit requirements and facilitate the attainment of NAAQS in lead nonattainment areas.

Future reform of EPA’s NSR program should not overlook the goal of attaining NAAQS in nonattainment areas, especially when EPA’s existing NSR program creates a significant loophole in regulating new sources in nonattainment areas. EPA and the states should not achieve the goal of providing for new economic growth at the expense of the goal of attaining NAAQS, especially by allowing more new sources to avoid permit requirements. EPA therefore should abandon its rules on the applicability of NNSR permits, limiting NNSR permits to new sources that are major for pollutants for which the area is designated as nonattainment, and adopt a rule that extends the applicability of NNSR permits to new sources that are major for any pollutant. This is the initial step EPA should take to remove a significant loophole in its new source pollution control in nonattainment areas. Further reforms would concern the trade-offs between the goals of attaining NAAQS and allowing for new economic growth.

CONCLUSION

Lead pollution presents unique concerns for human health, especially the health of children. The CAA requires EPA to promulgate NAAQS for lead. Under the CAA, EPA developed the NSR program to regulate new and modified stationary sources. EPA’s NSR program requires all major and certain minor stationary sources to undergo preconstruction review and approval. EPA’s NSR program includes the PSD and NNSR permit programs, with the latter having more stringent permit conditions than the former.

EPA’s regulation limits the applicability of PSD permit requirements to major stationary sources in attainment areas, exempting major stationary
sources in nonattainment areas. EPA also limits the applicability of NNSR permit requirements to new sources that are major for the pollutants for which the area is designated as nonattainment. Although EPA’s regulation on the applicability of PSD permits is reasonable, its regulation on the applicability of NNSR permits is not a permissible interpretation of the CAA. EPA’s regulation creates a significant loophole in the control of new source emissions in nonattainment areas, exacerbating lead pollution and further delaying the attainment of NAAQS for lead. Therefore, EPA should change its rule on the applicability of NNSR permits in nonattainment areas and adopt a case-by-case test to determine the impact of lead emissions from each new major source on the state plan to attain NAAQS for lead. This proposed test for the applicability of NNSR permits facilitates the fundamental goal of the new source review in nonattainment areas to attain NAAQS as expeditiously as practicable. It also accommodates the agency’s interest in minimizing administrative costs by giving EPA or state agencies the freedom to choose the method for assessing a new source’s impact on NAAQS attainment. This proposed test, potentially imposing environmental constraints on more industrial facilities, would stimulate technological innovation and ultimately facilitate economic growth. This proposed test, however, is not a panacea for all the problems of EPA’s NSR program or all lead pollution problems in lead nonattainment areas. The proposed test is the initial step to reform EPA’s NSR program and achieve the dual goals of attaining NAAQS and allowing for new economic growth.
A VISION OR A WAKING DREAM: REVISING THE MIGRATORY BIRD TREATY ACT TO EMPOWER CITIZENS AND ADDRESS MODERN THREATS TO AVIAN POPULATIONS

By Andrew W. Minikowski*

Introduction ............................................................................................... 152
I. Background ........................................................................................... 153
II. Proposed Amendments to MBTA ....................................................... 157
   A. Resolving Strict Liability Concerns: The Inclusion of Civil Penalties in MBTA for Incidental and Foreseeable Takes .................................. 158
   B. Enforcing Civil Penalties and Avoiding Selective Enforcement: The Need for a Citizen Suit Provision in MBTA ................................. 162
   C. MBTA as an Example: Growing Obsolescence of the United States’ Environmental Statutes and the Need to Revise to Reflect Modern Circumstances ...................................................................................... 168
Conclusion ................................................................................................ 171

INTRODUCTION

The populations of North American bird species are in precipitous decline. This decline is not the natural ebb and flow of avian populations but is instead attributable to a series of threats that have their genesis in human activity, including climate change, widespread habitat loss, and the

* The author would like to thank Professor Craig Pease and Christine Mertens (Vermont Law School ’14) for their invaluable contributions and suggestions during the writing of this article.

1. FLORENCE AND THE MACHINE, Bird Song, on LUNGS (Island Records, 2009).
production of wind energy. However, little action has been taken to prevent further decline in the number of birds. Federal protection of North American migratory bird species is derived solely from the Migratory Bird Treaty Act (MBTA). Enacted shortly after the turn of the twentieth century, MBTA has ceased to be an effective tool by which to protect its listed species because the operative mechanisms of the statute reflect the threats facing birds at the time it was enacted, rather than the modern threats posed by human activity and industrial production. This note, therefore, proposes several ways in which MBTA could be Congressionally amended in order to increase its efficacy and more adroitly address modern threats to bird populations, while arguing that MBTA’s current obsolescence is a warning of what could soon become of the other major environmental statutes.

I. BACKGROUND

Congress enacted MBTA in 1918 to deal primarily with the threat posed to migratory bird populations by unregulated hunting and the hunting of birds for market sale. As previous attempts to protect migratory birds under the Commerce Clause were constitutionally challenged, MBTA served as a legislative enactment of a treaty for the protection of migratory bird species between the United States and Great Britain. As its operative mechanism, MBTA makes it a misdemeanor for any person to “pursue, hunt, take, capture, kill, attempt to take, capture, or kill” any listed migratory bird species without a permit from the United States Fish & Wildlife Service.

In the almost 100 years since its enactment, MBTA has proved to be an effective piece of legislation in combatting those activities in which the

3. Id.
6. Several federal district courts found MBTA’s predecessor, the Weeks-McLean Act, to be an impermissible exercise of Congressional power under the Commerce Clause. See United States v. Shauver, 214 F. 154 (E.D. Ark. 1914).
8. 16 U.S.C. § 703. Species protected by MBTA are listed at 50 C.F.R. § 10.13 (2012). The list contains 836 species of birds, meaning that essentially every North American bird species is protected under MBTA. Only four species of birds are unlisted, due to their invasive/nuisance nature: the European Starling (Sturnus vulgaris), the Eurasian Tree Sparrow (Passer montanus), the Rock Dove (Columba livia), and the Monk Parakeet (Myiopsitta monachus).
intent to kill birds is clear. 9 Thus, MBTA has soundly dealt with the threats posed to bird populations by illegal hunting, trapping, and baiting. Historically, the vast majority of criminal prosecutions under MBTA have involved unlicensed hunting and trapping or the possession of birds taken without a permit. However, as the environmental movement gained popular and legislative support during the 1970s, the scope of prosecutions under MBTA began to change. 10 The federal courts and prosecutors began to expand the scope of liability under MBTA, holding parties criminally liable for *unintentional* bird deaths caused as a byproduct of agricultural and industrial processes. 11 Due to the lack of intent in these cases, the courts relied on the “take” provision of MBTA in order to hold defendants criminally liable. 12

However, as the scope of criminal liability under MBTA began to increase, so did many of the federal courts’ unease with it. By its very nature, MBTA is a strict liability statute in that it requires no requisite mens rea element to establish liability. Some courts feared that criminal liability under MBTA could reach the point of absurdity by holding parties liable for bird deaths that were truly beyond their control. 13 Most of the controversy in the courts focused on the elusive “take” provision. Unlike the Endangered Species Act (ESA), which provides a clear statutory definition of “take,” the language of MBTA offers no guidance as to what constitutes a “take” under the statute. 14 Furthermore, the Supreme Court has never dealt with the issue of liability under MBTA, leaving the lower federal courts with little guidance on how to decide MBTA cases. 15 Due to vying

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10. Askew, supra note 7, at 851.


13. The Second Circuit recognized this possibility early on, noting that at its most extreme, MBTA could impose liability on individuals for birds that die from flying into windows or airplanes. The court determined, however, that such liability could be avoided by sound prosecutorial discretion. FMC Corp., 572 F.2d at 905.


15. See Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 Envir. L. 579, 598 (2012) (noting that a lack of guidance by the Supreme Court has left the federal district courts to essentially fend for themselves in regard to liability issues under MBTA).
interpretations of the take provision, the scope of criminal liability under MBTA varies wildly between the various federal circuits.

Some of the circuits, notably the Eighth and the Ninth, adhere to a narrow, more traditional definition of liability under MBTA. Representative of this narrow interpretation is the recent decision in United States v. Brigham Oil & Gas, L.P., in which a federal district court refused to impose liability on an oil company for the incidental death of birds in its oil reserve pits. The district court interpreted “take” to refer only to deliberate conduct directed intentionally at birds rather than incidental bird deaths that are the byproduct of otherwise lawful commercial activity. The court reasoned that if the take provision were to be expanded beyond its plain meaning, MBTA would criminalize many otherwise benign, everyday activities. Thus, in the circuits that have adopted a narrow reading of the statute, only those activities historically covered by MBTA—hunting, trapping, baiting, and the possession of illegally obtained birds—fall within its scope of liability.

Other circuits have adopted a more broad interpretation of MBTA’s take provision due to the strict liability nature of the statute. It is under this interpretation of the take provision that defendants have been held criminally liable for incidental bird deaths. However, the various federal courts have followed different lines of reasoning to arrive at the conclusion that MBTA applies to incidental takes as well as intentional bird deaths. Some courts have focused simply on the fact that MBTA imposes strict liability for the death of birds, and that to make a distinction between direct and indirect conduct is to defeat the purpose of the statute. Concerned by a possible erosion of due process rights, other courts have imposed a “proximate cause” test on the statute that requires the defendant to know that the bird deaths could happen but do nothing to prevent them.

16. See generally Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997) (holding that habitat destruction from timber harvests do not constitute a take under MBTA); Seattle Audubon Soc’y v. Evans, 952 F.2d 297 (9th Cir. 1991) (holding that logging in the habitat of a listed bird species does not constitute a violation of MBTA).

18. Id. at 1209.
19. Id. at 1212.
20. See United States v. Apollo Energies, Inc., 611 F.3d 679, 685 (10th Cir. 2010) (providing a summary of how the different circuit courts have treated strict liability under MBTA).
21. See generally United States v. Moon Lake Electric Ass’n., 45 F. Supp. 2d 1070 (D. Colo. 1999) (holding defendant strictly liable for the death of birds that were electrocuted by perching on power lines).
22. See generally Apollo Energies, 611 F.3d 679 (holding defendant liable for bird deaths in oil machinery after USFWS informed defendant that such deaths were possible and easily avoidable, yet defendant took no action to prevent them); United States v. CITGO Petroleum Corp., 893 F. Supp.
However, the so-called “proximate cause” requirement is a judicial creation and is not expressed or even implied in the actual language of MBTA. This test is an important facet of the broad interpretation of “take” under MBTA, as it prevents liability under the statute from reaching the point of absurdity, as feared by the courts that have chosen to read the statute narrowly.\(^{23}\) Though strict liability poses a problem in the case of incidental takes, it is worth noting that some argue that without strict liability, MBTA would be practically unenforceable.\(^{24}\)

Vying interpretations of a statutory provision is not necessarily problematic. However, in the case of MBTA, the debate over a broad or narrow interpretation of “take” actually threatens to defeat the statute’s purpose of protecting listed bird species. When Congress passed MBTA in 1918, the dominant threat to North American bird populations was unregulated hunting and trapping.\(^{25}\) Not surprisingly, the threats to bird populations have changed dramatically in the almost 100 years since MBTA’s enactment and MBTA itself runs the risk of becoming a legislative antique no longer capable of protecting North America’s birds.\(^{26}\) This is because most of the modern threats to bird populations fall soundly within the definition of “incidental take” that has been so debated in the federal courts. Current United States Fish & Wildlife Service estimates place the total number of breeding birds in the United States at somewhere between ten and twenty billion.\(^{27}\) The vast majority of listed species have large numbers of individuals killed accidentally by human activity.\(^{28}\) In a given year, communication towers kill between four and five million birds, electrical transmission lines kill around 174 million, wind turbines kill 33 thousand, agricultural pesticide applications kill around 72 million, oil extraction pits kill roughly two million, window and building collisions kill a staggering 900 million, and housecats alone account for 39 million

\(^{22}\)d 841 (S.D. Tex. 2012) (holding defendant liable for bird deaths in uncovered oil tanks as such tanks, were supposed to be covered pursuant to Clean Air Act regulations).


\(^{24}\) See Finet, *supra*, note 5 at 17–18 (arguing that strict liability is the only way in which a statute such as MBTA can be effective).

\(^{25}\) Id. at 7–8.


\(^{28}\) Id.
Thus, vast numbers of listed birds are killed every year. While some federal courts refuse to include the very activity that is killing the birds within MBTA’s scope of liability, other federal courts quibble over where exactly to draw the line on the inclusion of such activity. The modern threats facing migratory bird species could not have possibly been contemplated by Congress when MBTA was passed in 1918, due to the extreme advances in technological and industrial development that have since occurred. The statute needs to be reexamined in the context of these modern threats in order to prevent it from becoming a mere nullity or legislative antique.

The remainder of this note will focus on the necessity of revising MBTA in order to resolve the varying interpretations of the take provision in the federal courts and bolster the statute to more effectively protect listed species from modern population threats. The first part examines the possibility of including civil penalties in MBTA in order to deal with incidental and unavoidable bird casualties. The second part argues that the inclusion of a citizen suit provision in MBTA would allow more effective enforcement against those parties that cause incidental takes. Finally, the note concludes with a policy discussion on the United States’ increasingly outdated environmental statutes and how to prevent their growing obsolescence.

II. PROPOSED AMENDMENTS TO MBTA

The most certain way to resolve the dispute in the federal courts over the correct interpretation of MBTA’s take provision—and to ensure more robust protection of listed bird species from modern threats—is for Congress to amend the statute accordingly. Though Congress has amended MBTA in the past, the majority of these amendments have been technical, rather than substantive alterations to the statute. In order to ensure the continued protection of North America’s migratory bird species, MBTA must be substantively amended with particular focus on the take provision. Specifically, MBTA should be amended to (1) provide for civil penalties in the case of foreseeable incidental takes and (2) include a citizen suit provision.
suit provision to empower citizens and non-governmental organizations (NGOs) to enforce the civil provisions against corporations and the government.

A. Resolving Strict Liability Concerns: The Inclusion of Civil Penalties in MBTA for Incidental and Foreseeable Takes

Holding defendants criminally liable under MBTA’s take provision for bird deaths that they did not deliberately and affirmatively cause is the issue that has so perplexed the federal courts. Whereas some courts have adopted the “proximate cause” test to find liability, others have simply refused to impose strict liability under the take provision, consequently leaving some of the most destructive threats to bird populations unchecked. This problem is magnified by the fact that the Fish & Wildlife Service issues no permits to allow incidental takes, yet when they do occur, some federal courts refuse to enforce MBTA’s provisions against guilty parties. Regardless, it is the interplay between MBTA’s strict criminal liability nature and its take provision that is preventing the statute from achieving its full potency.

The question is not whether MBTA should be amended. Rather the question is how MBTA should be amended. Previously suggested amendments have included a sweeping exception for incidental takes, a specific accounting of the type of bird deaths that constitute a violation of the statute, revision to ensure uniform enforcement under the statute, and the increase in fines for violations. It has even been suggested that bird deaths that likely violate MBTA can be addressed via regulatory

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32. See Corcoran, supra note 23, at 316 (discussing how various causes of bird deaths are prosecuted under MBTA).

33. See Lilley & Firestone, supra note 31, at 1181 (exploring the interplay between incidental takes, FWS permitting, enforcement by the federal courts and the problems posed by this situation).

34. See Scott W. Brunner, The Prosecutor’s Vulture: Inconsistent MBTA Prosecutions, Its Clash with Wind Farms, and How to Fix It, 3 SEATTLE J. ENVTL. L. 1, 5 (2013) (noting that Congressional amendment of MBTA is necessary to resolve its varying interpretations in the federal courts).

35. Id. at 29–30 (arguing for a broad liability exemption in the case of incidental takes); see also Conrad A. Fjetland, Possibilities for the Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds, 40 NAT. RESOURCES J. 47, 64 (2000) (suggesting that 16 U.S.C. § 703 should be amended to exempt accidental bird deaths from liability).

36. Corcoran, supra note 23, at 357.

37. See Askew, supra note 7, at 860 (noting that Congressional revision is needed to ensure uniform enforcement); see also Robbins, supra note 15, at 604–05 (arguing that a uniform prosecutorial framework must be implemented under MBTA).

38. See Fjetland, supra note 35, at 64 (arguing for increased fines under MBTA).
mechanisms outside of the scope of statute. However, none of these proposed amendments would resolve the quandary over strict liability for incidental takes while simultaneously protecting migratory bird populations from the threats posed by modern society.

The proper way in which MBTA should be amended is to adopt a provision allowing for the imposition of civil penalties for incidental—but foreseeable—takes of migratory birds under section 703. An amendment in this vein would ameliorate the conflict in the federal courts over imposing criminal liability on parties for unintentional conduct, as well as allow Congress or the Fish & Wildlife Service to define those activities which constitute an incidental take under the statute. If Congress or the Fish & Wildlife Service were able to define precisely what activity constitutes an incidental take under MBTA, the scope of liability under the statute could be exactly defined and remove any ambiguity over whether a particular class of bird deaths constitutes a violation of the statute. An ideal civil penalty amendment would resolve the strict liability-incidental take quandary, impose a foreseeability test on judicial analyses of incidental takes, and incentivize industry and agriculture to avoid needless bird deaths. The amendment would also contain a limited number of specific exemptions in which neither civil nor criminal liability would be imposed on parties for those bird deaths which are truly unavoidable.

The first step in drafting an effective civil penalty amendment would be to precisely define the term “take” within the meaning of the statute, as much of the controversy over the take provision has arisen due to the fact that Congress left the term undefined. The most efficient and uniform way to define take for the purposes of MBTA would be to adopt a modified version of the definition of “take” articulated by Congress in the ESA. Under the ESA, “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.” Proponents of a narrow interpretation of “take” under MBTA have argued that the lack of definition in MBTA bespeaks a Congressionally intended difference between MBTA and the ESA; that Congress could have amended MBTA following the enactment of the ESA in order to align the meaning of “take” under the two statutes. However, this is not so, as most

39. See Blake M. Mensing, Putting Aeolus to Work Without the Death Toll: Federal Wind Farm Siting Guidelines can Mitigate Avian and Chiropteran Mortality, 27 J. ENVTL. L. & LITIG. 41, 98–99 (2012) (arguing that the Department of the Interior should adopt regulations to prevent wind farms from being sited in bird flyways and to require preventative technology to be utilized in wind turbine design).
41. Id.
42. Means, supra note 9, at 828–33.
of what is defined as a “take” in the ESA is already designated as an explicit violation under MBTA. Thus, it is the “harass” and “harm” language of ESA’s take definition that needs to be incorporated into MBTA’s definition in order to bring incidental takes soundly within the scope of the statute. A potential definition of “take” under MBTA could read: any activity, whether incidental or intentional, that may foreseeably result in death due to harassment or harm. Such a definition would resolve potential ambiguity under the take provision as well as bring MBTA into accordance with more recent federal wildlife laws such as the ESA. In regard to the physical amendment of the statute itself, the new definition of take could be included within the existing language of section 703 of MBTA.

The second step in imposing effective civil penalties under MBTA would be to precisely define the penalties that result from civil violations of the statute. An ideal civil penalty under MBTA would take the form of a monetary fine imposed for each violation of the statute. Current criminal misdemeanor violations of MBTA can result in a fine of up to $15,000 and no more than six months in prison. In order to ensure consistency under the statute, civil fines should reflect the amounts imposed for criminal violations. Thus, a civil violation would result in a monetary penalty of the same amount but without the added risk of imprisonment that accompanies a criminal conviction under MBTA.

Furthermore, there would be an ideological difference between the criminal and civil fines under MBTA. Normally, a criminal fine serves to deter the criminal conduct at which it is aimed. However, in the case of incidental takes, a criminal fine cannot work to deter bird deaths that the perpetrator did not even intend to commit in the first place. Therefore, a civil penalty would work to compensate society for the ill caused by incidental bird deaths that could have been foreseeably prevented. Ideally, the revenue from civil penalties under MBTA could be channeled directly into the Fish & Wildlife Service to be used for the management of migratory birds and the National Wildlife Refuge System.

Though civil penalties under MBTA would not be designed to expressly deter incidental takes, the penalties would inadvertently do just that due to the strong economic incentive that the possibility of such fines would create. The threat of constant fines due to the death of birds as an

43. 16 U.S.C. § 703.
44. 16 U.S.C. § 707.
45. Id.
externality of production would incentivize many firms to take into account birds when conducting their operations in order to avoid accruing additional costs of operation. These firms could avoid civil penalties by altering production processes and taking into account the migratory flyways and nesting habits of local birds. The use of economic incentives to further environmental goals is not a foreign mechanism in the field of environmental law, the most prominent example of it appearing in Congress’ 1990 amendments to the Clean Air Act. Since many bird deaths are foreseeable, most firms would likely respond to the civil penalties as an incentive to take measures against accidental bird deaths. Of course, it is also eminently possible that large firms will simply ignore the economic incentives and absorb the civil penalties as just another cost of conducting business. However, should such a situation arise, these firms would still be subject to prosecution under MBTA’s criminal provisions. Thus, the civil and criminal penalties under MBTA can work together to a greater effect.

Though civil penalties under MBTA would substantially further the goals of the statute by affording extra protection to North America’s migratory bird populations, it is essential that the incidental takes that trigger civil penalties be only deaths that are foreseeable. Indeed, those courts that have imposed criminal liability under MBTA have been most willing to do so in those cases where the incidental takes were reasonably foreseeable. In United States v. Apollo Energies, the Tenth Circuit found that the incidental bird deaths were foreseeable since the Fish & Wildlife Service had warned defendants that their machinery could kill birds, offered suggestions on how to prevent the machinery from killing birds, and provided a “grace period” in which defendants could address the problem. Likewise, in United States v. CITGO Petroleum Corporation, the court found that the incidental death of birds was foreseeable since the oil tanks in which the birds died were supposed to be covered pursuant to federal and state law and that employees had previously reported the presence of dead birds in the tanks to management. Therefore, a civil penalty provision with a foreseeability requirement would operate most justly by only fining those that realized incidental bird deaths were possible, yet did nothing to reasonably prevent them from occurring.

Most importantly, however, the inclusion of a foreseeability requirement in the civil penalties provision would prevent civil liability

47. See 42 U.S.C. § 7651 (2006) (establishing a system of transferrable allowances in order to incentivize the abatement of sulfur dioxide emissions).
48. 611 F.3d at 691.
from expanding beyond its envisioned scope. A foreseeability requirement would prevent firms and individuals from being fined for bird deaths that were truly beyond their control and could not have been anticipated or prevented. Since unavoidable incidental takes are a reality of modern society, the civil penalties provision should also include certain enumerated exemptions in which civil liability would not be imposed upon those parties “responsible” for the deaths. There are certain causes of incidental deaths that would be near-impossible for any person to address, such as the birds killed by window collisions, airplanes, and roaming housecats. Therefore, the civil penalties provision should exempt those incidental takes which are unavoidably caused by citizens simply going about their daily business with no intent to kill birds.

A potential civil penalty provision could resemble the following: Any person, association, partnership, or corporation who shall violate this subchapter by committing an incidental take of a listed migratory bird species that was foreseeable and could have been reasonably prevented shall be civilly liable for such takes and shall be fined not more than $15,000. Those incidental takes caused by window or building strikes, motor vehicle and aircraft collisions, and the natural behavior of domesticated animals shall not expose any person, association, partnership, or corporation to criminal or civil liability under this subsection. In regard to the actual physical amendment of the statute, the civil penalties provision could be placed within the existing provision outlining criminal violations and penalties.

B. Enforcing Civil Penalties and Avoiding Selective Enforcement: The Need for a Citizen Suit Provision in MBTA

Most of the major environmental statutes of the 1970s contain citizen suit provisions that permit private citizens, citizen groups, and NGOs to file suit against entities for violating an environmental statute and against the government for failing to act pursuant to an environmental statute. Among the major statutes that contain a citizen suit provision are the Clean Water Act, the Clean Air Act, the ESA, and the Resource Conservation and

50. See FMC Corp., 572 F.2d at 905 (describing the potential for large swaths of commonplace activity to fall within the scope of liability created by MBTA).
51. See U.S. FISH & WILDLIFE SERV., supra note 27 (providing figures for the number of birds killed by window collisions and housecats).
Recovery Act.\textsuperscript{56} MBTA, enacted more than a half-century before the major environmental statutes, is notably lacking a citizen suit provision by which groups could privately enforce the statute against violators. In order to fully modernize MBTA and give full effect to any potential civil penalty provision, the statute must be further amended to contain an effective citizen suit provision.

The citizen suit provisions present in other environmental laws have been extremely effective in ensuring compliance and agency accountability due to their use by citizen groups and NGOs.\textsuperscript{57} Congress’ intent in including citizen suit provisions in the environmental statutes was to encourage better enforcement by the federal agencies and to allow citizens to privately enforce the laws where the government cannot.\textsuperscript{58} Congress’ policy behind citizen suits has been successful overall, as citizen suits have been shown to encourage both compliance and greater enforcement by the government.\textsuperscript{59} Indeed, the citizen suit has been wildly popular as a form of advocacy, due perhaps to declining trust in the government to enforce environmental laws on behalf of citizens.\textsuperscript{60} Across the breadth of federal law, the vast majority of citizen suits are filed under the environmental statutes.\textsuperscript{61} It is estimated that a new environmental citizen suit is filed every two business days—a rate that far surpasses both the Environmental Protection Agency and the Department of Justice.\textsuperscript{62} Seventy-five percent of all environmental lawsuits are citizen suits, which means that most environmental jurisprudence is directly attributable to them.\textsuperscript{63} Therefore, groups that bring citizen suits have the unique ability to help define national environmental policies.\textsuperscript{64} Finally, the popularity of citizen suits is due also to the significant incentives that exist for groups to bring suit. All of the environmental statutes that authorize citizen suits also provide for the recovery of attorney fees by the initiating parties.\textsuperscript{65} Furthermore, it has been noted that the existence of civil penalties in a statute serve as a significant

\textsuperscript{59} May, \textit{supra} note 57, at 22.
\textsuperscript{61} May, \textit{supra} note 57, at 15.
\textsuperscript{62} \textit{Id.} at 4–5.
\textsuperscript{63} \textit{Id.} at 8.
\textsuperscript{64} Austin, \textit{supra} note 60, at 260.
\textsuperscript{65} \textit{Id.} at 231.
inducement for parties to bring citizen suits against those violating environmental laws.\textsuperscript{66}

As previously noted, MBTA contains no provisions allowing citizen suits to be brought under the statute. The lack of a citizen suit provision in MBTA severely limits the enforcement of MBTA when compared to other environmental laws while simultaneously increasing the chances of selective enforcement by the Department of Justice.\textsuperscript{67} Thus, the only way in which citizens can become involved in the enforcement of MBTA is to file suit challenging agency actions pertinent to MBTA under the Administrative Procedure Act.\textsuperscript{68}

However, filing suit under the Administrative Procedure Act to enforce MBTA has been met with overwhelming failure by those citizens and NGOs that have attempted to do so. In \textit{Mahler v. United States Forest Service}, the plaintiff used the Administrative Procedure Act to challenge the agency’s decision to clear cut sections of a national forest that provided bird habitat.\textsuperscript{69} Specifically, the plaintiff alleged that the agency’s actions would constitute a take under section 703 of MBTA.\textsuperscript{70} The court noted that MBTA contains no citizen suit provision and further found that the agency’s timber harvesting did not constitute a take.\textsuperscript{71} In \textit{Seattle Audubon Society v. Evans}, the Audubon Society challenged a logging plan for the same reasons as in \textit{Mahler}.\textsuperscript{72} Again, the court refused to find a take under section 703.\textsuperscript{73} Other lawsuits brought by citizens under the Administrative Procedure Act to enforce MBTA have ended similarly.\textsuperscript{74} One notable success, however, occurred in \textit{Humane Society of the United States v. Glickman}, in which the plaintiff challenged a Fish & Wildlife Service regulation that allowed federal agencies to kill or take birds protected by MBTA without a permit from the Department of the Interior.\textsuperscript{75} Here the court held that MBTA contains no distinctions and that it applies equally to federal agencies and individuals.\textsuperscript{76} However, the Humane Society’s victory in \textit{Glickman} is the exception. Suits brought under the Administrative

\begin{itemize}
  \item \textsuperscript{66} Fotis, \textit{supra} note 58, at 172.
  \item \textsuperscript{67} Brunner, \textit{supra} note 34, at 10–11.
  \item \textsuperscript{69} 927 F. Supp. 1559, 1561 (S.D. Ind. 1996).
  \item \textsuperscript{70} \textit{Id.} at 1573.
  \item \textsuperscript{71} \textit{Id.}
  \item \textsuperscript{72} 952 F.2d 297, 298 (9th Cir. 1991).
  \item \textsuperscript{73} \textit{Id.} at 303.
  \item \textsuperscript{74} \textit{See generally} City of Sausalito v. O’Neill, 386 F.3d 1186 (9th Cir. 2004) (holding that plaintiff’s Administrative Procedure Act challenge to National Park Service plan to clear cut trees did not amount to a take under MBTA).
  \item \textsuperscript{75} 217 F.3d 882, 884 (D.C. Cir. 2000).
  \item \textsuperscript{76} \textit{Id.} at 886–87.
\end{itemize}
Procedure Act to enforce MBTA are necessarily constrained and limited in their scope. Thus, they cannot work to affect the broad trends needed to secure greater enforcement of the statute.

Perhaps the most unsettling consequence of MBTA’s lack of a citizen suit provision is the possibility of unchecked, selective enforcement of the statute by the Department of Justice. In this case, the mere possibility of selective enforcement has likely become a reality. While the Obama administration has prosecuted many oil and gas companies for violations of MBTA, it was only very recently that the Department of Justice prosecuted the first wind energy firm, despite the voluminous number of birds killed by that industry.\footnote{The Associated Press, \textit{Wind farms get pass on eagle deaths}, FUELFIX (May 14, 2013), http://fuelfix.com/blog/2013/05/14/wind-farms-gets-pass-on-eagle-deaths/; see Emma G. Fitzsimmons, \textit{Wind Energy Company to Pay $1 Million in Bird Deaths}, N.Y. TIMES (Nov. 22, 2013), http://www.nytimes.com/2013/11/23/us/wind-energy-company-to-pay-1-million-in-bird-deaths.html?_r=0.} In fact, it was only this past year that the first wind farm even attempted to seek a permit from the Fish & Wildlife Service to take birds under MBTA, revealing how widespread the lack of prosecutions in the wind industry truly is.\footnote{Phil Taylor, \textit{Minn. Wind Farm Seeks First Eagle-Kill Permit}, GREENWIRE (Jan. 18, 2013), http://www.eenews.net/greenwire/stories/1059975022/search?keyword=%22Migratory+Bird+Treaty+Act%22.} Thus, the wind industry is being indirectly subsidized by the current administration as it is a “favored” industry.\footnote{James Conca, \textit{Wind Energy Gets Away With Murder}, FORBES (Sept. 22, 2013), http://www.forbes.com/sites/jamesconca/2013/09/22/wind-energy-gets-away-with-murder/.} Typically, “disfavored” industries—oil, gas, pesticides, chemicals—are those which are most regularly prosecuted for bird deaths under MBTA.\footnote{Brunner, \textit{supra} note 34, at 13.} The reticence of the Department of Justice to prosecute the wind industry under MBTA poses serious threats to the integrity of the statute due to selective enforcement.\footnote{Id. at 4; see also Corcoran, \textit{supra} note 23, at 316 (noting that the most destructive causes of bird deaths are left unprosecuted under MBTA).} This is particularly alarming given the fact that one of the commonly proffered solutions to MBTA’s current problems is to simply rely on the sound prosecutorial discretion of the Department of Justice.\footnote{See Means, \textit{supra} note 9, at 835–36 (arguing that prosecutorial discretion is a solution to MBTA’s current problems); see also Robbins, \textit{supra} note 15, at 606 (arguing that the implementation of a uniform prosecutorial framework under MBTA would resolve many of the statute’s inefficiencies).} However, as current experience demonstrates, MBTA is highly vulnerable to selective prosecution and simply deferring to the discretion of the Department of Justice is unlikely to resolve this issue.\footnote{See Brunner, \textit{supra} note 34, at 21–24 (providing an excellent overview of current trends in prosecutorial discretion under MBTA).} It could be argued that environmental NGOs will be just as selective as the Department
of Justice in their filing of citizen suits to further other environmental interests, such as the propagation of green energy. However, the existence of NGOs committed solely to protecting birds and other wildlife—such as the National Audubon Society or Defenders of Wildlife—makes the threat of such a possibility negligible at best. Therefore, by allowing citizens and NGOs to privately enforce civil violations under MBTA via a citizen suit provision, the problem of selective enforcement would be effectively tempered.

It must be noted that some have argued that a citizen suit provision in MBTA is completely impractical and such an amendment would never be passed by Congress.\textsuperscript{84} However, the proposed citizen suit provision deemed impossible by commentators contained a provision in which personal liability could be imposed upon government officials for allowing violations of MBTA to occur unhindered.\textsuperscript{85} The citizen suit provision proposed by this note contains no such imposition of personal liability for government officials technically responsible for MBTA violations. This avoids the flaw that some commentators saw as fatal to a MBTA amendment being adopted by Congress.

A citizen suit provision in MBTA would ideally model those citizen suit provisions present in the Clean Water Act and the ESA. Furthermore, should a civil penalties provision also be adopted, the success of citizen suits under MBTA would likely resemble the resounding success of those brought under the Clean Water Act.\textsuperscript{86} A civil penalties provision is essential to vesting a citizen suit provision under MBTA with any real power.\textsuperscript{87} Thus, the proposed civil penalties amendment is necessary to vesting a citizen suit provision with any real power and vice versa.

The citizen suit provision under MBTA would contain two avenues by which citizen groups or NGOs could file suit for violations of the statute. The first avenue would permit parties to file suit in order to enforce civil penalties against those parties that are violating MBTA due to foreseeable incidental takes. Civil suits could be filed against corporations, industries, other business associations, and government agencies that are violating the statute. Individuals would not be exposed to civil liability under the citizen suit provision except in those cases where a court finds it appropriate to

\textsuperscript{84} See Fjetland, supra note 35, at 63 (arguing that an amendment to MBTA providing for citizen suits is an impossibility given the current state of Congress).

\textsuperscript{85} Id.

\textsuperscript{86} See Fotis, supra note 58, at 158–59 (noting that citizen suits brought under the Clean Water Act are far more successful than those brought under the Clean Air Act due to the clear imposition of civil liability and penalties in the former statute).

\textsuperscript{87} See id. at 156 (noting that the lack of opportunity for courts to assess civil penalties under the Clean Air Act has essentially turned that statute’s citizen suit provision into a nullity).
pierce the corporate veil. Again, these suits would be restricted to enforcement of the civil penalties imposed for incidental takes that could have been reasonably foreseen and prevented. Criminal enforcement of the statute would remain the duty of the Department of Justice.

The second avenue by which parties could file a citizen suit under the proposed MBTA amendment would be against the Department of the Interior or Fish & Wildlife Service for failure to carry out its statutorily mandated duties under MBTA. For example, should the Fish & Wildlife Service fail to enforce the statute or neglect to promulgate a regulation, parties could file an “agency-forcing” action under the citizen suit provision. Through this avenue citizens would be able to ensure that the responsible federal agencies are earnestly carrying out their duties under the statute. These types of suits could possibly help to counter selective enforcement of MBTA by the agencies. Furthermore, since the accountability of federal agencies affects all parties—rather than just environmental NGOs or citizen groups—it is likely that many “non-traditional” interests such as industries and corporations will file suit pursuant to this avenue in order to demand agency action and clarification.\footnote{See May, supra note 57, at 3 (noting that citizen suits under the other environmental statutes are brought by a wide array of interests for varying reasons and not just environmental NGOs for strictly environmental reasons).} Finally, by allowing citizens to challenge agency actions pursuant to MBTA under MBTA itself, the use of the narrow and unwieldy Administrative Procedure Act can be avoided as a means of redress.

The proposed citizen suit provision could resemble the following: \textit{Any citizen may commence a civil action on his own behalf against (1) any association, partnership, or corporation (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) the civil penalty provision of section 707 of this subchapter or (B) an order issued by the Fish & Wildlife Service with respect to section 707 of this subchapter, or (2) against the relevant federal agency where there is an alleged failure of the agency to perform any act or duty under this subchapter. The court may award costs of litigation to any prevailing party in actions brought pursuant to this section whenever the court determines such an award is appropriate.} In regard to the physical amendment of the statute, the citizen suit provision could be placed within MBTA’s omitted section 709.
C. MBTA as an Example: Growing Obsolescence of the United States’ Environmental Statutes and the Need to Revise to Reflect Modern Circumstances

Though the above proposed amendments would work to make MBTA more effective in the face of modern environmental concerns and issues, the revision of MBTA alone is but one necessary drop in the troubled ocean of environmental law. The current controversy surrounding MBTA is merely representative of the reality that the United States’ major environmental laws are quickly growing dangerously outdated. Although the hundred-year-old MBTA is the most extreme example, the same reality holds true for the relatively recent environmental statutes of the 1970s. The issue is that environmental statutes—MBTA being a prime example—have the ability to become frozen in the age in which they were enacted and not provide ways to address modern environmental threats that could not have possibly been foreseen when enacted. It is well noted that the major environmental statutes have failed to adapt to new environmental issues and take into account the developments in scientific understanding of these same issues. 89 Thus, the revision of MBTA is but one revision of the environmental laws that needs to occur in order to ensure their continued efficacy and relevance.

The reality is that attempting to use out of date statutes to combat uniquely modern environmental problems does not work. This is most apparent when examining attempts to curtail climate change—inarguably the most pressing environmental issue of our time—using existing environmental laws. 90 The paramount example is the United States Supreme Court’s 5-4 decision in Massachusetts v. Environmental Protection Agency where the Court held that the agency did indeed have authority under the Clean Air Act to regulate greenhouse gases emitted from motor vehicles. 91 In that case, a coalition of states sued the Environmental Protection Agency when it asserted that it lacked authority under the Clean Air Act to regulate climate change since it believed that greenhouse gases could not be considered “pollutants” under section 202(a)

89. See Mary Jane Angelo, Harnessing the Power of Science in Environmental Law: Why We Should, Why We Don’t, and How We Can, 86 TEX. L. REV. 1527, 1529 (2008) (noting a number of factors that have prevented environmental laws from adapting to changes in scientific understanding of environmental concerns).

90. See generally Jody Freeman & Andrew Guzman, Climate Change and U.S. Interests, 41 ENVTL. L. REP. NEWS & ANALYSIS 10695, 10698, 10702-07, 10709 (2011) (highlighting the global and economic impact of climate change).

of the statute. The agency additionally asserted that for it to act on climate change, Congress needed to have specifically mentioned the issue in the statute. Ultimately, the Court disagreed with the Environmental Protection Agency, finding that carbon dioxide and other greenhouse gases are air pollutants that can damage the public health and welfare, and therefore, are within the scope of the Clean Air Act. The Court came to this conclusion by noting that the definition of “pollution” in the statute includes “physical and chemical substances” and that greenhouse gases fall within such a definition.

However, in coming to its decision the Court noted that Congress could not possibly have known enough about the underlying science of climate change at the time of its enactment of the Clean Air Act to include climate change within the scope of the statute. Indeed, the federal government did not begin to devote any significant attention to climate change until years after the passage of the Clean Air Act. To justify its holding, the Court noted that Congress must have recognized that the Clean Air Act would require flexible interpretation in order to be continually relevant in the years following its enactment.

It would seem that the Supreme Court did precisely what was needed: it interpreted an environmental statute in such a way to combat a modern problem not yet understood at the time Congress enacted the statute. However, the “living environmental statute” method of interpretation—similar to Justice Oliver Wendell Holmes’ famous “living Constitution”—poses serious problems in actually combatting environmental issues. As the Environmental Protection Agency readily acknowledged, any regulatory power it had to combat climate change under the Clean Air Act provided a piecemeal approach to the problem instead of the cohesive strategy needed to adequately address the problem. Essentially, what the Supreme Court did in Massachusetts v. Environmental Protection Agency is no different from what the various federal district courts have done in holding defendants liable for incidental takes under MBTA: it broadly construed the language of an outdated statute to address a modern problem unimagined

92. Id. at 513.
93. Id. at 512.
94. Id. at 528.
95. Id. at 529 (citing 42 U.S.C. § 7602(g)).
96. Id. at 532.
97. Id. at 507–08.
98. Id. at 532.
100. 549 U.S. at 524–25.
by Congress when enacted. Furthermore, such a “living environmental statute” approach is grossly unstable, as the potential for new “living” interpretations provides no consistency upon which affected parties can base their operations and make informed decisions. Depending on the decisions of the various federal courts, interpretations of the environmental statutes would be subject to constant, radical change and reinterpretation. This method of “modernizing” the nation’s environmental laws is severely limited as it cannot provide the unified front that is necessary to address today’s environmental issues and their multifaceted natures.

Instead, it is the statutes themselves that need to be revised and updated in order to address the environmental concerns of the Twenty-First Century and not those of the bygone Twentieth. For example, it is absurd to believe that the Environmental Protection Agency can combat the United States’ contribution to climate change by relying solely on some broad language in a statute enacted to address the air pollution concerns of the early 1970s. To follow such a course would slowly and inexorably push the nation’s environmental statutes far beyond the scope of their enactment while decreasing their effectiveness in addressing contemporary environmental concerns. Thus, the existing language of the Clean Air Act should not be the basis for regulatory authority to combat climate change. Rather, the statute should be amended to include specific language to that effect or a separate law to address climate change should be passed by Congress. This approach should be followed by Congress when working to address other contemporary environmental problems.

Of course, the unfortunate reality is that the current Congress is hopelessly gridlocked on seemingly every major issue, including environmental concerns.101 Short of a miraculous détente in the current entrenched partisanship or another Cuyahoga River or Love Canal, it is unlikely that Congress will act to amend MBTA or any other of the federal environmental statutes, let alone pass new, comprehensive environmental statutes.102 Unfortunately, that means that there will likely be little increased federal action to protect migratory bird species under MBTA in the future. However, this provides an excellent opportunity for the states to take the lead on pressing environmental issues, as some states already have in regard to climate change.103 Partisan lines often become blurred at the

102. See generally Jonathan H. Alder, Fables of the Cuyahoga: Reconstructing a History of Environmental Protection, 14 FORDHAM ENVTL. L.J. 89 (providing an overview of the 1969 Cuyahoga River fire and federal reaction to the incident).
state and local levels where the concerns of constituents are likely to exert more pressure on elected representatives. Thus, the states are one level of government where substantive strides in the protection of migratory bird species could be implemented. MBTA itself explicitly permits states to develop and enforce laws and regulations “not inconsistent” with the federal statute. Therefore, while advocating for Congressional amendment of MBTA, the state legislatures and agencies can take action in the interim to protect migratory birds in ways consistent with MBTA and the ideas proposed in this note. Furthermore, if prominent environmental NGOs and citizen action groups were to make Congressional amendment of MBTA a flagship issue of their advocacy, it would certainly put some pressure on Congress due to increased publicity and citizen concern. Ultimately, as long as Congress remains gridlocked and deaf to their constituents and pressing necessity, it will be the role of citizens, NGOs, and state governments and agencies to take measures to bolster the protection of migratory birds and advocate for the amendment of MBTA.

**CONCLUSION**

This note has stressed the need for Congressional amendment of MBTA in order to resolve vying interpretations of the statute by the federal courts and allow for greater protection of listed migratory bird species from the threats posed by modern industrial production and human society. An ideal amendment to MBTA would contain a civil penalty provision as well as a provision authorizing citizen suits. The civil penalty provision would impose civil liability on parties in the form a fine for incidental—but foreseeable—takes of listed migratory bird species. The citizen suit provision would authorize citizens and NGOs to file suit against the government and third parties to enforce the statute’s civil provision against them. Amendment of MBTA is imperative as migratory bird populations in North America—and worldwide—are in a general decline, due in part to the multitudinous threats posed to them by human production, industry, and agriculture. The current obsolescence of MBTA is but a harbinger of the growing inability of the major federal environmental statutes of the 1970s to address modern environmental concerns. The need to amend MBTA and the process of doing so is therefore representative of the type of legislative controversy that will spring up around the United States’ other major environmental laws. Though the revision of MBTA may be stymied by the
current gridlock in Congress, state legislatures can take action to further protect migratory bird species within their respective jurisdictions and work with environmental NGOs and concerned citizens to advocate for Congressional amendment of MBTA.