



VERMONT JOURNAL
of ENVIRONMENTAL LAW

Volume 20 • Issue 2

VERMONT JOURNAL OF ENVIRONMENTAL LAW
VERMONT LAW SCHOOL

Volume 20, Issue 2

Summer 2019

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Cite to this *Journal* as: 20 VT. J. ENVTL. L. (2019).

The views expressed in this issue are those of the authors and do not represent the position or views of VJEL or Vermont Law School.

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CELEBRATING RICHARD OLIVER BROOKS

On June 22, 2018 a large audience of Vermont Law School alumni, faculty, staff, and friends gathered in the Chase Center to celebrate the 40th anniversary of the Environmental Law Center and to pay special tribute to Richard Oliver Brook—"Brooks" to his colleagues and friends—as the visionary founding director of the ELC. Following remarks by seven of the former ELC directors recalling past accomplishments and offering thoughts on the challenges facing environmental law and legal education in general, and the ELC in particular, a panel of VLS faculty presented a *Festschrift* to honor the scholarly contributions of their colleague.

Participants included Professors Stephen Dycus, John Echeverria, David Mears, Janet Milne, and Pat Parenteau. Each gave brief remarks (some briefer than others) summarizing the articles that are included within this special volume of the Vermont Journal of Environmental Law. Professors Hillary Hoffmann and Reed Loder also contributed to the collection. The articles span the gamut of environmental, land use planning, and natural resources law, along with observations on the Brooksonian view of the world. The essays reflect the tremendous breadth of Brooks' intellectual curiosity and dedication to the stewardship values that inspired the creation of the ELC grounded on a fundamental respect for the laws of nature and the rule of law.

We hope you enjoy this collection of musings and fond reminiscences of a true pioneer and giant in the field of environmental education.

-The Editors

**FESTSCHRIFT FOR PROFESSOR RICHARD O. BROOKS
FOUNDING DIRECTOR OF THE ENVIRONMENTAL LAW
CENTER AT VERMONT LAW SCHOOL
ON THE OCCASION OF THE CENTER'S 40TH ANNIVERSARY**

*David K. Mears**

In the fall 2017, at a meeting of the Vermont Law School environmental faculty, the following conversation took place:

Me: We are coming up on the celebration of the Environmental Law Center's 40th Anniversary next year, any suggestions?

Pat Parenteau: "We should honor Dick Brooks as the Center's founder before all of us geezers who remember him retire."

Environmental Faculty: [Laughter], "Speak for yourself," [Heads nodding], "But . . . good idea."

Pat Parenteau: "Who's up for doing a Festschrift?"

Environmental Faculty: [Confused looks], "A fest-what?"

.....

In the off-chance that any readers are as bewildered this term as were Vermont Law School's finest minds, the dictionary defines "Festschrift" as a volume of writings presented as a tribute or memorial, especially to a scholar. The term has its origins in German: "Fest" translating into "celebration;" and "Schrift" meaning "writing."¹ A Festschrift to honor Professor Richard Brooks is particularly appropriate. He was indeed the

* David Mears, Vermont Law School Class of 1991, is currently Executive Director of the Vermont office of the National Audubon Society. He is a former Associate Dean of Vermont Law School's Environmental Programs, and has held positions in state and federal government.

¹ *Festschrift*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/Festschrift> (last visited Aug. 21, 2019).

founding director of the Environmental Law Center in 1978 and launched what has become a center of learning, advocacy, and leadership known across the world for the work of its faculty, students and graduates.² In addition, Professor Brooks is a true seeker of knowledge, a scholar and teacher who provided the intellectual foundation for the Center and whose contributions continue to challenge and inspire. He has produced an impressive set of articles, book chapters, books, and other papers³ over a period that spans nearly five decades including a significant amount of work during the time he was the Environmental Law Center Director – a level of productivity that anyone who has tried to teach, administer a law school program, and write should find humbling – I certainly do.

I have had the honor of knowing Professor Brooks for nearly thirty years, since I first set foot on the Vermont Law School campus as a student in 1988. During those three years, he loomed as an especially large presence, both as a professor and as the Environmental Law Center's Director. He demanded that we engage in the work of understanding environmental law with the goal of using that understanding to drive change. Professor Brooks was not interested in a recitation of facts, or a memorized version of the rules and statutes, but in having his students dive deeper. He was impatient with the mere regurgitation of our reading materials. At the same time, he listened deeply and encouraged us when we worked to find meaning, even when we struggled.

Since graduating, I benefited from knowing Professor Brooks as a mentor while I served as a member of the Vermont Law School faculty and served in various roles including in his old position as the director of the Environmental Law Center. While Vermont Law School engages in an effort to imagine how we can best educate the next generation of environmental advocates, leaders, and problem-solvers, a review of Professor Brooks' writings provides a strong foundation for our work.

Readers of Professor Brooks' work will find his distinctive voice compelling. His colleagues' essays in this Festschrift echo and amplify his consistent reference to a set of foundational themes such as the need to consider the philosophical and ethical underpinnings of environmental law,

² Environmental Law Center, Centers and Programs, Vermont Law School, <https://www.vermontlaw.edu/academics/centers-and-programs/environmental-law-center> (Last visited Aug. 21, 2018).

³ Richard Brooks, Person, Directory, Vermont Law School, <https://www.vermontlaw.edu/directory/person/brooks-richard> (last visited Aug. 21, 2018).

and the need to imagine legal solutions that recognize the deep connections and dependencies among the human and natural worlds.

When reviewing Professor Brooks' writings, I was reminded of a Mark Twain quote:

There is no such thing as a new idea. It is impossible. We simply take a lot of old ideas and put them into a sort of mental kaleidoscope. We give them a turn and they make new and curious combinations. We keep on turning and making new combinations indefinitely; but they are the same old pieces of colored glass that have been in use through all the ages.⁴

Professor Brooks took this perspective seriously and required that his students understand the historical context and philosophical framework for environmental law. As a student, I would groan inwardly when Professor Brooks would reach back to the Greek philosophers when discussing statutes like the Clean Air Act. I wanted to know how to make sense of practical questions such as the Act's New Source Review provisions and the difference between pre-construction permits and operating permits for major stationary sources. I was less interested in the question of whether the human pursuit of knowledge should be through a spiritual and creative inquiry dedicated to the pursuit of higher, pure ideals (Plato), or in a logical analysis of the material world through a pursuit of facts (Aristotle).⁵ Nearly thirty years later, and in an era when the fundamental premise of national environmental laws, including the Clean Air Act, is being called into question, I now have a different perspective than I did as a law student. During a time of global climate disruption and profound risks to our current social and civilizational fabric, keeping the larger questions in mind is not a luxury for intellectuals but a necessity as we build a movement for social, legal and political change that is up to the task before us. Drawing upon "old ideas . . . to make new and curious combinations,"⁶ is a strategy that Professor Brooks models through his work and understanding the history and evolution of those ideas may allow us to stand on the shoulders of those who have gone before.

⁴ Mark Twain, *Mark Twain's Own Autobiography: The Chapters from the North American Review*, 255 (Michael J. Kiskis, 2d ed. 1924).

⁵ To read further about this timeless debate, see Arthur Herman, *The Cave and the Light: Plato Versus Aristotle and the Struggle for the Soul of Western Civilization*, (2013).

⁶ Twain, *supra* note 4.

In that vein, I recently found myself reminded of the value of understanding the evolution of modern thinking when reading a biography of scientist Alexander von Humboldt (1769 – 1859).⁷ Humboldt's work reinforces two of Professor Brooks' central themes: both the opportunity and need to look to past thought leaders for inspiration and guidance; and, the obligation to understand environmental law in the context of the connections between human and ecological systems. In her book, "The Invention of Nature," author Andrea Wulf does not just profile Humboldt as an "ecologist" ahead of his time but also discusses at length his impact on some of the greatest thinkers on the topic of the relation of humans to the natural world. Wulf carefully documents the ways in which Humboldt's view of nature as a complex, interconnected web that we humans disrupt at our own risk influenced no less than Charles Darwin, Henry David Thoreau, George Perkins Marsh, and John Muir.

Not coincidentally, Professor Brooks' works are peppered with references to these same intellectual giants; great thinkers whose works have deeply informed modern environmental policy. A theme of Professor Brooks' writing and teaching is that effective environmental policy is based upon ecological thinking, considering the relationships within the complex web of life including humans and human systems, not as an afterthought, but as a central focus of inquiry. He asks simply that we consider both the natural and social implications of our system of environmental laws and draws upon the work of scientists, philosophers, and other scholars to illustrate this fundamental principle.

Three of Professor Brooks' works illustrate his steadfast commitment to this theme. In an article published the same year that I graduated from Vermont Law School, Professor Brooks undertook to define "A New Agenda for Modern Environmental Law."⁸ In this article, Professor Brooks states that:

environmental law should be guided by modern ecological perspectives which can offer a modern reinterpretation of a series of traditional ethical ideals embodied in our tradition. Ideals such as holding the environment in trust for future generations, respecting non-human nature, making secure the citizens' health and lives (especially vulnerable citizens) protecting nature's beauty, community sharing of

⁷ Andrea Wulf, *The Invention of Nature: Alexander Von Humboldt's New World*, (2015).

⁸ Richard Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1 (1991).

renewable resources, and encouragement of ecologically sensitive lifestyles should be the starting point for reformulating environmental policy and law. The importance of these ideals is that they carry a rich tradition, and consequently are ensconced, more or less, in American culture.⁹

Consistent with this theme, Professor Brooks suggests the establishment of a “natural law philosophy” as foundational to a system of environmental laws.¹⁰ He recommends that we avoid overreliance on utilitarian “engineering objectives,” and instead that we build environmental laws based on ethical ideals, ideals that reflect shared cultural values and which are informed by ecological science.¹¹ Similarly, Professor Brooks promotes greater consideration of community values when constructing state and federal statutes,¹² and the teaching of environmental justice to ensure that disproportionate impacts of pollution and environmental degradation do not fall upon people of color or those who are economically disadvantaged.¹³ Each recommendation in this rich and provocative article demonstrates Professor Brooks’ dedication to a careful examination of the relationships among humans and the natural world, within the context of our history and culture, as critical to building a coherent system of environmental laws.

A second of Professor Brooks’ works that is notable for his commitment to the theme that we cannot separate humans from nature is “Speaking (Vermont) Truth to (Washington) Power.” This work is in the form of a lecture he delivered in the Spring 2005 at the Norman Williams Distinguished Lecture in Land Use Planning and the Law at Vermont Law School reproduced in the Vermont Law Review.¹⁴ Professor Brooks states:

The respect due both people and nature comes not only from seeing the value of both, but also understanding how both contribute to the common good which links us to one another. Law can either buttress the “lock up” of people and nature in a futile effort to protect us, or it

⁹ *Id.* at 15 (internal quotations omitted).

¹⁰ *Id.* at 13.

¹¹ *Id.* at 14.

¹² *Id.* at 20.

¹³ *Id.* at 26.

¹⁴ Richard Brooks, *Speaking (Vermont) Truth to (Washington) Power*, 29 VT. L. REV. 877–893 (2005).

can help to break down those walls and integrate both persons and nature within the community.¹⁵

Professor Brooks then draws upon Vermont's history of community and a strong connection to the landscape, the Vermont Constitution, and the ground-breaking state land use law known as Act 250 to illustrate the ways in which Vermont has established truths that the federal government should consider. He then cites to examples of Vermont Law School graduates who have gone on to play a major role in driving change at both the state and federal level and concludes that the answer to the future of the environmental movement:

lies in the fact that Vermont speaks the truth to Washington's power. That truth is the law and policy of inclusion of both people and nature in sustainable communities. Vermont illustrates that inclusion in its way of life. It works to push federal policy to fully recognize both people and nature. It offers a unique legal rationale for inclusion. And it promises to offer future services to the community-based ecosystem regimes.¹⁶

Professor Brooks then concludes by encouraging Vermont Law School students and faculty to engage in the work of using the legal system to drive effective environmental policy, in Vermont and beyond. His inspirational words embody for me and, I suspect, for many other Vermont Law School graduates, our shared hope that our education at a small law school in a town without a stoplight would equip us with the insights and tools necessary to address the myriad and complex environmental challenges presented by the modern world.

A third work represents Professor Brooks' commitment to "walking the walk," in the form of a paper sharing his reflections with state policy makers, planners and lawyers on the opportunities to update Vermont's famous 1970 land use law, Act 250,¹⁷ as it nears its fiftieth anniversary. This paper, entitled "Conserving and Restoring Vermont's Landscape: Reflections on the Goals Of Vermont's Act 250," provides his reflections on the implementation of the law, which he finds lacking, and a set of admonishments to commit to more fully achieving a shared understanding and commitment to protecting Vermont's natural and human communities

¹⁵ *Id.* at 879.

¹⁶ *Id.* at 893.

¹⁷ 10 V.S.A. § 6001–6093(2018).

as an interrelated whole. The motivation for his paper is an ongoing assessment of Act 250 by the Vermont General Assembly which, in 2017, formed “The Commission on Act 250: The Next 50 Years” which held hearings around the state and developed proposed improvements to the law currently under consideration by Vermont legislators.¹⁸

Professor Brooks’ paper begins by framing a central premise at the heart of any discussion regarding the Act 250’s goals, that Vermont’s people and the land are interconnected and that the law provides a pathway to protect that vital relationship:

Everyone agrees that Vermont is a beautiful state – green mountains, river valleys, forests and lakes, shaped in the past by geological forces, shaped in the present by its frigid winters, thawed by its emerald green summer and decorated by its brilliant autumn. But Vermont is also shaped by its people; their farms, compact villages, and urban areas; its onrushing “soft energy” program; its mountains are sculpted by visiting skiers and energy entrepreneurs. Less obvious but no less influential, to quote a famous Frenchman, Vermont is shaped by “the spirit of [its] laws.”¹⁹

Professor Brooks then proceeds to carefully examine the original goals and mechanisms of Act 250, harkening back to his treatise, “Towards Community Sustainability: Vermont’s Act 250,” published twenty years ago.²⁰ He concludes that the law has not met the expectations of the original drafters and offers a pointed critique along with a path for legislators and others as they examine the future of this important law.

Professor Brooks questions whether Vermont’s “pastoral life is whirled and past away,” such that an original goal of Act 250, to protect the landscape as a working environment in which humans interact with the land in a sustainable fashion, is no longer relevant.²¹ In essence, he asks if our shared values have changed such that we need to rethink this fundamental

¹⁸ <https://legislature.vermont.gov/committee/detail/2018/333/Reports>

¹⁹ Richard O. Brooks, *Conserving and Restoring Vermont’s Landscape: Reflection On the Goals of Vermont’s Act 250*, https://www.vermontlaw.edu/sites/default/files/2018-05/Draft_Act250_Memo.pdf [hereinafter Act 250 Paper] (referencing C. Montesquieu’s “The Spirit of the Laws” (1748)).

²⁰ Richard O. Brooks & K. Leonard, et al., *Toward Community Sustainability: Vermont’s Act 250* (Vol. I 1996); Richard O. Brooks & K. Leonard, et al., *Toward Community Sustainability: Vermont’s Act 250* (Vol. II 1997).

²¹ Act 250 Paper, *supra* note 19, at 9.

goal underlying the Act. After careful analysis, Professor Brooks' conclusion is not that Vermont abandon this goal, but that Vermont officials should pursue a more "complex pastoralism." He suggests that protecting Vermont's working landscape requires a recognition that a vision of sustainable communities in Vermont must go beyond protecting a set of natural features (e.g. air, water, soil, wildlife, and scenic beauty) as independent of each other, or of the human communities so interdependent upon these features. Instead, we should, he argues, recognize Vermont as

rural, with a modest low density population, clustered in small towns surrounded by open spaces, retaining to some extent its natural resource economy of farms, forests, nature based recreation pursuits, much of its land held in large lot, or commons or public ownership, and highly visible natural landscape features, (mountains, lakes, forests, rivers, valleys, farms) all contributing to its pervasive scenic beauty attracting tourists and second home development.²²

He concludes that we need to explicitly recognize, in Act 250, the importance of treating each feature of the Vermont landscape as part of an interrelated whole.

From this premise, Professor Brooks suggests six areas where Act 250 falls short and could be improved by a more explicit recognition of the broader goals covered by this "complex pastoral vision" and greater engagement at the community level where citizens can participate more easily.²³ He notes that the law currently omits major landscape elements such as mountains and downtowns and suggests that reorganizing the criteria to develop a more harmonized approach would strengthen the law.²⁴ Professor Brooks also describes the lack of effective and comprehensive municipal and state planning, and the failure of those plans and other non-regulatory parts of Vermont's land use law to align with the regulatory tools such as permitting.²⁵ Finally, he criticizes the law's current state of unfriendliness to citizen participation, particularly the ways in which the law limits citizens to engaging on a project-by-project level instead of being able to see the landscape as a whole.²⁶

²² *Id.* at 8.

²³ *Id.* at 6–7.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Consistent with his writing across the past five decades, Professor Brooks examines Act 250 through the lens of history, with an explicit recognition of the philosophical and ethical underpinnings of the law. His analysis is guided by the fundamental notion that we cannot address environmental issues in a manner that separates nature from humans. In this way, he reinforces this fundamental premise of all three of the works I have reviewed in this essay, and that he has repeated throughout his career whether in the classroom or through his writing and speaking.

It is an honor to be able to participate in a celebration of his writing and I encourage readers to enjoy not just the essays in this Festschrift, but to peruse Professor Brooks' own works as well – you will not be disappointed.

**EYE ON THE HORIZON WITH FEET FIRMLY PLANTED ON
THE GROUND:
RICHARD OLIVER BROOKS**

*Janet E. Milne**

Sifting through a scholar's lifetime of works to determine which to highlight is a humbling experience, especially when there is so much rich material that warrants attention. Like someone standing on a rocky slope who wants to build cairns to guide hikers, one must select from the array of stones on the ledges and build markers that will create a path for journeyers. The choices reflect the builder's personal and professional expertise and preferences; others might choose different stones and paths over the slope. But all paths lead to acknowledging how the lifelong work of Professor Richard Oliver Brooks has enriched our understanding of the law and life.

This short essay has chosen as its markers several substantial contributions that span Professor Brooks's career. The first is his 1994 book, *New Towns and Communal Values: A Case Study of Columbia, Maryland*.¹ The second is *Law and Ecology: The Rise of the Ecosystem*,² a book published in 2002 for which he was lead author. The third encompasses two works that focus on Vermont's Act 250. One is his 1996-97 two-volume tome, *Toward Community Sustainability: Vermont's Act 250*.³ The other is his 2018 Discussion Draft, *Conserving and Restoring Vermont's Landscape: Reflection on the Goals of Vermont's Act 250*, which provides a retrospective and prospective view of Act 250.⁴ These works collectively chart a path that shows how Professor Brooks has kept his eye

* Professor of Law and Director of the Environmental Tax Policy Institute at Vermont Law School. The author thanks Emma Akrawi for her editorial suggestions.

1. RICHARD OLIVER BROOKS, *NEW TOWNS AND COMMUNAL VALUES: A CASE STUDY OF COLUMBIA, MARYLAND* (1974) [hereinafter *NEW TOWNS*].

2. RICHARD OLIVER BROOKS, ROSS JONES AND ROSS A. VIRGINIA, *LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME* (2002) [hereinafter *LAW AND ECOLOGY*].

3. RICHARD OLIVER BROOKS WITH K. LEONARD & STUDENT ASSOCIATES, *TOWARDS COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 VOLUME I: THE CRITERIA FOR SUSTAINABLE DEVELOPMENT* (1996) [hereinafter *VERMONT'S ACT 250 VOL. I*]; RICHARD OLIVER BROOKS WITH K. LEONARD & STUDENT ASSOCIATES, *TOWARDS COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 VOLUME II: THE HISTORY, PLANS, AND ADMINISTRATION OF ACT 250* (1997) [hereinafter *VERMONT'S ACT 250 VOL. II*].

4. RICHARD OLIVER BROOKS, *CONSERVING AND RESTORING VERMONT'S LANDSCAPE: REFLECTION ON THE GOALS OF VERMONT'S ACT 250* (2018) [hereinafter *REFLECTION*].

on the horizon while planting his feet firmly on the ground. It is a path that can serve all of us well.

EYE ON THE HORIZON

All three areas of inquiry explore the unfolding horizons of the law and society—areas that were intellectual frontiers. Professor Brooks wrote *New Towns and Communal Values* at a pivotal point in the evolution of land use planning. Empowered by the United States Supreme Court’s 1926 decision in *Village of Euclid v. Ambler Realty*,⁵ municipalities used their land use regulatory powers to grapple with the challenges of directing urban and suburban growth within their boundaries. By mid-century, however, a handful of developers sought to create “new towns.”⁶ These towns were not accretions around existing settlements, nor were they governed by longstanding local institutions and residents.⁷ They were created from whole cloth, providing extraordinary experiments in the creation of community and the evolution of land use planning. Columbia, Maryland, lying between Baltimore and Washington, D.C., was one of the key examples. Columbia was planned and built during the 1960s.⁸ Using Columbia as a case study, Professor Brooks tackled the question of how effectively society can consciously construct a new and satisfying community. As he states in the opening lines of his book:

How successfully can we create, through deliberate planning, local communities that avoid the evils of modern urban life and achieve values that the modern city neglects? Should we seek to recreate these communities? Underlying these questions is an even more significant philosophical question: To what extent can man, through the exercise of his knowledge and art, shape the society to which he belongs?⁹

Those thorny questions are pivotal to evaluating the relative merits of “new” towns and expanding “old” towns and cities as communities. They also yield lessons about the role of law in shaping these communities.

5. 272 U.S. 365 (1926).

6. See NEW TOWNS *supra* note 1, at 15–20 (discussing history of new towns).

7. *Id.* at 207.

8. *Id.* at 8.

9. *Id.* at 3.

In defining communitarian goals, the Columbia case study considered a range of social values, including respect for nature and the land.¹⁰ In *Law and Ecology*, Professor Brooks and his co-authors from Dartmouth College put both law and science center front. They traced the development of the science of ecology and the law of environmental protection to probe the extent of the relationship between the two. Their goal was “to explore the desirability and feasibility of placing the ecological study of ecosystems at the center of an understanding of environmental policy and law.”¹¹

Like *New Towns and Communal Values*, the book marks an important point in time to take the long view. Major environmental protection regimes in the United States and elsewhere focused on specific elements of the environment, such as air quality, water quality, and the protection of endangered species.¹² These regimes provided tangible goals for administratively feasible regulation. But the ecosystem itself is not so neatly compartmentalized, calling into question whether and how the law can or should take a more nuanced approach. When characterizing the development of environmental policy and law, commentators sometimes use generational terms. The first generation brought the major command-and-control statutes of the 1970s, such as the Clean Air Act and the Clean Water Act; the possibility of a new generation of environmental policies emerged late in the 20th century, such as market-based instruments and other alternatives to command-and-control regulation.¹³

Writing at the turn of the century, Professor Brooks and his co-authors resisted the allure of turning their attention to the new generation, the proverbial new kids on the block. Setting the evolution of environmental law and the science of ecology in a rich historical context, they instead grappled primarily with how the first generation of environmental and natural resource protection laws can learn to function more effectively by incorporating an ecosystem perspective. *Law and Ecology* does not suggest that new policy instruments cannot play an important role.¹⁴ Rather, it focuses on how important innovations or refinements within the boundaries of existing law can allow environmental and natural resource policy to ripen with the passage of time and the increasingly sophisticated understanding of ecosystem science. For example, the book identifies how

10. *Id.* at 4.

11. LAW AND ECOLOGY, *supra* note 2, at xi

12. *Id.* at 122.

13. For discussions of the generational evolution, see Richard Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21 (2001), and Robert Stavins & Bradley Whitehead, *Market-Based Environmental Policies in THINKING ECOLOGICALLY THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 105–06 (Marian R. Chertow & Daniel C. Etsy eds., 1997).

14. LAW AND ECOLOGY, *supra* note 2, at 378.

low visibility mechanisms that operate under the statutory surface can link law and ecology, such as plans prepared in the course of the regulatory process, manuals, impact statements, and interagency agreements.¹⁵ It posits that these “bridge documents” can play a key role.¹⁶ In other words, *Law and Ecology* takes now seemingly traditional and still noble legal regimes and explores how those laws in effect are ongoing experiments in the ability to adapt to change as new scientific horizons emerge.¹⁷

The third area of inquiry highlighted here involves Vermont’s Act 250,¹⁸ a unique state environmental law. Enacted in 1970, Act 250 was an extraordinary legal pioneer at the forefront of federal and state environmental protection efforts. Although it has been amended over time, and its statewide planning component never reached fruition, it remains novel. Act 250 operates through a permitting requirement for developments that meet certain statutory criteria.¹⁹ It applies a wide range of factors that encompass environmental impacts, fiscal impacts, energy conservation, the preservation of compact settlements, and more.²⁰ Act 250 constitutes environmental protection writ large, striving to preserve the character and landscape of Vermont.

Act 250 has had a long and relatively sturdy history. It is currently undergoing a review commissioned by the Vermont legislature as its 50th anniversary approaches in 2020.²¹ Professor Brooks’s works have painted an extremely thorough and thoughtful portrait of Act 250 and its place in environmental protection and land use regulation. His two-volume book, *Toward Community Sustainability: Vermont’s Act 250*, captures its evolution and practice over Act 250’s first three decades by painting the big picture, its technical application, and its strengths and weaknesses. It explores how Act 250 addressed complex challenges over the years, such as: how to define the activities that warrant the heightened regulatory review; how to balance the environmental protection and economic viability; how to integrate local, regional, and state-level planning; how to mesh federal and state regulatory requirements; and what procedures should govern administrative and judicial proceedings. Professor Brooks recently wrote an essay, *Conserving and Restoring Vermont’s Landscape: Reflection on the Goals of Vermont’s Act 250*, in the midst of the pending

15. *Id.* at ix, 270, 379.

16. *Id.* at 379.

17. Note that *Ecology and the Law* also examines more recent legal regimes, such as international agreements. *Id.* at 325–364.

18. 10 V.S.A. §§ 6001 et seq. (2013).

19. *Id.* § 6001(3)(A).

20. *Id.* § 6086(a).

21. An Act Relating to the Commission on Act 250: The Next 50 Years, Act 47 (2017).

evaluation of Act 250. As a discussion draft, it provides insightful analysis that both looks back over the past five decades and looks forward. Professor Brooks has assessed Vermont and the past, present, and future role of Act 250 with admirable candor. He has offered creative, thoughtful suggestions about how Act 250 might meet the challenges of the coming decades.

Throughout these works, Professor Brooks skillfully sifted through the experiences of the past—the experiment with Columbia, Maryland, the intersection of science and significant environmental statutes, and Vermont’s Act 250 nested among federal laws and local land use regulations—to see how they can inform the future. In some ways, his approach is akin to the environmental concept of adaptive management, which offers the ability to continually learn and refine based on experience. However, pursuit of the horizon drives his works. Professor Brooks has chosen issues that operate at new edges of policy and law. In pursuing those issues, he consistently presses for better ways to reach the horizon, whether that means new policies²² or additional research that might generate new policies.²³ Yet the pursuit consistently recognizes that the law is but one factor among many. Professor Brooks ultimately seeks to understand and improve how the law interacts with other disciplines to build stronger human and ecological communities.²⁴ That multidisciplinary goal is a significant horizon in itself.

FEET FIRMLY PLANTED ON THE GROUND

In his inquiries, Professor Brooks is keenly aware of the role of geographic place—the setting within which social values and the law come home to roost and shape the ecological landscape and human communities. While his mind engages at a high intellectual and theoretical level, his feet stand firmly in the real, physical settings that give rise to his analysis. The works highlighted in this essay offer three perspectives on the influence of physical settings in society and law.

Professor Brooks’s analysis of Columbia’s bold experiment with creating a new town yielded many worthy conclusions. It explored the complex question of how society creates communities and what community means. But one is particularly significant. His work challenged the assumption that putting people in proximity in a new town will create communal values, an assumption that motivated Columbia. He concluded that the creation of communal values instead requires careful complex

22. *E.g.*, REFLECTION, *supra* note 4, at 40, 41, 49, 56, 59, 60.

23. *E.g.*, LAW AND ECOLOGY, *supra* note 2, at 391, 392.

24. *E.g.*, *id.* at 385.

planning, including the definition of values and ways to promote them.²⁵ In his words, “[g]uiding such a planning effort is the faith that a strengthened family, a sense of belonging, a respect for nature and tradition, and a sense of shared values can be maximized through rational planning rather than mistakenly hoped for as the product of the creation of new settlements.”²⁶ At the same time, he recognized that rational planning will not work in isolation. “The roles of spontaneity, tradition, self-expression, love—components essential to communitarian ideals and not subject to rational planning—will have to intervene and flower along with the results of any planning effort.”²⁷ But a significant message is clear: communal values will not grow from proximity alone.

While *New Towns and Communal Values* reached the conclusion that putting people in geographic proximity in a new town is not enough to create communal values, Professor Brooks’s analyses of Vermont’s Act 250 moved on to examine a very different setting—the working landscape of Vermont inhabited by longstanding communities. Act 250 was born out of the fear that new mountain resort development would change the character and environment of the state.²⁸ The law strove to preserve and enhance an existing sense of place. One can think of Professor Brooks’s Act 250 work as another inquiry into communal values and the role of the law in protecting communal values, in particular the shared sense of place and vision.²⁹ He in effect carried on the inquiries he started with Columbia, Maryland, as he explored how and whether Act 250 protects and builds a sense of place.

In *Law and Ecology*, Professor Brooks and his coauthors also emphasized the importance of the sense of place in the effective merger of ecology and the law. A public commitment to a place can inspire people to enact of protective laws. As they wrote in the concluding chapter of *Law and Ecology* after highlighting the place-based character of ecology and conservation biology:

The natural places are bounded not only by natural but also by human culture.... Since we humans are part of places,...we experience a sense of place.... Our places can become like our extended private property which are expressions of who we are. Once we value our places,

25. NEW TOWNS, *supra* note 1 at 195.

26. *Id.*

27. *Id.* at 203.

28. REFLECTION, *supra* note 4, at 4.

29. See VERMONT’S ACT 250 VOL. II, *supra* note 3, at 1–2.(discussing how environmental law is developed from the culture of the place).

place poses ethical issues for us. We may seek to resist others' efforts to change our place or interfere with the relationships we have to our place.³⁰

In the authors' eyes, "the love of a place or species" promoted the application of an ecosystem perspective in efforts to preserve Mono Lake, the Redwoods, Chesapeake Bay, and Atlantic fish stocks.³¹

That commitment to a specific place rings loud and clear in Professor Brooks's work on Act 250. We each have our own personal preferred sense of place, and we each may take different measures to protect that place. Professor Brooks's love of Vermont is evident, and it has animated his multi-decade commitment to the study of the law and community in Vermont. This is work from which we have benefitted tremendously. As he simply and beautifully stated when he introduced the second volume of *Toward Community Sustainability: Vermont's Act 250*:

For the past eighteen years I have lived, worked and participated in the community life of Vermont. Outside of my office window is a view of the White River, the arc of the Green Mountains, and the South Royalton playground.

This is 'my place' and the story of a law that governs it.³²

As Professor Brooks's words convey, a sense of place is grounded in the physical setting, but it is inextricably entwined with human life.³³ The multi-faceted nature of a community encompasses the ecological setting and human interactions with and within that setting.

The sense of place in Vermont not only motivates Professor Brooks's work, but also is the central goal of Act 250 against which he has measured the law's ultimate success. As he wrote last year, "[i]t is my contention, supported by an extensive study of the history of this law, ... that this entire law was animated by a pastoral vision of Vermont and the threats originally perceived to the object of that vision."³⁴ His assessment, however, reached the conclusion that Act 250 and other related laws "have been expanded and obscured by the pursuit of a laundry list of goals and objectives which hide the law's central mission—the preservation and conservation of Vermont's pastoral nature."³⁵ Among his recommendations, Professor Brooks highlighted the need to consider how the law and economic forces

30. LAW AND ECOLOGY, *supra* note 2, at 384.

31. *Id.* at 383. The authors also understood that the boundaries of cherished places and the boundaries of legal regimes may not always neatly match. *Id.* at 384.

32. VERMONT'S ACT 250 VOL. II, *supra* note 3, at 3 (footnote omitted).

33. *See also* LAW AND ECOLOGY, *supra* note 2, at 385.

34. REFLECTION, *supra* note 4, at 3.

35. *Id.* at 2.

can better protect major landscape features, such as mountains, villages, forests, farmland, and rivers, that help define Vermont's sense of place.³⁶

The question of the role of physical setting in creating and sustaining communities and their values is particularly powerful and timely today. The internet and social media create virtual communities of a new sort that transcend physical boundaries. Commentators speak of the rise of "tribalism" as people seek out those of like mind regardless where they might reside.³⁷ And yet there is also a thirst for local geographic identity, such as through the "buy local" movement.³⁸ In the 21st century, what do we mean by communal values, how do we create or maintain them, and what is their role in society? From an environmental perspective, if senses of place move from the physical world into the virtual world, what are the implications for the ecosystems on which we depend? Will people continue to appreciate them, to strive to understand them, and to protect them through law or otherwise? One hopes that the force and magic of the physical and human reality that surrounds us every day will continue to motivate us, just as it has Professor Brooks.

In closing, Professor Brooks has used the power of his mind and pen to improve the understanding of society—the combined human and natural ecosystem and the role of law as one player in that marvelous ecosystem. His analyses have given us many gifts that this essay regrettably cannot cover. To the mind of this colleague, however, perhaps one of Professor Brooks's most lasting contributions is the example he sets as a scholar. He artfully probes the unfolding edges of society and law, recognizes the importance of the complex world around us, and objectively tests the success of the law in that world. He has helped build the law's sense of place as it moves toward new horizons.

36. *Id.* at 70–72.

37. *E.g.*, George Packer, *A New Report Offers Insights into Tribalism in the Age of Trump*, THE NEW YORKER (Oct. 12, 2018), <https://www.newyorker.com/news/daily-comment/a-new-report-offers-insights-into-tribalism-in-the-age-of-trump>.

38. *See* Steven M. Schnell, *Deliberate Identities: Becoming Local in America in a Global Age*, 30 J. CULTURAL GEOGRAPHY 55, 71, 73 (2013) (discussing examples of buy local campaigns in America).

BROOKS ON STAGE(S): A ONE-MAN SHOW ABOUT LIFE AND LAW

Stephen Dycus

We buy tickets to a play, or borrow a book from the library, or meet a friend with the hope of learning something and maybe having some fun in the process. At a minimum, we expect to gain some insight into ourselves by listening to others and observing their experiences. We may receive affirmation of what we already believed was true, or we may find new ways of thinking about the world and our place in it, or we may recognize new ways to be helpful. Richard O. Brooks's writings offer all of these rewards.

In this brief essay thanking Brooks for his scholarship, I want to focus on recent and some yet-unpublished work. This work may be unfamiliar to readers who know Brooks best for his brilliant contributions in the environmental law field, addressed elsewhere in this festschrift. I especially want to direct the reader's attention to a remarkable 2006 article entitled *The Refurbishing: Reflections upon Law and Justice among the Stages of Life*.¹

Writing about the stages of life—by which Brooks means segments of a human life divided by age—the author is himself on stage declaiming, in elegant prose that's filled with “Aha!” moments, ideas that are powerfully obvious and yet strikingly original. He has a gift for describing familiar principles and events in entirely new ways, clarifying meanings, and linking causes and effects. In a one-man show that would draw crowds in a New York theater, he answers questions that we've all had, but rarely asked, about the most fundamental aspects of life, law, culture, politics, economics, ethics, and even sex. On nearly every page I've stopped myself to ask, “Why didn't I see that before?”

The illuminating quality of Brooks's writing seems clearly related to—indeed to be grounded in—his life-long devotion to the study of philosophy. This subject, described by one popular novelist as an investigation of “the visible, graspable world in all its varied aspects and phenomena,”² was the focus of Brooks's early formal education, with bachelor and master degrees

¹ Richard O. Brooks, *The Refurbishing: Reflections upon Law and Justice among the Stages of Life*, 54 BUFF. L. REV. 619 (2006) (hereinafter *Stages*).

² BENJAMIN BLACK, WOLF ON A STRING 74 (2017).

from the University of Chicago in social and political philosophy. The scholarship described here is in fact filled with references to the works of Western philosophers, ancient and modern.³

Brooks' recent work is also somewhat autobiographical, reflecting the author's insights accumulated from a long and thoughtful life in law and public service. Writing about the current stage of his own life—old age, accompanied by retirement and a growing awareness of his mortality—Brooks shows us new ways to think about ourselves in each succeeding stage and to embrace this final one with grace and dignity. And he does so with something approaching cheerfulness—albeit tinged occasionally by a growing sense of resignation—yet with a clear determination to put whatever time he has remaining to good use. This despite his admission that as a graduate student he was “uninterested, indeed repelled at the prospect of aging and the study of it!”⁴

In his article on the stages of life, Brooks systematically examines each of five major periods in most people's lives—birth and childhood, student days, marriage and family, middle age, and old age—setting forth the characteristics typical of each stage. In the process, however, he acknowledges that because individuals mature at varying rates, and because they are shaped in succeeding stages by differing personal experiences and environments, the assignment of stages to particular ages is imprecise. So also, the placement of boundaries between stages is somewhat arbitrary, and the boundaries themselves are not sharply defined but marked by gradual transitions.

Brooks points out that at an earlier age he was unaware that he was a member of any particular stage in life.⁵ It is only “in retrospect [that] these stages and my passage through them seem[] obvious.”⁶

Recognition of stages is the product of both common sense and culture, based in part on biology. We don't want kindergartners driving or drinking, and octogenarians probably should not pilot jetliners. We've spared individuals younger than 18 years from the death penalty for capital crimes because they lack the responsibility that comes with maturity, and because they are especially susceptible to outside influences.⁷ And middle-aged

³ My own background in philosophy is extremely limited. When I read Kant in an introductory college course, my response was, “I can't.” Much of what I know about philosophy, I have gleaned from Brooks' writings.

⁴ Stages, *supra* note 1, at 619.

⁵ *Id.* at 623.

⁶ *Id.*

⁷ See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (explaining that juveniles are more susceptible to negative influences).

individuals are barred from public school, where their presence would be disruptive.

The law also recognizes these stages and has a profound influence on the lives of individuals within each stage. “It establishes, creates, or ratifies the boundaries of the stages of life; it allocates goods within these boundaries: and it helps give meaning to the various stages.”⁸ It “establishes links between and among the stages of life,” and “helps to define the justice relevant to each stage and between the stages.”⁹

Despite the considerable variations among members at each stage of life, however, the law tends to treat members within each stage alike. Yet, it recognizes those members in sometimes inconsistent ways. On the one hand, law bestows benefits based on age, as when children are entitled to a public education and senior citizens may enroll in Medicare. Law also protects individuals from discrimination based on age, as in hiring. On the other hand, law sometimes imposes “unjustified constraints upon the freedom to define ourselves and pursue a range of actions at any age,”¹⁰ as when children are forbidden to marry, and senior citizens are denied the opportunity to serve in the military.

Brooks points out that the law “does, and indeed should, play an important role in the steps of our self-development.”¹¹ Law also should serve as a “vehicle for the self-fulfillment of citizens . . . based, in part, upon our changing capacities at different stages of our lives,” just as those changing capacities mark our changing social responsibilities and rights.¹²

What law fails to do is to recognize these stages in relation to one another over the entire span of a lifetime—what Brooks calls “an arc of life.”¹³ The stages of life, Brooks writes, “must be recognized as part of a unity of life rather than simply handy categories for making some age-specific legal rules and decisions.”¹⁴

What’s more, instead of serving as a “vehicle for self-fulfillment,” law may interfere with an individual’s freedom to choose how to live her own life by treating individuals within each respective stage of life similarly.¹⁵

⁸ Stages, *supra* note 1, at 627.

⁹ *Id.* at 628.

¹⁰ *Id.* at 620.

¹¹ *Id.* at 630.

¹² *Id.*

¹³ Stages, *supra* note 1, at 620.

¹⁴ *Id.* at 621.

¹⁵ *Id.* at 630.

The individual narratives of our lives have a much more vivid meaning to us, whether these lives are lives which follow standard stages or not. Stages of life appear as merely the expressions of poetry or the product of “scientific generalizations” of outside observers drawing up averages of individually unique lives.¹⁶

Of particular relevance here, Brooks notes, “[h]ow one responds to old age appears to differ from person to person.”¹⁷

In his article, Brooks seeks “a refurbishing of the ancient idea of life stages.”¹⁸ He notes that the Greeks recognized a “close link” between law and custom. But, while “the law was reflective of the character of [both] the law maker and the persons to which the law applied,” it also “measured distribution according to merit or need, corrective justice according to the rectification of selfish deeds, and exchange justice according to the market.”¹⁹ Thus, both the determination of stages, and the allocation of the goods of life within each stage, would depend on the need or merit of individuals within that stage. “[I]t is useful,” Brooks asserts, “to regard modern laws in a somewhat classical fashion in order to construct the vision of a progressive series of stages of life, each with its own unique moral meaning.”²⁰

One modernist approach “enable[s] citizens to freely choose the activities, capacities, and objects they prefer at any and every time in their lives.”²¹ The main concerns of age-related modern laws, however, are to “ensure the satisfaction of basic needs, especially of the dependant young and the helpless old,” and to “ensure that age groups, especially the old, are not discriminated against.”²² Yet in serving these ends, the law’s fixing of boundaries for each stage seems arbitrary, and the freedoms associated with each stage are not always pegged to levels of maturity. For example, in young adulthood the eligibility to drink, drive, vote, and serve in the military may arise at different ages even though the physical abilities, judgment, and responsibility required for each seem comparable, and individuals arrive at each fixed boundary with varying qualifications. In old age, the boundaries may or may not fairly reflect the process of biological

¹⁶ *Id.* at 637.

¹⁷ *Id.* at 638.

¹⁸ *Id.* at 620.

¹⁹ *Stages*, *supra* note 1, at 645.

²⁰ *Id.* at 657.

²¹ *Id.* at 646.

²² *Id.*

decay within a given individual. Also remarkable, Brooks insists, is the fact that modern laws fail to “reflect any sense of the continuity and cumulativeness of growth and decay of life processes.”²³

Still, according to Brooks, “law, rather than nature or custom, is required for the recognition of stages of life in complex modern societies.”²⁴ Law and the political process are needed to achieve distributive justice in allocating fungible goods, such as wealth, access to education, and health services, among the stages.²⁵ For this purpose, law might provide a “more refined set of criteria for distribution according to need, freedom and merit reflecting the stages of development.”²⁶

“Probably the most developed legal regime of any stage of life is the array of laws bearing upon the stage of old age.”²⁷ These laws are aimed at protecting the vulnerable elderly and providing resources for the end of life. Yet by at least tacitly linking the old age stage of life to decay and death, they may disempower the elderly.²⁸ On the other hand, the law may provide solace to the elderly by allowing them to interact with future generations in making wills, transmitting wealth and wisdom to survivors.

Most important, in Brooks’s view, “the stages of life are part of ‘a life’—they are not discrete steps in a ladder to nowhere.”²⁹ The law helps to tie these stages together. Laws governing education, parenting, and saving for retirement are examples. Viewing such laws this way invites questions about their appropriateness in serving the ethical function of supporting a good life.

“The curve of life,” Brooks concludes, quoting Carl Jung, “is like the parabola . . . which, disturbed from its initial state of rest, rises and then returns to a state of repose.”³⁰ Still, the stages of life are not viewed by either “the underlying culture or the law as parts of an arc of a whole life . . . And yet, it might be desirable to view the law as either reinforcing or establishing the arc of life,”³¹ because “one role of law is the bestowal of justice among the stages within an arc of life.”³² By putting the life stages

²³ *Id.*

²⁴ *Stages, supra* note 1, at 621.

²⁵ *Id.* at 646.

²⁶ *Id.* at 667.

²⁷ *Id.* at 675.

²⁸ *Id.* at 678.

²⁹ *Stages, supra* note 1, at 681.

³⁰ *Id.* at 688 (quoting CARL G. JUNG, *The Structure and Dynamics of the Psyche*, in 8 COLLECTED WORKS OF C. G. JUNG 406 (Herbert Reed et al. eds., 2d ed. 1978)).

³¹ *Brooks, supra* note 1, at 688.

³² *Id.* at 622.

together, furthermore, we might “better understand how law facilitates and impedes self-fulfillment.”³³

If this all seems to be headed in one direction, that’s because it is, just as we all are. Brooks ends his *Stages* article this way: “In old age, social institutions might support both the recognition and acceptance of the growing vulnerability of age along with new opportunities in leisure to make sense of the entire arc of one’s life.”³⁴ Thus, the article provides background and an introduction for a more recent work, still in progress, focused on old age, retirement, and the end of life.

A new book, yet unpublished at this writing, bears the working title “The Final Elegy: The Consolations of the Classics.”³⁵ It describes an experiment in which Brooks seeks to embrace old age and its losses by consulting the classics of literature, hoping to find in them a measure of detachment and consolation suited to this final stage of life. Old age is dominated, he suggests, by physical and mental decline, forced retirement, loss of respect, the death of friends and loved ones, and, for many, a diminished optimism and ambition. With a heightened awareness of the propinquity of one’s own death, there is also an increasing sense of a foreshortened future. These losses are naturally accompanied by emotions of sadness, regret, nostalgia, and alienation. One way to understand and cope with these emotions, Brooks posits, is through meditative reflection assisted by a review of the classics. The new book includes reports on his own reflective meditations on each of the various losses.

Building on his earlier work, Brooks treats the stage of old age as an elegy — a poetic form that traditionally addresses the death of a loved one, characterized by sadness but offering consolation. But more modern elegiac writing may treat other kinds of losses and may take the form of prose. So, as he concludes, it may be useful in achieving a sense of detachment from the losses associated with old age.

In composing his elegy, Brooks reflects on a number of classical works, with special regard for the writers’ engagement in “classical leisure,” which he describes as reflective activity undertaken for its own sake. He points especially to the writings of Petrarch, Montaigne, and Henry David Thoreau, all reflections on a solitary life apart from society. So Brooks employs this strategy to look back at past losses, and to anticipate future

³³ *Id.* at 689.

³⁴ *Id.* at 692.

³⁵ Richard O. Brooks, *The Final Elegy: The Consolations of the Classics* (unpublished manuscript) (on file with author). Brooks has shared only portions of his draft manuscript with me thus far, so my review of it here is necessarily qualified not only by that incompleteness, but also by the fact that the work as a whole is unfinished.

losses and the completion of life. With the perspective that only hindsight can offer, he expects to find solace in his ability to grapple with the emotions arising from these losses.

The literary classics play a critical role by helping to understand the experience of old age in the light of what he calls “universal ideas,” expressed in what he views as the best of thought and expression, as well as the fine arts and historical accounts of great deeds. Thus, for example, classical writings about work and leisure help in understanding retirement; ideas of biological functioning and the cycle of nature illuminate the process of physical decline in old age; analyses of self-reliance and self-determination shed light on the process of growing dependency; and works on being and consciousness help to appreciate death itself more fully. The permanent truths revealed in the classics, according to Brooks, allow us to make sense of our lives.

Needless to say, the classical works are only accessible to those with a liberal education like the one Brooks received. Such instruction includes, for example, a reading of the great books that express the foundations of Western culture. Therefore, Brooks’s new book includes a strong plea for liberal education for all students, as providing a basis for effective citizenship and preparation for more specialized vocational training.

In a Preface, Brooks confesses that he undertook this latest book as an excuse for doing what he wanted to do in old age anyway—to read (or reread) the classics to which he was introduced in his early liberal education and to consider their implications for the final stage of life. He might also have regarded this work as a testamentary effort, as Dean Thomas Shaffer put it, “to frustrate or at least to manipulate the grim reaper.”³⁶

All of this may sound far more melancholy in this brief description than it really is in Brooks’s fascinating, fuller account. To be sure, the new book appears to contain almost none of the fine, straightforward legal analysis that marks so many of his earlier works, although the legal implications are very clear. Instead it offers a new way for everyone—not just the elderly, but also younger legal scholars, students, and others—to think about loss and consolation at every stage of life. It is a way to understand the last stage in an “arc of life” to relate better to members of this stage, and to work for justice for them. Equally important, it contains powerful suggestions for members of this last stage about how to find comfort and even joy as they prepare for their eventual exit stage right. Whatever Brooks’s motivations for this latest work, we may be deeply grateful for the result.

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THOMAS L. SHAFFER, DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH 9 (1970).

This tribute to Brooks' scholarship would be incomplete without a recognition of his influence on my own writing. In his role as Director of the Environmental Law Center at Vermont Law School, Brooks gave me my very first opportunity to publish my work. That came in my third year as a law teacher, with the editorship of an anthology on groundwater protection in Vermont, which was published by the Environmental Law Center.³⁷ This nudge from my friend and mentor gave me the confidence I needed to send off the manuscript for my first law review article the following year.³⁸

One other early collaboration with Brooks was very important to me. The Attorney General of Vermont called Brooks in 1989 to ask whether the Law School's Environmental Law Center would submit an amicus curiae brief supporting the state's position in what turned out to be a landmark public trust doctrine case in the Vermont Supreme Court.³⁹ The case concerned the planned conveyance of filled land on Burlington's Lake Champlain waterfront that the state had transferred to a railroad company more than a century earlier. Brooks asked me to help with the brief.⁴⁰

I remember that we both struggled with a very tight deadline. On the day the amicus brief was due, I complained that I just wasn't quite ready to stop researching and polishing my part of the brief. Brooks responded, "This brief can either be perfect or be filed, but not both." The brief was filed on time (barely).⁴¹ The Supreme Court ruled that the railroad's interest in the filled land was conditioned on its continued use for railroad purposes, and that the state was obliged to protect and administer the land as trustee for the benefit of the public.⁴² The Court described the public trust doctrine as "antediluvian," but retaining "an undiminished vitality."⁴³ The doctrine is not "fixed or static," the Court wrote, but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit," and evolving "in tandem with the changing public perception of the values and uses of waterways."⁴⁴ It was a splendid victory for the public interest.

³⁷ GROUNDWATER LAW IN VERMONT: PLANNING FOR UNCERTAINTY, PLURALISM, AND CONFLICT (Stephen Dycus ed., 1979).

³⁸ See J. Stephen Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 VAND. L. REV. 871 (1980).

³⁹ State v. Central Vermont Ry., Inc., 153 Vt. 337, 571 A.2d 1128 (1989).

⁴⁰ *Id.* at 1129.

⁴¹ *Id.*

⁴² *Id.* at 1135.

⁴³ *Id.* at 1130.

⁴⁴ *Id.* (internal quotations and citations omitted).

Brooks's work on this case, like so much of his teaching and scholarship, underscored for me the opportunities and responsibility that lawyers have to use their professional training and experience to be helpful. It combined hard work, creativity, high standards, a commitment to the truth, and a determination to use whatever influence he could muster for the public good. It also was yet another demonstration of Brooks's generosity and sense of humor.

Brook's example, like his written work, has informed and inspired us all, and it will inspire the efforts of future generations. We are deeply grateful. Fortunately, his scholarship is still work in progress, only the latest stage in a long life well lived. We can hardly wait for the next act.

RICHARD BROOKS ON THE SEASHORE

*John D. Echeverria**

I have gratefully taken on the assignment to offer some observations on Richard Brooks' practical accomplishments and theoretical contributions in the field of coastal zone management. Those who have a Vermont-centric view of the world and appreciate Professor Brooks' efforts to protect Vermont's environment might be surprised to learn about his work in protecting coastal areas. Before coming to Vermont, Professor Brooks had a whole other life—living, teaching, and agitating in the coastal zones of Connecticut and Rhode Island. To highlight a few of his accomplishments during this earlier phase of his life, he helped draft Connecticut's key coastal legislation and defeat the first and arguably most important “takings” challenge to Connecticut's coastal protections in the Connecticut Supreme Court.

My contribution to this Festschrift proceeds in three parts. The first part provides a brief summary of Professor Brooks' contributions in the field of coastal zone management, especially in Connecticut. The second part describes and comments upon Professor Brooks' observations, after a lifetime of experience and reflection, on the challenges associated with coastal zone management, in southern New England and in general. The third part comments on one of the key coastal zone management challenges that has emerged since Professor Brooks started working in this field: sea level rise.

Parenthetically, and still by way of introduction, I will comment briefly on the (at least to me) interesting and gratifying links between the life and times of Professor Brooks and myself—wholly apart from our joint membership on the faculty of Vermont Law School and my brief service as the acting director of the Environmental Law Center, which Professor Brooks founded and ably led for many years.

First, we are both graduates of Yale Law School (or the “the Yale Law School,” as it is sometimes called), although Professor Brooks graduated approximately 20 years before I did. Beach access is one of the myriad coastal management issues Connecticut has faced, and Professor Brooks has

* Professor, Vermont Law School

commented thoughtfully on that issue.¹ While I was at Yale, I wrote a seminar paper on conflicts over beach access in Connecticut. The most memorable part of the experience was that my faculty supervisor was reportedly one of the wealthier members of the Yale faculty and owned a substantial coastal home. I look back with gratitude on his benign indulgence of my youthful ravings about plutocrats barring the hoi polloi from reaching the waters of Long Island Sound. Sadly, as Professor Brooks knows full well, beach access represents fraught class conflict in Connecticut.

Second, Professor Brooks and I share a love of sailing, though I suppose neither of us partakes much anymore now that we both live in a state without an ocean coast and (truth be told) not even a great lake. Late in life, Professor Brooks wrote about navigating his Cape Cod Bullseye in Long Island sound, including one memorable day-long reach along the entire Connecticut shore.² I have a similar memory of being at the tiller of a large sloop on a straight shot from Gardiner's Island to Stonington, though happily the boat in question was not my own (which in my experience has always been the best arrangement, given the expense and trouble of owning and maintaining a boat).

Finally, though I do not regard myself as a coastal zone expert, early in my career I did a considerable amount of work in this field that overlapped, to a degree, with Professor Brooks' work. In the 1970s, during a gap year between college and law school, I worked in the coastal office of the New Jersey Department of Environmental Protection in Trenton, New Jersey. Later that year, and for several months the following year, I worked for the federal Office of Coastal Zone Management within the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, in Washington, D.C. Interestingly for present purposes, in the federal coastal zone office I worked under the supervision of Ms. Kathryn Cousins, the North Atlantic Regional Manager, who oversaw the development of state coastal programs in all the New England coastal states including, of course, Connecticut.

Two lessons stand out for me from my early experience in coastal zone management in Washington, D.C. One was administered by the very accomplished and widely admired director of the federal coastal office who one day urgently solicited ideas from staff on how to spend more money

1. Richard O. Brooks, *Making 'the Mediterranean of the Western Hemisphere' a Sustainable Community: the Connecticut Coastal Zone Management Act and the Long Island Sound*, 13 VT. J. OF ENVTL L. 453, 470-72 (2012).

2. *Id.*

quickly. The end of the fiscal year was approaching and the office had not exhausted its supply of funding from Congress. When I naively suggested we might simply return the unused and apparently unneeded money to Congress, the office director sternly lectured me on the imperative for every federal agency to spend every penny allotted by Congress or risk a dreaded cut in appropriations the following year. He was correct, of course, and the lesson was received: Washington, D.C. operates according to special rules.

The other lesson related to the deep and continuous tension between the federal government and the states in the implementation of federal environmental programs. The federal Coastal Zone Management Act (CZMA), adopted in 1972, authorized generous funding (at least in its early years) to states to support the development and implementation of state coastal programs.³ Congress sought, in effect, to use its bully pulpit and the lever of federal funds to encourage states to perform coastal management that followed federal guidelines and achieved federal goals. The coastal states, for their part, welcomed the federal money, but they did not necessarily share the same environmental goals that Congress expressed in the CZMA. And to the extent they did share the same goals, or perhaps had even more ambitious goals, the states sometimes wished to accomplish these goals in their own ways. The result, from my observation, was ongoing conflict between federal coastal officials responsible for doling out federal funds to accomplish federal goals and state officials intent on extracting as much money as possible from the federal government without necessarily doing the federal government's bidding. During this early phase of my career, I got to see that conflict from both sides in the arena of coastal zone management.

I. Richard Brooks' Coastal Zone Career

From 1962, following his graduation from Yale Law School, until 1978, when he joined the Vermont Law School faculty, Professor Brooks represented private as well as public clients in Connecticut.⁴ During this period he also taught planning and law at the University of Rhode Island and Connecticut College. Professor Brooks worked during this period on a variety of land use and environmental problems, including the novel idea of new town developments. But a primary focus of his work during this era was coastal zone management.

3. See Coastal Zone Management Act 1972, 16 U.S.C. §§ 1451-1456 (2017).

4. Brooks, *supra* note 2, at 454.

In particular, he worked, to use his own description, “with a small band of environmental attorneys to consult with Art Rocque, then Director of the Connecticut Coastal program, to draft state legislation for Connecticut’s coastal management program.”⁵ The result of this effort was the Connecticut Coastal Management Act of 1979.⁶ This legislation, like similar pieces of legislation enacted in other coastal states during the same period, was adopted in response to Congress’s adoption of the federal Coastal Zone Management Act of 1972. I do not have a recollection, based on my own personal experience, of the federal office’s relationship with the Connecticut coastal program; my personal dealings were primarily with officials in Rhode Island and Maine. But I am confident that the same kind of federal-state frictions described above also arose with respect to Connecticut.

My guess is that the Director of the Connecticut Coastal Program convened the group, of which Professor Brooks was a part, to draft new state coastal legislation because the federal office informed him that it would be advisable for the state to enact new legislation to secure long-term federal funding for the implantation of a state coastal management program. The accuracy of this guess is supported by the fact that the federal coastal program did not approve the Connecticut coastal program until 1980. This was fairly late in the process relative to other New England states, but just one year following enactment of the Connecticut Coastal Management Act.⁷

Just as the Connecticut coastal legislation was apparently the product of a negotiation between the federal and state coastal offices, it also represented the product of a negotiation between the state coastal office and local communities that already had been vested with considerable land use regulatory authority and state agencies with pre-existing legal authority over the coast. As Professor Brooks explained in his 2012 retrospective about the development of the Connecticut program, “[t]he strategy for securing passage of the law [in the Connecticut legislature] was to defer to local regulation as well as the existing activities of state agencies.”⁸ In a nutshell, the Act created a two-tiered coastal zone.⁹ The first was a more stringently protected tier, the “coastal boundary,” generally extending inland 1,000 feet from the shore.¹⁰ The second tier, the “coastal area,”

5. *Id.*

6. CONN. GEN. STAT. ANN. § 22a-94 (2010).

7. See NAT’L OCEANIC AND ATMOSPHERIC ADMIN., OFF. OF COASTAL ZONE MGMT., *Coastal Zone Management Programs*, <https://coast.noaa.gov/czm/mystate/> (last visited Nov. 17, 2018).

8. Brooks, *supra* note 2.

9. NAT’L OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 8.

10. *Id.*

included all of the state's 36 coastal municipalities.¹¹ The Act articulated various new policies calling for the protection and wise use of the coastal zone. But in terms of implementation, the Act hardly worked a legal revolution. The Act relied heavily on local government implementation of traditional planning, zoning, and subdivision requirements to achieve the policy goals of the state act.¹² The Act also required that existing state plans and procedures be modified and coordinated to achieve the goals of the state coastal law.¹³

In sum, as an example of cooperative federalism, the Connecticut coastal program illustrates how carefully proponents of new environmental protections sometimes must thread the needle to accomplish their goals.¹⁴ The program shows how difficult it can be to create a state initiative that is new and bold enough to meet with federal approval, but that is sufficiently deferential to existing state and local laws and institutions so as to avoid foundering on the shoals of state politics.

Another example of Professor Brooks' coastal work was his representation of four citizen intervenors in a hearing before the Atomic Energy Safety and Licensing Board. This work was in connection with an application by Connecticut Light & Power to construct an additional unit of the Millstone Nuclear Power Plant in Waterford, Connecticut, on Long Island Sound.¹⁵ Two of the intervenors lived and owned homes in proximity to the plant, while the other two intervenors swam and fished near the plant with other members of the public.

The intervenors raised a series of objections to issuance of the proposed license, including inadequate notice, defects in the record, and failure by the Atomic Energy Commission staff to conduct an adequate environmental analysis under the newly-enacted National Environmental Policy Act.¹⁶ In December 1969, the board issued a construction permit for the project and rejected the intervenors' objections.¹⁷ Professor Brooks came away disappointed but educated by the process. "Most apparent in the Millstone case," he wrote, "was the vigorous attempt by the AEC and the applicant

11. *Id.*

12. CONN. DEP'T OF ENERGY & ENVTL. PROT., *Overview of the Connecticut Coastal Management Program*, https://www.ct.gov/deep/cwp/view.asp?a=2705&q=323536&deepNav_GID=1622 (last updated Oct. 17, 2018).

13. *Id.*

14. *Id.*

15. See Richard O. Brooks, *Millstone Two and the Rainbow: Planning Law and Environmental Protection*, 4 CONN. L. REV. 54 (1971) (describing Professor Brooks' participation in the regulatory proceedings in detail).

16. *Id.* at 57.

17. *Id.* at 58 - 59.

power company to exclude considerations of the environment which would slow the speed of power plant development.”¹⁸ While he acknowledged that opponents of nuclear plants are granted a formal opportunity to intervene in the regulatory proceedings, and in that sense can have their say, he thought “the relative inequality of resources of local conservation groups vis-à-vis power companies casts serious doubts on the impact of intervention.”¹⁹

On a more positive note, in 1975, Professor Brooks achieved a major victory on behalf of coastal management in the Connecticut Supreme Court in *Brecciaroli v. Connecticut Commissioner of Environmental Protection*.²⁰ The Court rejected a takings challenge based on denial of a permit seeking permission to fill over five acres of tidal wetlands in the Town of Guilford.²¹ Professor Brooks, along with the late Angus McBeth,²² one of the founders of the Natural Resources Defense Council (NRDC), filed an amicus brief on behalf of the NRDC in support of the commissioner of environmental protection. The individual plaintiff owned a 20.6-acre parcel of land abutting the East River, 17.5 acres of which had been designated as tidal wetlands.²³ The owner wished to develop the property as a 6-lot industrial subdivision.²⁴ To further that plan he sought regulatory approval to place four feet of fill on 5.3 acres of the designated wetlands.²⁵ The Department of Environmental Protection rejected the application, and the landowner filed suit challenging the decision on various grounds, including that it amounted to an unconstitutional taking without just compensation.²⁶

The trial court rejected the takings claim, and the Connecticut Supreme Court affirmed on appeal.²⁷ The Court first acknowledged that its precedents established that a regulatory restriction amounts to a taking when it results in a “practical confiscation” of land.²⁸ But the plaintiff could not invoke that rule because the permit denial left the owner the opportunity to develop the unregulated upland portion of the property, nor could he

18. *Id.* at 80.

19. *Id.* at 81.

20. *Brecciaroli v. Conn. Comm’r of Env’tl. Prot.*, 362 A.2d 948 (Conn. 1975).

21. *Id.* at 953.

22. See Bart Barnes, *Angus C. Macbeth, lawyer who helped shape environmental rules, dies at 74*, THE WASHINGTON POST (Jan. 28, 2017), https://www.washingtonpost.com/local/obituaries/angus-c-macbeth-lawyer-who-helped-shape-environmental-rules-dies-at-74/2017/01/28/d02c1942-e4bc-11e6-a547-5fb9411d332c_story.html?utm_term=.ccf73dd07a33.

23. *Brecciaroli*, 362 A.2d at 948.

24. *Id.* at 949 - 50.

25. *Id.* at 950.

26. *Id.*

27. *Id.*

28. *Id.* at 951.

apply to fill a smaller portion of the wetlands.²⁹ The Court also said that its precedent recognized that, depending on the facts and circumstances, a regulation that falls short of a confiscation can still result in a taking.³⁰ But the Court said there was no taking under this alternative test, especially given that the Department denied the application to prevent the “public harm” that would flow from destroying ecologically valuable wetlands.³¹ The decision was a clear and decisive victory that was undoubtedly crucial to the future effectiveness of the Connecticut coastal program, especially for protecting the state’s relatively limited but very valuable salt marshes.

The *Brecciaroli* decision, issued in 1975, predates most of the important steps in the evolution of the modern takings doctrine in the U.S. Supreme Court. In particular, it predates the Supreme Court’s landmark 1978 decision in *Penn Central Transportation Co. v. City of New York*,³² in which the Court rejected a takings challenge to the city’s designation of Grand Central Terminal as an historic landmark, and in the process articulated the multi-factor framework the courts use to analyze most regulatory takings claims today.³³ It also predates the Supreme Court’s 1993 decision in *Lucas v. South Carolina Coastal Council*,³⁴ in which the Court ruled in favor of a takings claimant challenging a state restriction on beachfront development, applying a new per se rule that a regulation that denies the owner all economically viable use generally will be regarded as a taking.³⁵ However, the *Brecciaroli* decision presciently anticipated both of those decisions by embracing a two-tier approach to the takings analysis: applying a rule of virtual automatic liability to “confiscatory” regulations, while applying a more nuanced, facts-and-circumstances analysis to other regulations with less severe adverse economic impacts.³⁶

The decision also was prescient insofar as the Connecticut Court implicitly applied a “parcel as a whole” approach in assessing the economic impact of the permit denial. Rather than focus on the economic impact of denial of permission to fill 5.3 acres of wetlands, the Court assessed the regulatory burden in the context of the entirety of the claimant’s 20-plus

29. *Id.* at 952.

30. *Id.*

31. *Id.*

32. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978).

33. *Id.* at 125 (“In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.”).

34. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

35. *Id.* at 1015.

36. *Brecciaroli*, 362 A.2d at 948-53.

acre parcel consisting of both uplands and wetlands.³⁷ This “parcel as a whole” approach was later explicitly embraced by the U.S. Supreme Court in the *Penn Central* case,³⁸ and recently reaffirmed by the Supreme Court in *Murr v. State of Wisconsin*, involving a takings challenge to zoning restrictions protecting a wild and scenic river corridor.³⁹

II. Richard Brooks’ Reflections on Coastal Zone Management

In 2012, with the encouragement of his long-time colleague and former Dean of Vermont Law School Kinvin Wroth, Professor Brooks published a highly personal reminiscence about his involvement in the Connecticut coastal program in the Vermont Journal of Environmental Law. I will use Professor Brooks’ observations and reflections in this article as the starting place for my own observations about Professor Brooks’ contributions.

The central theme of Professor Brooks’ 2012 article is that coastal zone management, as defined by current law and policy, “is best understood not as an effort to protect a natural coastal ecosystem, but rather as the development of a sustainable coastal community in which the natural ecosystem and coastal ways of life are maintained in a continuing balance.”⁴⁰ This observation strikes me as both wise and useful. The coastal zone is an ecologically complex, biologically productive, and delicate portion of the landscape perched on a narrow knife edge between the ocean and the dry land. It includes many specific natural features – such as salt marshes, tidal flats, and barrier beaches – that are as worthy of aggressive preservation efforts as any other part of our nation’s landscape.

But, as Professor Brooks’ observation highlights, the coastal zone is already heavily developed and subject to intense development pressure. For many reasons, population density along the shore far exceeds the

37. *Id.* at 952-53.

38. *Penn Cent. Transp.*, 438 U.S. at 129 (“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has affected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”).

39. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017) (One potential argument that might have been made in the *Breccaierolli* case, but which the Court’s opinion does not discuss, is that the department was not liable for a taking because the tidelands at issue were below the mean high-water line and therefore subject to the public trust doctrine. Under this argument, the Connecticut Supreme Court might have concluded that the public trust doctrine represents a “background principle” of state property law precluding the claimant from asserting a property entitlement to fill the tidelands to begin with, foreclosing a finding of takings liability on any theory); *see, e.g., Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (rejecting a takings claim based on a regulatory restriction on tideland development based on the Washington public trust doctrine).

40. Brooks, *supra* note 2.

population density in the interior of the country. According to U.S. Census projections, population growth in the coastal zone is expected to increase at a faster rate than in the nation as a whole.⁴¹ For understandable reasons, people like to live, work, and play in the coastal zone. In addition, many intensive land uses are necessarily, or at least preferentially, located in coastal zones, such as port facilities, energy plants, and sewage treatment plants.

Preservation of certain natural features of the coast represents a matter of national policy priority (nothing is finer in nature than a healthy expanse of spartina patens). But coastal zone management as a whole involves a complex balancing of human needs and ecological imperatives, or to use Professor Brooks' terms, "sustainable development" and "environmental protection." Several conclusions follow from this observation. One is that coastal management is characterized by "continuous tension," to use Professor Brooks' phrase, between pro-preservation and pro-development policies up and down the coast and over time. Another is that effective coastal zone management, if it is going to succeed in preserving any key natural features of the coast, calls for a strict segregation of land uses. At least some fragile portions of the coast must be effectively preserved while development that is inevitably destructive of natural features can also be accommodated.

Another point Professor Brooks made in his 2012 article is that the coastal zone defies application of a "unified system of environmental management."⁴² Part of the challenge flows from our complex federal system. The federal government leads in providing policy direction and financial support. The states lead in developing the coastal programs. And, in many cases, local governments (such as in Connecticut) take a lead role in actual program implementation. Institutionalized conflict is the inevitable result, as I suggested above. Another difficulty is that many activities occurring outside the coastal zone affect the coastal zone's health but are not subject to coastal program regulation. For example, the operation of dairy farms in Tunbridge, Vermont, feeds pollutants into the Connecticut River and ultimately Long Island Sound, but these polluting activities are obviously not subject to regulation by Connecticut authorities.⁴³ Finally, while a coastal program involves focused regulatory scrutiny of certain

41. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NATIONAL COASTAL POPULATION REPORT: POPULATION TRENDS FROM 1970 TO 2020 3 (Mar. 2013).

42. Brooks, *supra* note 2.

43. Nora Doyle-Burr, *Small Vermont Farmers Wrestle With New Water Quality Rules*, VALLEY NEWS (July 24, 2016), <https://www.vnews.com/Farmers-Say-Proposed-New-Water-Rules-Could-Be-Burdensome-3171900>.

activities within the coastal zone, cross-cutting regulatory programs address many issues affecting the coast, including water quality, energy facility siting, or waste disposal. With all this complexity, it is hard to define the coastal zone, identify the activities affecting the coast, or determine the impacts of these activities on the environmental health of the coastal zone—much less achieve the ultimate objective, which is to control these adverse impacts.

Scientific complexities compound the difficulties facing coastal managers. This is what Professor Brooks has dubbed “a serious lack of knowledge of ecosystemic relationship and the change in those relationships over time.”⁴⁴ Professor Brooks laments that, in the context of the Connecticut coastal protection effort, “[t]here was no scientifically-guided [Long Island] Sound program.” He contends that “proper assessments and monitoring were not undertaken.”⁴⁵ But he also recognizes that the intractable nature of scientific inquiry has to be taken into account:

Fisheries management cannot predict the relative impacts of water quality, habitat conditions, and other factors on the fish population. The impacts of many energy activities upon fish population and the sediment conditions are difficult to assess. The relative contributions of point sources and non-point sources to overall pollution of the Sound are difficult to quantify.⁴⁶

In my view, Professor Brooks comes closest to hitting the nail on the head when he recognizes that institutional and programmatic failures are ultimately less important than the inherent difficulties of doing good science, which can effectively guide regulators and policy makers.

I had firsthand experience in the federal coastal zone office, faced with the challenge of evaluating the environmental consequences of governmental efforts to manage and protect the coastal zone. As the office approached reviewing initial applications for approval of state coastal programs, the question arose of how to assess the environmental impacts of program approvals in accordance with the National Environmental Policy Act (NEPA). To develop a strategy for performing the necessary NEPA analysis, I proposed the simple-minded, but I think sensible, idea that we assess how state permitting actions would change once a federally approved coastal program was in place. After all, if federal funding and review of

44. Brooks, *supra* note 2, at 454.

45. *Id.*

46. *Id.*

state coastal planning efforts did not produce some improvement in the performance of state permitting programs, what was the purpose for the federal program? But for state officials more interested in securing federal funding than in changing their policy directions, the idea that federal program approval was designed to produce changes in state permitting results was problematic. Anyway, my reward for coming up with this bright idea was to camp out for several weeks each in Providence, Rhode Island and Augusta, Maine. And for those weeks, I reviewed state permitting files to identify which permitting actions might be “improved” once a federally sanctioned program was in place. I was, to say the least, an unpopular visitor and in each state an unfortunate assistant attorney general had to accompany me during every minute of my visit. In the end, the federal office was satisfied this technique met the requirements of NEPA. As far as I know, no one challenged this conclusion and the Maine and Rhode Island coastal programs were approved. Whether the performance of these programs actually improved as a result of federal financing and oversight, I haven’t a clue.

III. The Coastal Zone in the Era of Sea Level Rise

Richard Brooks’ coastal zone career largely predates the emergence of the most urgent coastal zone management issue today – ongoing and projected sea level rise due to climate change. While we have recognized the mechanism of global warming for over a century,⁴⁷ only in the last several decades have we recognized global warming in general and sea level rise in particular as critical public policy challenges. The first World Climate Conference, which ultimately led to the establishment of the Intergovernmental Panel on Climate Change, was held in 1979. Domestically, the U.S. Council of Environmental Quality, led by Vermont Law School’s own Gus Speth, issued the first high-level official warning about climate change and its potential environmental consequences in a 1980 report to the president.⁴⁸ Even if our public policy responses have not been commensurate with the magnitude of the threat posed by climate change, the subsequent growth in our understanding of the threat, and about sea level rise in particular, has been breathtaking..

According to the latest information from the U.S. Global Change Research Program, “global average sea level has risen by about 7-8

47. Svante Arrhenius, *On the Influence of Carbonic Acid in the Air upon Temperature on the Ground*, 41 PHIL. MAG. & J. OF SCI. 237, 237-39 (1896).

48. U.S. COUNCIL FOR ENV’T QUALITY, THE GLOBAL 2000 REPORT TO THE PRESIDENT-- ENTERING THE TWENTY-FIRST CENTURY 12 (1980.)

inches since 1900, with almost half (about 3 inches) of that rise occurring since 1993.”⁴⁹ Looking to the future, the program’s recent Climate Science Special Report predicts that “Global average sea levels are expected to continue to rise by at least several inches in the next 15 years and by 1-4 feet by 2100.”⁵⁰ Ominously, taking into account new information about ice sheets melting in Greenland and Antarctica, the report says, “A rise of as much as 8 feet by 2100 cannot be ruled out.”⁵¹ If, eventually, all of the ice covering Antarctica, Greenland, and mountain glaciers around the world were to melt, sea level would rise by several hundred feet.⁵²

The original version of the federal Coastal Zone Management Act said nothing about sea level rise.⁵³ However, the last set of comprehensive amendments to the federal act, the Coastal Zone Act Reauthorization Amendments of 1990, embrace the issue of climate change.⁵⁴ The amendments include the following forceful finding:

Global warming results from the accumulation of man-made gases, released into the atmosphere from such activities as the burning of fossil fuels, deforestation, and the production of chlorofluorocarbons, which trap solar heat in the atmosphere and raise temperatures worldwide. Global warming could result in significant global sea level rise by 2050 resulting from ocean expansion, the melting of snow and ice, and the gradual melting of the polar ice cap. Sea level rise will result in the loss of natural resources such as beaches, dunes, estuaries, and wetlands, and will contribute to the salinization of drinking water supplies. Sea level rise will also result in damage to properties, infrastructure, and public works. There is a growing need to plan for sea level rise.⁵⁵

The 1990 amendments also added to the Coastal Act’s declaration of policy statements that state programs developed under the Act should

49. U.S. Climate Science Special Report, *Executive Summary: Highlights of the Findings of the U.S. Global Change Research Program Climate Science Special Report*, <https://science2017.globalchange.gov/> (last visited Nov. 10, 2018).

50. *Id.*

51. *Id.*

52. NAT’L SNOW AND ICE DATA CTR., *Facts About Glaciers*, <https://nsidc.org/cryosphere/glaciers/quickfacts.html> (last visited Nov. 10, 2018).

53. See 16 U.S.C. § 1451 (1976).

54. Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388-299.

55. *Id.* at 1388-300. The 1990 amendments also amended the findings supporting the coastal act itself, to state: “because global warming may result in a substantial sea level rise with serious adverse effects in the coastal zone, coastal states must anticipate and plan for such occurrence.” 16 U.S.C. § 1451 (l).

provide for “the management of coastal development to minimize the loss of life and property caused by improper development in ... areas likely to be affected by or vulnerable to sea level rise,” and “the study and development ... in any case in which the Secretary considers it appropriate, of plans for addressing the adverse effects upon the coastal zone of land subsidence and of sea level rise.”⁵⁶ The amendments also authorized the federal coastal office to make special “enhancement” grants to the states to address the effects of sea level rise.⁵⁷ Numerous states have taken advantage of this program, at least up to the advent of the current administration.⁵⁸

While my current knowledge of coastal planning efforts is only fragmentary, my understanding is that coastal managers are deferring the major work of addressing the threat of sea level rise into the future. It is doubtful that this head-in-the-sand approach can continue for very long. One important challenge is devising an effective, efficient, and equitable process for helping communities implement organized retreat from the eroding shore. According to one report, based on projections developed by Zillow, rising seas will likely submerge nearly 1,000,000 Florida properties worth more than \$400 billion.⁵⁹ Another issue is how to manage the use and development of lands behind coastal defense structures, to the extent that states and local communities can successfully defend against the rising seas, even if only temporarily.⁶⁰ Yet another urgent question is whether the nation should place a moratorium on the expenditure of untold millions of dollars for acquiring for conservation coastal lands slated to soon be overcome by rising seas. If Professor Brooks has the time, in his self-described “old age,” to help address these issues, we could use the benefit of his wisdom and experience.⁶¹

56. 16 U.S.C. 1452(2)(K) (2017).

57. 16 U.S.C. 1456(b) (1992).

58. U.S. GOV'T ACCOUNTABILITY OFF., CLIMATE CHANGE: INFORMATION ON NOAA'S SUPPORT FOR STATES' MARINE COASTAL ECOSYSTEM RESILIENCE EFFORTS 9-13 (Sept. 2016).

59. Christopher Flavelle, *The Nightmare Scenario for Florida's Coastal Homeowners*, BLOOMBERG, <https://www.bloomberg.com/news/features/2017-04-19/the-nightmare-scenario-for-florida-s-coastal-homeowners> (last updated Apr. 19, 2017, 5:33 PM).

60. John D. Echeverria, *Managing Lands Behind Shore Protection Structures in the Era of Climate Change*, 28 J. LAND USE & ENVT. L. 71, 77 (2012).

62. Brooks, *supra* note 2.

SPEAKING REGIONAL TRUTH TO WASHINGTON POWER OVER FEDERAL PUBLIC LANDS

*Hillary M. Hoffmann**

On the twenty-fifth anniversary of the creation of the Environmental Law Center at Vermont Law School, Professor (and former ELC Director) Richard Brooks delivered the Norman Williams Distinguished Lecture in Land Use Planning and the Law, entitled Speaking (Vermont) Truth to (Washington) Power.¹ Like many of Professor Brooks' scholarly works, this lecture explored common themes of federalism, sustainability, land use, and environmental protection.² His lecture also addressed topics unique to his work alone, including legal value assessments, environmental justice, social justice, and the processes of legal and institutional change.³ After exploring several examples of statutes passed by the Vermont legislature since the state was established as an independent republic in 1777, Professor Brooks concluded that Vermont's power to effect change on a national scale was somewhat disproportionate to its size (both geographically and based on population) and primarily arose out of Vermont's community-focused, inclusive, and progressive legal and social values.⁴

Because Professor Brooks ("or Brooks," as everyone at Vermont Law School (VLS) refers to him) retired before I began teaching at Vermont Law School, I mostly came to know him through his excellent reputation amongst our mutual colleagues and, of course, through his scholarship. Those who know him well speak fondly of him, and the many kind words they have shared in passing over the years led me to the inevitable conclusion that Brooks has been, in many ways, the heart of Vermont Law School's Environmental Law Center. He is beloved—by our colleagues at

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1. Richard O. Brooks, *Speaking (Vermont) Truth to (Washington) Power*, 29 VT. L. REV. 877, 877 (2005) [hereinafter *Speaking Truth to Power*]. As Brooks acknowledged in his original work, the concept of "speaking truth to power" draws from the Civil Rights movement and the scholarship of Dr. Martin Luther King, Jr. Originally, the phrase was thought to derive from an 18th Century Quaker saying.

2. *Id.* at 892-93.

3. *Id.* at 879-80.

4. *Id.* at 888.

VLS, by his former students, and by his peers at other institutions—and you cannot speak with someone who knows him well without seeing them smile.

When I first set out to read Brooks' scholarly works, I discovered some of the basis for this admiration. His scholarship is quite interesting; it usually incorporates an interdisciplinary approach to legal problems or issues and incorporates theory at multiple levels.⁵ The subject matter also varies widely: from zoning and coastal management to environmental ethics, philosophy, and history;⁶ and he has explored (and embraced) legal, scientific, and social uncertainty in many of his published works.⁷ Many of his articles are refreshingly normative but not in a way that alienates the reader,⁸ and finally, Brooks' writing continually challenges existing legal paradigms, exploring their weaknesses, suggesting alternatives, and often, rowing against the scholarly tide.⁹

These qualities are all present in Brooks' 25th Anniversary Williams Lecture. What interested me most about this talk was its relevance to my own scholarship regarding the national crisis unfolding on federal public lands, driven by the Trump Administration's pursuit of energy development, mining, and "deregulation"—or, in other words, unraveling the protections set in place by previous administrations.¹⁰ From opening submerged lands to offshore drilling to the President's reduction of the Bears Ears and Grand Staircase-Escalante National Monuments, the Trump Administration has charted a course reminiscent of the disposal era of the late nineteenth century, stopping just short of outright transfers of public lands into private and state hands.¹¹ This is a crisis not only because of the unprecedented speed and breadth of the Department of Interior's efforts to erode previous administrations' environmental and natural resources

5. See generally Richard O. Brooks, *Cicero's Beloved Republic: The Insufficiency of Expanded Humanistic Rhetoric in the Service of Comparative Law*, 16 ILSA J. INT'L & COMP. L. 73, 75 (2009) (describing the importance of comparative law in ancient Rome).

6. *Id.*; See generally Richard O. Brooks, *Making the "Mediterranean of the Western Hemisphere" a Sustainable Community: The Connecticut Coastal Management Act and the Long Island Sound*, 13 VT. J. ENVTL. L. 453, 455 (2012) (assessing the Connecticut coastal management laws' concern with ecosystem management and sustainability).

7. Brooks, *supra* note 5, at 75.

8. See Brooks, *supra* note 1, at 880-81 (describing an example of Vermont's role in speaking truth to Washington's power).

9. Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 2 (1991).

10. Julie Turkowitz, *Ryan Zinke is Opening up Public Lands. Just Not at Home*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/us/ryan-zinke-montana.html>; Lauren Katz, *Ryan Zinke Spent his First Year in Public Office Selling Off Rights to Our Public Lands*, VOX (Mar. 16, 2018, 5:25 PM), <https://www.vox.com/policy-and-politics/2018/3/5/16853432/ryan-zinke-interior-department-secretary>.

11. Katz, *supra* note 10.

protection measures, but also because of the permanence of some of these actions inflicted on landscapes and ecosystems throughout the nation.¹² What intrigued me about Brooks' Williams Lecture were the reflections of similar themes in his references to mid-nineteenth century Vermont.¹³ In this time period, industry ravaged the state's natural resources (and particularly, its forests), leaving a denuded shell of the state's pre-colonial natural glory. Reading Brooks's lecture brought to mind an obvious parallel between that period of Vermont's history and the present situation facing America's public lands.¹⁴

I have therefore chosen to pay tribute to Professor Brooks' inspiring work by exploring his theme of speaking local truth to national power and making an attempt to apply this concept west of the 100th meridian, in the so-called public lands states.¹⁵ I have organized this tribute in two parts: (1) an explanation of the Brooks "principle" of speaking local environmental truth to national power and (2) an application of this principle to the western public lands states.

THE BROOKS PRINCIPLE OF SPEAKING LOCAL ENVIRONMENTAL TRUTH TO FEDERAL POWER.

Although the principle of effecting national change through local activism is not new to the fields of environmental advocacy or environmental law, the manner in which Brooks frames this concept in his Williams Lecture, and in his other scholarship, is unique. One of the unique aspects of Brooks' Principle, as I'm calling it, is that law and legal change cannot be divorced from an understanding and exploration of the motives of their human drafters. Understanding the human values driving environmental decision-making is an essential element in the effort to make legal change.¹⁶ Carried further, Brooks posits that exploring the economic, ecological, or sociopolitical underpinnings of an environmental crisis or problem helps create a solution that is both tailored and long-lasting.¹⁷

Finally, Brooks' Principle includes some normative assessments.¹⁸ This is somewhat unusual in legal scholarship, and indeed, many legal scholars

12. Turkowitz, *supra* note 10; Katz, *supra* note 10.

13. *Speaking Truth to Power*, *supra* note 1, at 885-86.

14. *Id.*

15. *Id.* at 877, note a1. (noting, by Brooks himself in the first footnote, the notion of "speaking truth to power" is not his, and was borrowed from the civil rights movement).

16. *Id.* at 888-89.

17. *Id.* at 892-93.

18. *Id.* at 878.

pride themselves on their scholarly distance from statements about what “should” be, rather than what is.¹⁹ Conversely, legal scholars couch normative statements in objective terms, trying to (perhaps) shield the reader from any personal connection to the reasons why they are writing about a given topic—which may be that the legal scholar cares about the outcome on a deeper level than they can come right out and state in the academic piece. The way Brooks thwarts this tradition by weaving normative statements into his analysis is refreshing, honest, and lends a great degree of authenticity to his work.²⁰

The initial substantive premise of the Brooks Principle in the Williams Lecture is that human beings have deliberately separated themselves from nature and, in so doing, have made it easier to destroy nature without thought of consequence.²¹ Brooks notes that we have created this separation in part because humans (and particularly those of European origin) have always had somewhat of a fundamental fear of nature, which drives our behavior and, in particular, our laws and legal decisions.²² Using the astute observation of Robert Frost from so long ago, Brooks reminds us that during the daylight, we all like to stare at the flowers and watch the birds fly by, but at night, most of us feel like we need to shut the windows, draw the blinds, lock the doors, and protect ourselves from the unseen, unknown dangers lurking outside.²³ The role of law, according to Brooks, is to both explore the reasons why we want to shut the windows and then (hopefully) break down the barrier between self and other, to integrate ourselves with nature in a way that allows us to appreciate the manner in which we are so inextricably connected to an ecosystem, or a feature of that ecosystem.²⁴

This is a lofty goal for the law, to revise an entire societal paradigm that was hundreds, if not thousands, of years in the making. To start somewhere concrete, Brooks uses Vermont’s history and several examples of Vermont state law that reflected and fostered the integration of humans and nature, dating all the way back to the pre-constitutional period.²⁵ Setting aside the eradication of Vermont’s indigenous population during the colonial period (which is a pretty large set-aside), Brooks noted that Vermont always had a

19. See *id.* at 877-78 (describing Norman Williams’s legacy in American land use law and reform).

20. See *Id.* at 878 (statement of Richard O. Brooks) (“I wish to introduce the notion that both people and nature can be segregated-separated off from our community, and that we should pursue the integration of both people and nature as a joint enterprise.”).

21. *Id.* at 878-79 (simplifying the concept into this basic thesis).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 884.

remarkably inclusive and progressive approach to the law.²⁶ This stretched from the days that the Vermont Constitution was ratified, supporting the abolition of slavery in 1777, through the passage of Act 250, Vermont's famous land use and zoning law, in 1969.²⁷ These values were reflected in specific provisions of the Vermont Constitution, such as Chapter 2, section 67, which contained a guarantee of public access to game and fish on the public commons, as well as in other statutes and judicial opinions.²⁸ As Brooks noted, these early Constitutional efforts at inclusion and access to natural resources reflected Vermont's inherent values of integration, rather than segregation (both among its human inhabitants and between them and its natural inhabitants and ecosystems).²⁹

Later examples of Vermont's dedication to the value of integration can be seen in the conservation efforts that sprang out of the industrial devastation the state experienced in the nineteenth century.³⁰ These efforts ultimately led to some of the most progressive state land use and environmental laws in the country.³¹ The resulting attempts to define what made Vermont so "Vermont" was also reflected in the writings of ecologists and legal theorists of the early twentieth century, such as George Perkins Marsh: "The ravages committed by man subvert the relations and destroy the balance which nature had established between her organized and her inorganic creations; and she avenges herself upon the intruder, by letting loose upon her defaced provinces destructive energies."³²

Further attempts to guard against these harms can be seen in the Vermont legislature's codification of the inherent value of Vermont's natural landscape in Title 10 of the Vermont Statutes Annotated, which states:

"Preservation of the agricultural and forest productivity of the land, and the economic viability of agricultural units, conservation of the recreational opportunity afforded by the state's hills, forests, streams and lakes, wise use of the state's non-renewable earth and mineral reserves, and

26. *Id.* at 881, 884-85.

27. *Id.* at 884; *See generally* Robert F. Gruenig, *Killington Mountain and Act 250: An Eco-Legal Perspective*, 26 VT. L. REV. 543, 544-45 (2002), (describing the progressive nature of Act 250).

28. Brooks, *supra* note 1 at 884 and 888.

29. *Id.* at 884.

30. *Id.* at 885-86.

31. *Id.*

32. *Id.* at 885.

protection of the beauty of the landscape are matters of public good.”³³

These same values also can be seen in Act 250, which was one of the earliest and most conservation-oriented state land use laws in the country.³⁴ Brooks is careful to note, though, that the Vermont approach to conservation and environmental protection is not a pure “rights-based approach.”³⁵ Vermont’s legal values system is holistic, inclusive, and broad-scale, rather than individualistic, circumstance-based, and specific.³⁶ Vermont also takes a consistent, long view of environmental and natural resources management—embracing the notion of “community,” as well as the “ecological setting” in which natural resources lie, or environmental pollutants appear, over a long span of time.³⁷ These values are not only reflected in state legislation, but also in the opinions of the Vermont Supreme Court and in the actions of various state agencies.³⁸ Throughout Vermont’s history, therefore, the inclusive, community-based, harmonious value system of Vermonters has shaped both local and state laws, as well as effecting change on the national level.³⁹

Many of the laws Brooks mentions, and the litigation he focuses on, particularly in the environmental context, arose out of the federalist structure of various statutes, such as the Clean Water Act and the Clean Air Act.⁴⁰ These Acts reserve primary regulatory authority in the federal government but allow states to assume primacy if they can satisfy a certain set of Congressionally prescribed criteria.⁴¹ Thus, Vermont’s progressive water quality standards were spurred by the federal requirement in the Clean Water Act that applied a minimum threshold of acceptable pollution in all navigable waterways.⁴² The judgments that Vermont attorneys pursued against Midwestern power plants were a result of the federalist structure of the Clean Air Act, which also required states to develop

33. *Id.* at 886-87.; VT. STAT. ANN. tit. 10, § 6042 note (Utilization of Natural Resources) (2004).

34. RICHARD O. BROOKS ET AL., TOWARD COMMUNITY SUSTAINABILITY: VERMONT’S ACT 250, THE CRITERIA FOR SUSTAINABLE DEVELOPMENT I (1996).

35. Brooks, *supra* note 1, at 888-89.

36. *Id.*

37. *Id.*

38. *Id.* at 889.

39. *Id.* The only exception to this is seen in Vermont’s recent treatment of its indigenous peoples, which has been problematic, and sometimes tragic, since the state’s founding in 1777. *See State v. Elliott*, 616 A.2d 210, 215 (1992).

40. *Id.* at 883.

41. 33 U.S.C. § 1312 (2002); 42 U.S.C. §§ 7401, 7402(a), 7410(a)(1) (1990).

42. 33 U.S.C. § 1312 (2002).

minimum air pollution criteria or be subject to the new federal standards.⁴³ So, in some sense, the progressive laws, regulations, and legal choices Vermont made were spurred by federal action, although the degree to which Vermont implemented these federal statutes and regulations was largely a reflection of Vermont values.

THE BROOKS PRINCIPLE OUT WEST: SPEAKING LOCAL TRUTH TO POWER
IN THE PUBLIC LANDS STATES.

After doing some serious mulling over this portion of my contribution to the festschrift, I can say, at the outset and in the interest of full disclosure, that I have not answered my ultimate question—does the Brooks Principle apply west of the 100th meridian?⁴⁴ However, in the paragraphs that follow, I will attempt to explain my thinking around the answer to this question. If the word choice in this section seems tentative, that is deliberate, because the elements of Brooks' Principle—especially the notions of integration, speaking local environmental truth to national power, and developing ecosystem-based legal structures—might translate to the public lands states out west, although the path forward could be a bit trickier due to the history, laws, and somewhat incongruous values of those states.

To start, the laws that shaped the West generally reflect the values of Manifest Destiny, rather than the works of Robert Frost or Aldo Leopold.⁴⁵ Mineral and timber development, along with access to and control of water (necessary to accomplish these objectives, as well as to fuel settlements in the arid west) drove the establishment of states like Colorado, Montana,

43. Brooks, *supra* note 1, at 893; 42 U.S.C. § 7410(a)(1) (1990).

44. See Leroy K. Latta, Jr., *Public Access over Alaska Public Lands As Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811, 813 (1988) (describing how public lands states are the states made up of land acquired from foreign governments or tribes after the ratification of the Constitution); see John R. Schwabrow, *Supervision of Operations Under Federal and Indian Oil and Gas Leases by the U.S. Geological Survey*, 8 ROCKY MTN. MIN. L. INST. 241, 241, 264 (1963) (exemplifying how the term is often used in Natural Resources Law to refer to the states containing the greatest percentage of federal public lands, which are Colorado, Wyoming, Montana, New Mexico, Arizona, Nevada, Utah, Idaho, Oregon, Washington, and California).

45. John W. Ragsdale, Jr., *The American Legacy of Public Land Rebellion*, 48 URB. LAW. 599, 601 (2016); Heidi M. Biasi, *The Antiquities Act of 1906 and Presidential Proclamations: A Retrospective and Prospective Analysis of President William J. Clinton's Quest to "Win the West"*, 9 BUFF. ENVTL. L.J. 189, 196 (2002); Brenda W. Jahns, *Reforming Western Water Rights: Contemporary Vision or Stubborn Revisionism?* IN PROCEEDINGS OF ROCKY MTN. MIN. L. INST. 21-1, 21-3 (Rocky Mtn. Min. L. Inst., 1993).

Nevada, and California.⁴⁶ The natural resources and property laws of these states have always reflected this driving force, encouraging the privatization of many public resources and by necessity, restricting public access to them, which federal and state governments viewed as the fastest way to tame the vast wilderness west of the Mississippi.⁴⁷ A necessary piece of that puzzle was bringing the Wild West under the control of a distant federal government in Washington, D.C.⁴⁸

Also unlike in Vermont, slavery was not a focus of western constitutions, as it was abolished while many of the western states were still territories.⁴⁹ However, the federal policies of removing indigenous nations and relocating them to reservations within many of the western states established an exclusionary, rather than unified, populace in many of the western territories and states.⁵⁰ The separation of indigenous and non-indigenous populations created an enclave mentality in both populations, threads of which remain in those states today.⁵¹ Moreover, as a result of the reservation era, and treaties negotiated during that time, the tribal influence on western natural resources management and environmental regulation is extensive in some western states.⁵² This adds a layer of political, regulatory, and social complexity that was almost completely absent from Vermont's post-constitutional history.⁵³

The physical geography and scale of the western states is vast compared to a state like Vermont, as well.⁵⁴ The state of Vermont is roughly the size of one and a half counties in southern Utah, for instance.⁵⁵ And although the population demographics of western states is changing,

46. E.g. Hon. Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1, 4 (1997) (discussing the role of mineral development and water appropriation in the establishment of the State of Colorado).

47. *Id.*

48. Hobbs *supra* note 46; Ragsdale *supra* note 45, at 601; see generally Michelle Bryan Mudd, *Hitching Our Wagon to A Dim Star: Why Outmoded Water Codes and "Public Interest" Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENVTL. L.J. 283, 300 (2013) (describing the development of water rights in the western states).

49. See, e.g., NORTHWEST ORDINANCE OF 1787, art. VI (stating that "There shall be neither slavery nor involuntary servitude in the said territory....").

50. See, e.g., PAUL SHEPARD, A POST-HISTORIC PRIMITIVISM, IN THE WILDERNESS CONDITION: ESSAYS ON ENVIRONMENT AND CIVILIZATION 40, 58 (Max Oelschlaeger ed., 1992).

51. *Id.*

52. Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42, 69 (2014).

53. See *id.* (discussing general scope of tribal environmental authority and listing various tribal environmental regulatory efforts in western U.S.).

54. U.S. CENSUS BUREAU, GUIDE TO STATE AND LOCAL CENSUS GEOGRAPHY (2010), http://www.census.gov/geo/reference/guidestloc/select_data.html.

55. U.S. CENSUS BUREAU, 2010 CENSUS, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

their economies have until very recently been driven by extractive natural resources industries, such as timber harvesting, grazing, and mining.⁵⁶ These extractive industries are not only part of the economy but also still form part of the core of the western ethos.⁵⁷ Take livestock grazing, for example. This pursuit has never made many ranchers wealthy, and particularly not in the western states, where water and forage are scarce and drought plagues many ranchers.⁵⁸ Yet the acreage of public lands subject to federal grazing permits has not declined by any measurable degree since the mid-twentieth century.⁵⁹ Public lands ranching is still an honorable and esteemed way of life in the western states, by and large.⁶⁰ Moreover, the federal government manages grazing in a way that largely incorporates and reflects this ethos, regardless of the impacts of large-scale grazing on the public lands.⁶¹ Even when the market, the permittee, and the allotment conditions indicate that the Bureau of Land Management (BLM) should phase grazing out, BLM continues to offer grazing permits and often refuses to reassess its manner of authorizing grazing use on public lands.⁶²

In further contrast, and unlike Vermonters, Westerners tend to be extremely individualistic, coming together when necessary to defend their rights-based system against threats from outsiders, and then dispersing again to their individualist goals.⁶³ The saga of Cliven Bundy in southern Nevada exemplifies this.⁶⁴ Mr. Bundy was the patriarch of a large ranching family who held a grazing permit allowing him to pasture his cattle on the BLM-managed Bunkerville Allotment along the Virgin River, which he did for decades.⁶⁵ When BLM made some minor management changes to his permit to protect the habitat of species other than livestock, Bundy refused

56. Headwaters Economics, WEST WIDE ECONOMIC ATLAS ((Nov. 2017), <https://headwaterseconomics.org/dataviz/west-wide-atlas/>).

57. Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?* 30 IDAHO L. REV. 555, 556-57 (1994).

58. Vickery Eckhoff, *The Real Price and Consequences of Livestock Grazing on America's Public Lands*, THE DAILY PITCHFORK (Feb. 12, 2015), <https://www.westernwatersheds.org/sustainable-cowboys-welfare-ranchers-american-west/>.

59. Feller, *supra* note 57, at 556-57.

60. Am. Historical Ass'n, *Are There Good Reasons for Being a Farmer?* [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-35-shall-i-take-up-farming-\(1945\)/are-there-good-reasons-for-being-a-farmer](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-35-shall-i-take-up-farming-(1945)/are-there-good-reasons-for-being-a-farmer), (last visited 11/14/18).

61. *Id.*

62. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 836-37 (6th ed. 2007).

63. Sarah Childress, *The Battle Over Bunkerville: The Bundys, the Federal Government, and the New Militia Movement*, FRONTLINE (May 16, 2017), <https://www.pbs.org/wgbh/frontline/article/the-battle-over-bunkerville/>.

64. Ragsdale *supra* note 45, at 599.

65. Childress, *supra* note 63.

to comply with them (holding the belief, then, as now, that his access to the public grazing allotment constituted a property right under the United States Constitution), and the BLM cancelled it.⁶⁶ Bundy continued to graze despite the cancelled permit, though.⁶⁷ BLM pursued formal trespass actions against him, and then attempted to remove and impound his cattle.⁶⁸ These actions seemed to stoke Bundy's ire, causing him to resist further, first through litigation and later by armed standoffs, for nearly two decades.⁶⁹ At one point, in 2014, Bundy summoned a militia to Bunkerville in response to the latest BLM effort to impound his cattle, resulting in days of tense impasse and ultimately forcing the BLM to leave Bunkerville, and leave Bundy alone.⁷⁰

Lost in the chaos was any discussion of the state of the Bunkerville Allotment, containing fragile desert ecosystems, thousands of paleontological and archaeological resources, and rare desert species such as Joshua Trees and bighorn sheep.⁷¹ With the exception of a few local environmental groups, no one discussed the state of these ecosystems, whether they were being stewarded well, and what the local residents of nearby towns wanted for these lands.⁷² The discussion focused almost exclusively around whether Cliven Bundy had individual rights to graze them, and if so, what the nature of those rights were.⁷³ BLM did not seek, or otherwise consider, neighboring landowners, ranchers, or other users of the public lands to determine whether there was a public consensus about the path forward.⁷⁴

The Bundy saga illustrates another contrast between the Northeast (Vermont in particular) and the West, which is that the western individualist ethos is also quite white, and sometimes even racist. The laws of these states, and judicial interpretations of those laws, often contain little acknowledgment of the deep and lengthy tribal relationship with certain places.⁷⁵ They are silent about the role of African American soldiers and

66. Alyosha Goldstein, *By Force of Expectation: Colonization, Public Lands, and the Property Relation*, 65 UCLA L. REV. DISCOURSE 124, 138 (2018).

67. *Id.*

68. Childress, *supra* note 63.

69. *Id.*

70. *Id.*

71. [Friends of Nevada Wilderness, Gold Butte National Monument](https://www.nevadawilderness.org/goldbutte), <https://www.nevadawilderness.org/goldbutte> (last visited Nov. 14, 2018) (describing developments that led to President Obama declaring a National Monument out of the Bunkerville Allotment in December 2016).

72. Childress, *supra* note 63.

73. *Id.*

74. *Id.*

75. *Baley v. United States*, 134 Fed. Cl. 619, 670 (2017) (referring to the system of western water rights, which relies on the prior appropriation system based on the "first in time" principle. Yet,

settlers who moved west to settle under the homestead laws and build the railroads that connected West to East.⁷⁶ They do not mention the Asian miners who worked in the western mines, enriching their owners under the General Mining Law and other disposal statutes of the nineteenth century.⁷⁷ Recognition of legal rights to those outside the white mainstream (such as same sex relationships and same sex marriage) came only recently to parts of the West, and still have not been clearly recognized in others.⁷⁸ These are just a few examples, as well, but they illustrate how far many of the western states have to go before fully incorporate the values of *all* western citizens into state laws.

These challenges, and others, make it more difficult to initiate and carry out landscape-level planning and ecosystem-based conservation initiatives in the West. They also make it challenging for the western states to embrace a legal framework that is holistic, rather than individualistic and rights-based.⁷⁹ And, while not everyone in the West is like Cliven Bundy, he does represent many of the traditions that make up the modern Western ethos, even if they are not so openly expressed by others.⁸⁰ Examples of successful landscape-level, cross-jurisdictional environmental planning efforts, such as the Northwest Forest Plan in the 1990s, are rare, while examples of failed attempts, such as the Greater Yellowstone Ecosystem planning effort or the Sage Grouse Conservation Initiative, abound.⁸¹

The recent national monument reductions in Utah also highlight some of the challenges facing the modern West. In December 2017, President Trump dramatically reduced two national monuments in central and southern Utah: the Bears Ears National Monument and the Grand Staircase-

western water rights do not recognize tribal water appropriations as legal “firsts” in many instances. Tribes often hold junior water rights in water systems that they have used since time immemorial, while non-native descendants of foreign arrivals to the system in the late nineteenth century hold senior rights).

76. Library of Congress, *Rise of Industrial America*, 1876-1900, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseindwest/> (last visited Dec. 8, 2018).

77. See Mary Szto, *From Exclusion to Exclusivity: Chinese American Property Ownership and Discrimination in Historical Perspective*, 25 J. TRANSNAT'L L. & POL'Y 33, 46 (2016).

78. *Tribune Editorial: The Same-sex Marriage Battle is Over*, SALT LAKE TRIB. (Sept. 14, 2017) <https://www.sltrib.com/opinion/editorial/2017/09/14/tribune-editorial-the-same-sex-marriage-battle-is-over/>.

79. Childress, *supra* note 63.

80. COGGINS ET AL., *supra* note 62, at 753; George Ochenski, *Saving Sage Grouse: Another Collaborative Failure*, COUNTERPUNCH (May 18, 2018), <https://www.counterpunch.org/2018/05/18/saving-sage-grouse-another-collaborative-failure/>.

81. COGGINS ET AL., *supra* note 62, at 753.; George Ochenski, *Saving Sage Grouse: Another Collaborative Failure* (May 18, 2018), <https://www.counterpunch.org/2018/05/18/saving-sage-grouse-another-collaborative-failure/>.

Escalante National Monument.⁸² President Clinton had originally created the Grand Staircase-Escalante Monument in 1996, setting aside 1.88 million acres of federal land in the redrock canyon country south of the small town of Escalante, Utah.⁸³ Clinton established this Monument because these lands contained a “spectacular array of scientific and historic resources,” including unique desert ecosystems, a trove of fossils and archaeological ruins and artifacts, rare desert animal species, and sites of historical importance.⁸⁴ President Obama later created the nearby Bears Ears National Monument, establishing a 1.35 million acre reserve south of the small town of Moab, Utah, and bordering the Navajo Nation and the San Juan River.⁸⁵

The Bears Ears Monument was unique in that it was the first tribally proposed National Monument.⁸⁶ Dating back to the 1930s, area tribes had sought federal protection for the area around the Bears Ears buttes because of their shared cultural and religious importance to various tribes.⁸⁷ The Bears Ears region was the birthplace of Navajo leader Manuelito, who led the resistance against the federal government’s forced relocation of Navajos to Bosque Redondo, New Mexico on “the Long Walk,” as it is known to the Navajo.⁸⁸ Manuelito also helped negotiate the treaty securing the Navajo people’s right to remain on their ancestral lands in what is now formally recognized as the Navajo Nation.⁸⁹ Several other tribes “trace their ancestry to the ancient peoples who populated the region since time immemorial,”⁹⁰ such as the Mogollon, Fremont, and Anasazi, who constructed “ancient roads, shrines, pit houses, pueblos, great houses, kivas, and cliff dwellings” throughout the Bears Ears region.⁹¹

82. Julie Turkowitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>.

83. BEARS EARS INTER-TRIBAL COAL., *Proposal Overview*, <http://bearssearscoalition.org/proposal-overview/> (last visited Nov. 15, 2018).

84. Turkowitz, *supra* note 82; See Proclamation No. 6920, 61 Fed. Reg. 50, 223 (Sept. 24, 1996), <https://www.gpo.gov/fdsys/pkg/WCPD-1996-09-23/pdf/WCPD-1996-09-23-Pg1788.pdf> (establishing the Grand Staircase-Escalante National Monument).

85. Turkowitz, *supra* note 82.

86. Bears Ears Inter-Tribal Coal., *Native American Connections*, <http://bearssearscoalition.org/proposal-overview/ancestral-and-modern-day-land-users/>, (last visited Nov. 14, 2018).

87. Bears Ears Inter-Tribal Coal., *Proposal Overview*, *supra* note 83, (showcasing other tribes with a cultural connection to the Bears Ears region including the Pueblos of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, Sandia, San Felipe, San Ildefonso, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Ysleta del Sur, and Zia, the Hualapai Tribe, and the White Mountain and Jicarilla Apache).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

When both Monuments were established, there was some local opposition, antipathy, and fear about what the designation would mean for nearby, non-Indian communities.⁹² Yet there was also a great deal of support, particularly around the Bears Ears proposal.⁹³ It was an open question after each Proclamation, though—would the Monuments bring tourists to replace the lost opportunities for mining jobs or would the region suffer economically?⁹⁴ The answer is still somewhat unclear, and depends on whom you ask. Some locals claim that the Monuments hamstring local economies because they preclude mining, grazing, and restrict some off-road vehicle use (outside of designated areas).⁹⁵ However, many local business owners in the small towns surrounding the Monuments, including Escalante (population 787), Boulder (population 225), and Kanab (population 4,526), have claimed that the Monument brought a notable financial boost.⁹⁶ Economic studies support the latter view, showing that monument designations boost the economies of nearby small towns, bringing tourists, creating jobs, and luring new residents with the promise of a protected outdoor “playground” at their backdoor.⁹⁷

Environmental and conservation advocates were thrilled with the Bears Ears and Grand Staircase Monument designations, as they restricted development and protected fragile desert ecosystems that were at risk of irrevocable harm from mining and nearly unfettered off-road vehicle use.⁹⁸ But once the political tides shifted in Washington in the fall of 2016, the Monument opposition’s voices grew stronger, and eventually, carried the day.⁹⁹ In January 2017, when President Trump took office and Secretary of

92. David DeMille, *Culture War Plays Out at Grand Staircase Monument*, USA TODAY, (May 10, 2017), <https://www.usatoday.com/story/news/nation-now/2017/05/11/clear-clash-cultures-play-wednesday-two-sides-20-year-old-debate-over-grand-staircase-escalante-national-monument-tried-make-their-case-visiting-interior-secretary-ryan-zinke/317253001/>.

93. Stephanie Mencimer, *National Monuments in Utah are Far More Popular Than Trump Thinks*, MOTHER JONES, (Dec. 4, 2017), <https://www.motherjones.com/politics/2017/12/national-monuments-in-utah-are-far-more-popular-than-trump-thinks/>.

94. Brian Maffly, *Oil and Coal Drove Trump’s Call to Shrink Bears Ears and Grand Staircase, According to Insider Emails Released by Court Order*, SALT LAKE TRIB. (Mar. 2, 2013), <https://www.sltrib.com/news/environment/2018/03/02/interior-department-emails-show-oil-and-coal-played-a-big-role-in-bears-ears-grand-staircase-monument-redraws/>, (mining was prohibited after the 1996 Proclamation and Grand Staircase contained vast coal and other mineral deposits, while Bears Ears contained oil and gas, and uranium reserves).

95. Phil Lyman, *Awaiting the Fate of Bears Ears*, SALT LAKE TRIB. (Sept. 9, 2017), <https://www.sltrib.com/opinion/commentary/2017/09/19/phil-lyman-awaiting-the-fate-of-bears-ears/>.

96. Lyman, *supra* note 95; Heidi McIntosh, *Utah May be Trading a Dinosaur Wonder for a Coal Mine*, SALT LAKE TRIB. (Aug. 23, 2017), <https://www.sltrib.com/opinion/commentary/2017/08/24/commentary-utah-may-be-trading-a-dinosaur-wonder-for-a-coal-mine/>.

97. McIntosh *supra* note 96; Headwaters Economics, *supra* note 56.

98. McIntosh *supra* note 96.

99. *Id.*

Interior Ryan Zinke (literally) rode into his first day on the job in Washington, D.C. on an Irish Sport Horse named Tonto,¹⁰⁰ the plans to unravel Monument protections began. The two met with various Republicans and unveiled a series of initiatives designed to replace various protective measures of previous Administrations, which they viewed as the overbearing reach of distant Washington bureaucrats, with more industry-friendly solutions.¹⁰¹ Utah politicians like Sen. Orrin Hatch, Governor Gary Herbert, and local county commissioners mounted a campaign to convince Trump and Zinke that the Bears Ears and Grand Staircase Monuments were an affront to the values of Utah citizens.¹⁰² Their objections gained traction with Secretary Zinke and eventually, in December 2017, Trump signed two Proclamations reducing the Grand-Staircase Escalante National Monument by almost half, and the Bears Ears National Monument by nearly eighty percent.¹⁰³

After their shock wore off, supporters of the Monuments were left to wonder whether Trump's actions actually did fulfill the wishes of Utahns. In other words, had Sen. Orrin Hatch spoken Utah's truth to Washington's power? A majority of the individual comments submitted to the Department of Interior related to Secretary Zinke's proposal to reduce the Monuments opposed any reductions,¹⁰⁴ but polls conducted by Utah news organizations reflected nearly an even split, with half opposed and half supporting.¹⁰⁵ Nationally, there was overwhelming support for the National Monuments at the size that Presidents Clinton and Obama had established them, while locally it was a different story.¹⁰⁶ This begs the larger question of whether it is possible to speak local truth to national power when there is no one local

100. Matthew Haag, *The Interior Secretary, and the Horse He Rode in On*, N.Y. TIMES, Mar. 3, 2017, <https://www.nytimes.com/2017/03/02/us/politics/secretary-ryan-zinke-horse-interior.html>.

101. Thomas Burr, *Effort to Shrink Bears Ears National Monument Started Before Donald Trump Was Elected President*, SALT LAKE TRIB. (Dec. 3, 2017), <https://www.sltrib.com/news/politics/2017/12/03/effort-to-shrink-bears-ears-national-monument-started-before-donald-trump-was-elected-president/>.

102. *Id.*

103. Hannah Nordhaus, *What Trump's Shrinking of National Monuments Actually Means*, NAT'L GEOGRAPHIC (Feb. 2, 2018), <https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/>.

104. Juliet Eilperin & Darryl Fears, *Interior Secretary Recommends Trump Alter at Least Three National Monuments, Including Bears Ears*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/08/24/interior-secretary-recommends-trump-alter-a-handful-of-national-monuments-but-declines-to-reveal-which-ones/?noredirect=on&utm_term=.196b191b44cf.

105. Brian Maffly, *A Majority of Utahns Favors Trimming Bears Ears, but Most Oppose Breaking Up Grand Staircase*, SALT LAKE TRIB. (Oct. 24, 2017), <https://www.sltrib.com/news/environment/2017/10/24/majority-of-utahns-favor-trimming-bears-ears-but-most-oppose-breaking-up-grand-staircase-poll-says/>.

106. Eilperin & Fears, *supra* note 104.

truth. If Utah residents could not agree on whether they supported the Monuments, it seems fruitless to examine how Utah residents would go about resurrecting them after President Trump's December 2017 Proclamations.

Yet, there is also more at stake in this Monument battle than just local values. There is also the Antiquities Act, congressional will, and the conservation legacies of multiple presidential administrations to consider, all of which are national, rather than local values.¹⁰⁷ The Antiquities Act authorizes presidents to proclaim national monuments to protect and preserve "objects of historic and scientific interest," including battle sites, dinosaur fossils, and sometimes, entire ecosystems.¹⁰⁸ The Monuments as originally established reflected the majoritarian values of the American citizenry, at least in the sense that they were implemented by two duly elected Presidents. Yet, the same could be said for President Trump's reductions.

So where does this leave us in determining whether Brooks' Principle applies in the west? The rights-based legal systems of the various western states reflect the western values of individualism and extraction of natural resources. Yet, these states also contain vast quantities of federal public land, which gives all Americans a voice in how they are used and managed. While potentially complicating matters further, perhaps that jurisdictional mixture actually simplifies some parts of the analysis.

For one, federalism is a powerful driving force in the west, as it is in Vermont. The Constitution allocates power over federal lands and federal property to the Congress, which has delegated some of this authority to the states.¹⁰⁹ However, for federalism to work, much of the authority must be reserved to the federal government, as it is under the Property Clause, which is reflected in the delegation to the executive in the Antiquities Act.

Brooks doesn't directly tackle the role of federalism in his Williams Lecture, but many of the frameworks he discusses arose out of the federalist structure governing environmental regulation in the United States.¹¹⁰ In a separate piece, Brooks discussed the origins of federalism and its role in American society.¹¹¹ Describing the work of the medieval political theorist, Johannes Althusius, who was "reputed to have invented" the notion of federalism, Brooks determined that Althusius's principle of consociation

107. See 54 U.S.C. § 320301(a) (2012) (enacting the Antiquities Act).

108. *Id.*

109. U.S. CONST. art. IV, § 3, cl. 2.

110. *Speaking Truth to Power*, *supra* note 1, at 888 (discussing litigation brought by two Vermont attorneys under the Clean Water Act, to enforce the state's water quality standards).

111. Richard O. Brooks, *Vermont Law School's Program for the Study of Global Civil Society*, 23 VT. L. REV. 699, 703-4 (1999).

was potentially a useful means of evaluating American and Canadian federalism.¹¹² Consociation allows for the simultaneous existence of different legal systems or different groups under a unified government structure, but with the latitude to maintain their separate identities, values, and principles or laws.¹¹³

Federalism, and particularly, the consociation of Althusius, may provide a source of resolving controversies like the ones arising from the Bears Ears proclamation and reduction, and for the west more generally. It is unlikely that there ever will be one type of westerner, with a consistent value set, or at least, not to the degree that exists in Vermont. Out west, there will always be progressives and conservatives, ranchers, environmentalists, skiers and mountain bikers, coal miners, power plant operators, anglers, wilderness fans, and fossil hunters. There will always be tribal governments and sovereign tribal nations, as varied as the cultures they represent, and controlling vast amounts of land and playing a role in the management of large public resources like rivers and lakes. There will always be county governments, state governments, and large federal landholdings managed by federal government officials. And the need for all of these factions to make decisions about environmental and natural resources issues will never abate. A system based on consociation would recognize the differing legal authority and value systems of each of the governments mentioned above, and perhaps allow for more mutually satisfactory environmental decisionmaking.

For one particularly controversy, that of the Utah Monument reductions, it is still an open question of whether Brooks' principle applies. As the litigation over Trump's Monument reductions marches on, the federal courts will decide whether his actions were constitutional, possibly considering whether they reflect the values of the American public and maybe even the tribal proponents of the Bears Ears Monument in particular.¹¹⁴ For the sake of both Monuments' ecosystems, historic resources and for American environmental protection more generally, hopefully the courts will answer the constitutional question in the negative. The same goes for the sacred cultural values that the Hopi, Navajo, Ute, and Zuni hold in the lands surrounding the Bears Ears buttes. For now, though as Brooks concludes in his Williams Lecture, perhaps the simple act of

112. *Id.* at 703.

113. *Id.*

114. Hillary M. Hoffmann, *Grand Staircase-Escalante and Bears Ears National Monuments Litigation*, ENVIRONMENTAL LAW PROFS BLOG (Dec. 5, 2017), http://lawprofessors.typepad.com/environmental_law/2017/12/grand-staircase-escalante-and-bears-ears-national-monuments-litigation.html.

bringing the litigation is, itself, speaking truth to power, regardless of the outcome.¹¹⁵

115. *Id.* (stating that the lawsuits challenging Trump's Monument reductions were filed by various groups, including a consortium of tribes, represented by the Native American Rights Fund, regional and national environmental groups, and scientific organizations).

PURSUING A GOOD LIFE IN THE LAW: PROFESSOR RICHARD BROOKS

Reed Loder

“How does one lead a good life in the law?”¹ This question pervaded the scholarly and teaching career of Richard Brooks, Professor Emeritus at Vermont Law School. Keeping the question alive is a huge challenge in the contemporary world of legal education, which tilts precipitously toward “pragmatic” concerns while training fewer students laboring under backbreaking debt, for scarcer and newly configured jobs. The challenge is to understand and remember why the question counts more than ever in these strained times.

Recently, some philosophers and social psychologists have rejected traits of character as explanations for personal behavior.² So-called “situationist” critics of character ethics have even denied the existence of character itself, citing psychological studies purporting to demonstrate that situational factors determine conduct.³ On this view, the features of one’s institutional or workplace environment dictate how one will behave, overriding tendencies often attributed to character, such as the propensity to take risks,⁴ to assist others in need,⁵ or even to perceive oneself as morally accountable for individual decisions.⁶ If this diminished view of personal agency is true, law students are entering a world of constrained autonomy, exacerbated by the lack of empowerment to select one’s work or workplace in a shrinking legal universe.

Professor Brooks’ personal identity ethics stand in stark contrast to the cramped view that our external constraints largely dictate what we do. The

1. Richard O. Brooks, *Ethical Legal Identity and Professional Responsibility*, 4 GEO. J. LEGAL ETHICS 317, 317 (1990) (stating the “fundamental question in legal ethics”).

2. John M. Doris, *Persons, Situations, and Virtue Ethics*, 32 NOÛS 504, 504-505 (1998).

3. *Id.* at 504, 506-507 (proposing “situationist” psychology as a more reliable explanation for human behavior than virtue approaches).

4. See, e.g., Kenneth D. MacKenzie, *An Analysis of Risky Shift Experiments*, 6 ORG. BEHAV. & HUM. PERF. 283, 283 (1971) (group dynamics enhancing risky behavior).

5. See, e.g., Russell D. Clark III & Larry E. Word, *Why Don’t Bystanders Help: Because of Ambiguity?* 24 J. PERSONALITY & SOC. PSYCHOL., 392, 393, 399 (1972) (showing that experimental subjects in groups were less likely than alone subjects to respond to an emergency in the next room).

6. ELIZABETH WOLGAST, *ETHICS OF AN ARTIFICIAL PERSON: LOST RESPONSIBILITY IN PROFESSIONS AND ORGANIZATIONS* 64-65, 143 (1992) (proposing that the sense of personal agency is necessary to avoid diffusion of responsibility).

sense of freedom that emerges in Professor Brook's writing perhaps underemphasizes well-documented research in social psychology, showing how circumstances shape people's decisions to obey authority,⁷ conform their beliefs to their peers,⁸ and lead them to accept collective risks they would never take on their own.⁹ In "Ethical Legal Identity and Professional Responsibility," Professor Brooks depicts multiple legal characters that he claims offer a "rich variety of choice."¹⁰ These characters include such familiar legal denizens as officer of the court, advocate, and problem solver, and some who are less obvious such as "reflective craftsman," social engineer, and "gentleperson."¹¹ Compounding the range of choices, lawyers can select their identities incrementally and in clusters.¹² The character notion of ethics conveys moral autonomy that is valuable to students facing some genuinely intractable aspects of the law and the profession. Better to aspire to become the kind of lawyer one hopes to be while crushed by debt and approaching a disempowering market than to succumb passively to perceived insurmountable forces.

Professor Brooks acknowledged student skepticism about ethics as reducible to "personal preference."¹³ He also noted that students reject the value of ethics unless offered visions with "moral appeal" that guide them through specific ethical and legal conflicts.¹⁴ Students will disregard theories "not clearly based upon any sympathetic ethical principles," no matter how analytically sound.¹⁵ He predicted that students ultimately would reject Renaissance humanism in favor of more inclusive attitudes toward the nonhuman world.¹⁶ Much in this prescient analysis motivates environmental students at Vermont Law School. Recent international developments inspire students. For example, Ecuador has included the

7. See JOHN SABINI & MAURY SILVER, *MORALITIES OF EVERYDAY LIFE*, 60-61, 64-65, 70 (1982) (discussing the famous Milgram experiments and difficulty subjects had in extracting themselves from the pattern of following orders).

8. *Id.* at 84-85 (describing the Asch experiments in which peer influence interfered with subjects' ability to make objective judgments about which line on paper was longer).

9. See Daryl J. Bem et al., *Group Decision Making Under Risk of Aversive Consequences*, 1 J. PERSONALITY & SOC. PSYCHOL. 453, 453, 458-59 (1965) (describing how group decision making enhances risky behavior).

10. Brooks, *supra* note 1, at 321.

11. *Id.* at 322.

12. *Id.* at 363-364.

13. Richard Brooks, *The Future of Ethical Humanism, The Re-Introduction of Ethics into the Legal World: Alan Gewirth's Reason and Morality*, 31 J. OF LEG. EDUC. 287, 288 (1981) [hereinafter *Humanism*] (exploring Gewirth's theory as offering "some basis for values other than personal preferences").

14. *Id.* at 289.

15. *Id.* at 302.

16. *Id.* at 304-305.

rights of Pacha Mama (Mother Earth) in its Constitution,¹⁷ and Bolivia has enacted similar legislation to protect the rights of nature.¹⁸ Students cheer the compact between the Commonwealth of New Zealand and the Maori (Iwi) people to bestow legal standing and specific personhood rights on the Whanganui River.¹⁹ Students are not naive about the challenges of such developments. They eagerly examine the confounding boundary and conflict of rights problems that these concepts pose. Yet nearly 50 years after Christopher Stone advocated granting legal standing to the environment,²⁰ some people – though not enough at home – are finally beginning to implement some ideas with “moral appeal”²¹ beyond an entirely human-centered, economic framework. These steps are heartening and exciting. Maybe it is possible, after all, to move beyond the “arrogance of humanism”²² in environmental law.

One bold illustration of the contemporary move away from narrow humanism is a growing international movement, variously identified as “Earth Jurisprudence,” “Ecological Law,” “Rights of Nature,” and “Earth Law.” Proponents of this perspective urge that laws be modified to reflect the ecological interdependency and interrelationship of everything in the universe.²³ For example, reformed property law would not place individual rights of ownership above the rights of other beings dependent on the land, including present and future humans, nonhumans, and natural processes. Property owners would have ecological responsibilities to refrain from degrading the land.²⁴ Land rights would be defined by features of the land itself and would vary among parcels.²⁵ The idea of conservation would be

17. REPUBLIC OF ECUADOR CONSTITUTION OF 2008, Oct. 20, 2008, arts. 71-74.

18. Frank Chávez, *Bolivia's Mother Earth Law Hard to Implement*, INTER PRESS SERVICE (May 19, 2014), <http://www.ipsnews.net/2014/05/bolivias-mother-earth-law-hard-to-implement/> (last visited Nov. 12, 2008) (discussing The Framework Law of Mother Earth and Integral Development for Living Well).

19. See general Christopher D. Stone, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects*, 45 S. CALIF. L. REV. 450-501 (1972) (explaining why nature should have standing).

20. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (2017/7) (N.Z.), <http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html>.

21. Brooks, *supra* note 13, at 289.

22. *Id.* at 304.

23. See, e.g., CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* 78, 112 (2nd ed. 2011) (arguing that human and earth jurisprudence are subordinate to natural systems that should regulate laws).

24. See, e.g., Eric Freyfogle, *Private Rights in Nature: Two Paradigms*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 270-278, 275 (Peter Burdon ed., 2011) [hereinafter *EXPLORING WILD LAW*] (describing land owner's limited ability to degrade their land).

25. *Id.* at 276.

“updated by ecological realities and clearly tied to a vision of responsible land use.”²⁶

The task of re-envisioning the law and its ethical foundations along such lines is formidable because of the weight of culture and legal precedent. Longstanding “western” belief separates humans from the rest of nature and treats humans as superior over the nonhuman world that exists for our uses.²⁷ At worst, this exploitative attitude has despoiled our planet and caused a “sixth mass extinction, according to lawyer Cormac Cullinan, Earth Jurisprudence advocate.²⁸ At best, humans anoint themselves as planetary managers who “can do things better than nature.”²⁹ Western law protects individual and corporate control over the environment, but fails to protect ecological interests and species directly when conflicts arise.³⁰ This dominant western legal vision is incompatible with a modern scientific worldview,³¹ perhaps summoning a new natural law theory that Professor Brooks deemed “largely out of fashion.”³² Quantum physics poses “webs of relationships interacting in a network fashion with other systems” with inseparable parts.³³ On this view, nature is systemically complex and structurally diverse but intertwined.³⁴ Yet environmental law remains largely compartmentalized into media (water, air, land). Combined with granting legal power over lands or places to a few humans and corporations, American environmental law violates the welfare of nature as an integrated whole.³⁵ According to Earth Jurisprudence founder and Catholic theologian Thomas Berry, all individual things reach their realization in the “Great Self” of the universe, which is the source of all value.³⁶ Thus, an appropriate ethic seeks mutual benefit and reciprocity in relationships, aiming to heal and restore damage to the earth.³⁷ I do not know whether, or to what extent, Professor Brooks might accept these ideas. Actually, I could imagine him rejecting them wholeheartedly just to invite a debate! Yet, I think he would agree that exploring them is one way of searching for a worthwhile and meaningful life in the law.

26. *Id.* at 278.

27. CULLINAN, *supra* note 23, at 44-46.

28. *Id.* at 35.

29. *Id.* at 52.

30. *Id.* at 63-64.

31. See PETER BURDON, *Eco-Centric Paradigm*, in *EXPLORING WILD LAW*, *supra* note 24, at 85-96, 88 (describing a modern worldview where networks and systems are central in modern biological and physical sciences).

32. Brooks, *supra* note 13, at 288.

33. BURDON, *supra* note 24, at 88.

34. *Id.* at 89.

35. CULLINAN, *supra* note 23, at 105.

36. THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* 190 (1999).

37. CULLINAN, *supra* note 23, at 116.

The promise of a “good life in the law” also motivates those studying Animal Law. Nothing could be more discouraging than law that brutalizes animals in agriculture, entertainment, research, wildlife conservation practices, and everyday cruelties. The immorality of this law has spiked with rapidly growing scientific knowledge about the cognitive and emotional lives of animals,³⁸ including invertebrates.³⁹ The students who pursue animal law strive to improve the existence of their fellow creatures step by tiny step, taking heart in paltry victories while stretching for pivotal moments. To them, “a good life in the law” is to reform the many laws that could be so much less painful for nonhumans. In my experience, those who persist are finding meaningful employment and are starting to make a difference.⁴⁰

Professor Brooks is particularly critical of the narrow approach to ethics in law schools, despite the post-Watergate outcry for ethics codes and courses teaching codes.⁴¹ Even the American Bar Association, which has promulgated the Model Rules of Professional Conduct, recognizes that “[t]he Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”⁴² Professor Brooks generally decried “the lack of ethical intellectual content in legal education,”⁴³ given the few courses grounding legal principles in “ethical systematic thought.”⁴⁴ Perhaps this is especially a problem in an environmental curriculum because the fundamental personal questions are ethical, such as: “How should I best live my life?” “What is my place in the universe?” “How

38. See, e.g., MARC BEKOFF & JANE GOODALL, *MINDING ANIMALS: AWARENESS, EMOTIONS AND HEART* 128-129 (2002) (discussing animal “theory of mind” or “cognitive empathy” and its neurological basis).

39. See, e.g., JENNIFER A. MATHER ET AL., *OCTOPUS: THE OCEAN’S INTELLIGENT INVERTEBRATE* 115 (2010) (discussing outdated view that octopus is merely tissue).

40. See, e.g., Vermont Law School, Alumni Spotlight: *Kara Shannon JD’15 Animal Defender*, <http://connect.vermontlaw.edu/news/alumni-spotlight-shannon> (last visited Nov. 12, 2018); Animal Legal Defense Fund, *2016 Advancement of Animal Law Scholarship Winners* (May 12, 2016), <http://aldf.org/article/advancement-of-animal-law-scholarships/2016-advancement-of-animal-law-scholarship-winners>; and Evans & Page, <http://evansandpage.com> (last visited Nov. 12, 2018) (Noting the post-graduate employment of several Animal Law students: Nicholas Malkovich worked with the Jane Goodall Institute writing papers on primate personhood; Kara Shannon works with the American Society for the Prevention of Cruelty to Animals (ASPCA) on humane agriculture and animal welfare; William Lowrey, a promising animal litigator, worked[?] for the Animal Legal Defense Fund; and Geneva Page, my student before Vermont Law School even had a course on animal law, has a full time private practice devoted exclusively to animal law. The list does not include the many students who have had animal law internships and externships during their years of study).

41. Brooks, *supra* note 13, at 287.

42. MODEL RULES OF PROF’L CONDUCT, Preamble and Scope (AM. BAR ASS’N 1983).

43. Brooks, *supra* note 13, at 287.

44. *Id.*

should I treat the nonhuman world?” When it comes to law and policy, the questions are obviously ethical: “What are the boundaries of public responsibility of a company that pollutes?” “Should an American corporation use practices in developing countries that are environmentally prohibited at home?” “Should developed countries most historically responsible for carbon emissions bear more global responsibilities going forward to mitigate climate change and promote adaptations?” These questions deserve more than passing mention from course to course. Rather, they deserve at least some systematic ethical treatment, informed by centuries of “ethical systematic thought.”⁴⁵ In 1948 Aldo Leopold wrote: “No important change in ethics was ever accomplished without an internal change in our intellectual emphasis, loyalties, affections, and convictions.”⁴⁶ A deeper approach to ethics across the curriculum would probably hearten Professor Brooks, no matter how much he might be tempted to take a contrarian position.

So let Vermont Law School embrace the broad questions that Professor Brooks asked throughout his career, not merely as a historical nod to an erstwhile “liberal arts approach” to law school. Of course, bar exams, jobs, and mundane practice skills play a central role in contemporary legal education, and legal educators would be remiss not to emphasize them. The danger is to become so submerged in these most “pragmatic” pursuits that one overlooks the practical and motivating value of integrating these skills with a broader and more reflective approach. As Professor Brooks reminds us, the ultimate pragmatist John Dewey “urged that a truly liberal education will refuse to isolate vocational training from education.”⁴⁷ We can best serve our students with a reflective approach to the law that will simultaneously sharpen their thinking and prepare them for successful careers. Keep the approach of Professor Richard Brooks alive because a good life in the law is more important than ever.

45. *Id.*

46. ALDO LEOPOLD, *THE LAND ETHIC* 237, 241 (Louis P. Pojman et al. eds., 7th ed. 2017).

47. Richard O. Brooks, *Undergraduate Legal Education as a Vehicle for Liberal Education*, 72 *LIBERAL EDUC.* 361, 366 (1986) (writing on undergraduate legal studies programs with liberal arts emphasis).

GREEN JUSTICE REVISITED: DICK BROOKS ON THE LAWS OF NATURE AND THE NATURE OF LAW

Patrick Parenteau

In *Green Justice: The Environment and the Courts*, first published in 1987 and updated in 1996, Richard Oliver (Dick) Brooks and his longtime collaborator Thomas More Hoban set out to explore the interrelationship between the legal system and the environment.¹ The authors use key environmental law cases on topics as population, the public trust doctrine (PTD), biodiversity conservation, and sustainability. *Green Justice*, for undergraduate and non-law graduate courses in environmental law and policy, as well as public administration and planning, traces the origins and foundational principles of environmental law. These principles are drawn from our English common law heritage and overlain by an elaborate architecture of statutory and regulatory laws at every level of government. The authors undertook the ambitious task of explaining the American legal system, the nature of environmental regulation, theories of jurisprudence, and principles of ecology, all in 219 pages.

Some might say the authors bit off more than they could chew. But the book has proven prescient in identifying a number of issues that have become the hot button issues of today. These issues include: global warming, species extinction, access to justice, constitutional rights to a healthy environment, and recognition of the “rights of nature.” The book also highlights a resurgence of common law remedies such as public nuisance to look at the failure of the other branches of government to address the most pressing threats to public health and safety.

Brooks and Hoban chose to focus on a period they dubbed “the environmental decades” between 1970 and 1990. They selected 14 case studies with precedential judicial decisions to illustrate the major features of environmental litigation, as well as the role of the courts in adjudicating disputes and determining rights and responsibilities.² A lot has happened since these cases were decided. In this essay I will pick out a few of the more interesting developments in the law and offer some observations on where things might be headed.

1. THOMAS M. HOBAN & RICHARD O. BROOKS, *GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS* 16 (2d ed. 1996).

2. *Id.*

From Endangered Species Protection to the Rights of Nature

In *Green Justice*, Brooks and Hoban picked the *Palila* case³ to illustrate how litigation could be brought in the name of an endangered species to challenge governmental action that threatened to eradicate its habitat. The case involved a small, finch-like bird living in the montane forests of Hawaii. The bird's habitat was rapidly disappearing as a result of the introduction, by the Hawaii Department of Natural Resources, of two exotic species of wild sheep and goats highly prized by sport hunters.⁴ The issue was whether the destruction of the bird's habitat by the exotics constituted a "take" in violation of the Endangered Species Act (ESA).⁵ The Ninth Circuit Court of Appeals held it was a "take" and ordered the state agency to remove the offending animals and allow the habitat to recover.⁶ Today, the *Palila* clings to life in a tiny patch of habitat on the upper slopes of Mauna Kea Volcano on the Big Island.⁷

It is widely recognized that the ESA's species by species approach to conservation is inadequate and inefficient—too little, too late. Ecosystem based approaches that seek to reconnect fragmented habitats and overcome the patchwork management regimes created by political boundaries are the preferred methodology. But even that approach may not be enough to slow the accelerating mass extinction of plants and animals worldwide.⁸ Wildlife advocates have long argued for a broader concept of conservation, recognizing that nature itself ought to have enforceable rights.⁹

3. *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988). The court initially said that the "*palila* has legal status and wings its way into federal court as a plaintiff in its own right." *Id.* at 1107. In a subsequent case the Ninth Circuit clarified its holding that cases could be brought in the name of the species provided there was also a human plaintiff with standing to bring the case as "next friend[.]" *see Cetacean Community v. Bush*, 386 F.3d 1169, 1173-74 (9th Cir. 2004).

4. *Id.* at 1107.

5. *Palila*, *supra* note 4, at 1108 ("The Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved'...") (citing Endangered Species Act, 16 U.S.C. § 1531(b)).

6. *Id.* at 1110.

7. *Palila*, American Bird Conservancy, <https://abcbirds.org/bird/palila/> (last visited Mar. 1, 2019).

8. *See* EDWARD O. WILSON, *HALF EARTH: OUR PLANET'S FIGHT FOR LIFE* 54 (2016) (applying the significance of mass extinction of living things globally).

9. *See* RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 4 (1989) (arguing that morality should include the relationship between humans and nature and that ethics should expand from not only the preoccupation with humans and their Gods, but also animals, plants, rocks, and nature); *see* CORMAC CULLINAN, *WILD LAW: A MANIFESTO*

What has come to be known as the rights of nature movement is gaining ground in courts and international tribunals around the world.¹⁰ In Ecuador, in a case brought on behalf of the Vilcabamba River,¹¹ the Provincial Court of Loja handed down a path-breaking decision interpreting the Ecuadorian Constitution.¹² The Court held that the Constitution requires the Provincial Government to redo a road-widening project that was damaging the river and to apologize for not undertaking more detailed studies of the projects potential harm.¹³ Also, New Zealand's Parliament passed the Te Awa Tupua Act, giving the Whanganui River and ecosystem legal standing in its own right to guarantee its "health and well-being."¹⁴

In Bolivia, in response to the impacts of climate change on the nation's economic and community health, the National Congress enacted "The Law of Mother Earth." The purpose of the law is to protect the natural world—its resources, sustainability, and value—as essential to the common good and well-being of its citizens.¹⁵

FOR EARTH JUSTICE 101 (2d ed. 2011) (quoting THOMAS BERRY, EVENING THOUGHTS: REFLECTING ON EARTH AS A SACRED COMMUNITY 149 (2006)) ("Every component of the Earth Community has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing process of the Earth Community."); see CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT 3 (3d ed. 2010) (reiterating the author's original thesis that "we give legal rights to forests, oceans, rivers, and other so called 'natural objects' in the environment—indeed, to the natural environment as a whole."); see DAVID R. BOYD, THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD XXXV (2017) (arguing that protecting Earth's life-support systems requires a new set of rights for non-human animals, other species, and ecosystems).

10. See COUNCIL OF CANADIANS, THE RIGHTS OF NATURE: THE CASE FOR A UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH (2011) (discussing the movement to recognize the Rights of Nature following the 2010 World People's Conference in Bolivia); see *Our Mission*, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, <http://therightsofnature.org/fundamental-principles/> (last visited Mar. 2, 2019) ([The Alliance] is a network of organizations and individuals committed to the universal adoption and implementation of legal systems that recognize, respect and enforce "Rights of Nature[.]"); see *Champion The Rights of Nature*, COMMUNITY ENVTL. LEGAL DEF. FUND (Aug. 4, 2015), <https://celdf.org/rights/rights-of-nature/> (discussing the work in advocating for Rights of Mother Earth in courts and international tribunals).

11. See *id.* (explaining how the case was brought by an American couple, Richard Frederick Wheeler and Eleanor Geer Huddle, who own property on the Vilcabamba River).

12. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR DE 2008, [CONSTITUTION] title 2, chap. 7, art. 7, translated in Georgetown University Political Database of the Americas, pdba.georgetown.edu/Constitutions/Ecuador/english08.html (stating that nature "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.").

13. Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE <http://therightsofnature.org/first-ron-case-ecuador/> (last visited Mar. 2, 2019).

14. Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016, pt. 2, cls 12–14 (N.Z.). The legislation settled a centuries old lawsuit brought by the Wanganui iwi in the name of the river. The law entrusts custodianship of the river to the Wanganui iwi and the government and sets up an elaborate management structure.

15. Peter Neil, *Law of Mother Earth: A Vision From Bolivia* HUFFINGTON POST (Jan. 18, 2015), https://www.huffingtonpost.com/peter-neill/law-of-mother-earth-a-vis_b_6180446.html.

In Colombia, the Constitutional Court declared that the heavily polluted Atrato River is “a living entity, subject to rights related to protection, conservation, maintenance and restoration at the hands of the state and the indigenous communities . . .”¹⁶ Later, in a case brought by 25 youth plaintiffs, the Supreme Court of Colombia, in a more sweeping decision, ruled that the “Colombian Amazon is recognized as an entity, a subject of rights” including the right to “legal protection, preservation, maintenance and restoration.”¹⁷

The United States (U.S.) courts have yet to embrace the rights of nature doctrine.¹⁸ A case brought in the name of the Colorado River against the State of Colorado was quickly withdrawn after the plaintiffs were threatened with sanctions under Rule 11 of the Federal Rules of Civil Procedure for bringing a “frivolous” case.¹⁹ That may have been a prudent move. In January 2018, a federal judge in Pennsylvania ordered Thomas Linzey, co-founder of the Community Environmental Legal Defense Fund (CELDF), and a colleague to pay \$52,000 in legal fees incurred by a company that wanted to install a fracking waste injection well in Grant Township.²⁰ The Township had adopted an ordinance drafted by CELDF banning such wells. Magistrate Judge, Susan Baxter, accused Linzey of using a “frivolous” legal argument, i.e. the right to local self-government and the rights of nature, including “rivers, streams, and aquifers,” to “exist, flourish, and naturally evolve,” to defend the ordinance.²¹ The judge

16. World Conscious Pact, *The Constitutional Court Recognizes the Atrato River as a Subject of Rights* (Sep. 8, 2017) <https://worldconsciouspact.org/news/the-constitutional-court-recognizes-the-atrato-river-as-subject-of-rights/>.

17. *Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court’s Decision*, DEJUSTICIA (April 4, 2018), <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/> (“[T]he fundamental rights of life, health, liberty, and human dignity are determined by the environment and ecosystems. Without a clean environment, the plaintiffs and human beings, in general, can’t survive, much less protect those rights for the children or future generations.”).

18. See generally Hope M. Babcock, *A Brook With Legal Rights: The Rights of Nature in Court*, 43 *ECOLOGY L. Q.* 1,11,13–14 (2016) (discussing the Court’s rejection of the Rights of Nature to have standing in Court).

19. Lindsay Fendt, *Colorado River ‘personhood’ case pulled by proponents*, ASPEN JOURNALISM (Dec. 5, 2017), <https://www.aspenjournalism.org/2017/12/05/colorado-river-personhood-case-pulled-by-proponents/>; See generally FED.R.CIV.P. 11 (discussing representations to the court and sanctions against lawyers who violate Rule 11).

20. Grant Township Supervisors, *Grant Township, PA: Sanctions Against Our Lawyers ‘Badge of Courage,’* COMMUNITY ENVTL. LEGAL DEFENSE FUND (Jan. 12, 2018), <http://celdf.org/2018/01/grant-township-pa-sanctions-lawyers-badge-courage/>.

21. Seth Whitehead, *Judge Reprimands CELDF Lawyers for ‘Bad Faith’ Efforts to Ban Pa. Wastewater Well*, MOUNTAIN STATES (Jan. 09, 2018), <https://www.energyindepth.org/judge-reprimands-celdf-lawyers-for-bad-faith-efforts-to-ban-pa-wastewater-well/> (“An attorney’s zealous advocacy for the protection of a client’s interests is certainly appropriate; however, the legitimate pursuit of justice imposes important obligations on counsel to ensure that the Court is not a mechanism of harassment or unbridled obstruction. The continued pursuit of frivolous claims and defenses, despite

excoriated Linzey for pressing arguments that had been rejected numerous times in previous cases that Linzey was involved.²² The decision is sure to have a chilling effect on lawyers' thinking of bringing novel rights of nature claims.

Critics argue the rights of nature concept proves too much and asserts a claim to higher morality that ignores practical and political reality of allocating scarce resources needed to support a global population approaching 9 billion.²³ But it also has the support of prominent environmental law scholars like Tulane law professor, Oliver Houck, who has written a deeply personal, but also intellectually rigorous critique of the concept.²⁴ Houck poses the essential question whether the rights of nature is just an abstract idea or whether it is law to apply. Here is his answer:

Nature and natural things can be recognized as a party in interest, if and as we say so, which would by itself add an element of candor to many proceedings and help to balance the scales. Nor is there a problem of practicability; lawyers represent nonhuman interests every day, including corporations that we have simply declared to be persons. As for more substantive rights, why not those too if their principles can be reasonably determined? Similar rights for selected species and ecosystems already exist.²⁵

Professor Houck acknowledges the “stiff challenges in science and ethics” that await the actual implementation of the rights of nature.²⁶ But after noting the failure of conventional environmental law to arrest the massive ecological degradation taking place across the globe—deforestation, wetlands loss, mass extinction, coral bleaching, ocean acidification, melting ice sheets and glaciers, etc.—he ends with a plea to recognize that the “Rights of nature tap into a place that anthropomorphism

[attorney] Linzey's first-hand knowledge of their insufficiency, and the refusal to retract each upon reasonable request, substantially and inappropriately prolonged this litigation, and required the Court and PGE to expend significant time and resources eliminating these baseless claims.”).

22. Dave Hasemeyer, *Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today*, INSIDE CLIMATE NEWS (May 9, 2018),

<https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general> (“This Court determined that Attorneys Linzey and Dunne have pursued certain claims and defenses in bad faith. Based upon prior CELDF litigation, each was on notice of the legal implausibility of the arguments previously advanced.”).

23. James L. Huffman, *Do Species and Nature Have Rights?* 13, PUB. LAND L. REV. 51 (1992); Daniel Worster, *The Rights of Nature: Has Deep Ecology Gone Too Far?* FOREIGN AFFAIRS, November/December, 1995 (Magazine), at 111.

24. Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, 31 TUL. ENVTL. L.J. 1, 44 (2017).

25. *Id.* at 44.

26. See Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, 31 TUL. ENVTL. L.J. 1, 44 (2017) (identifying the challenges that apply to nothing of “the colossus of climate change”).

and its pragmatism, for all its importance, cannot touch: A powerful link to the human heart.”²⁷

From the Shores to the Atmosphere: The Elusive Promise of the Public Trust Doctrine

Brooks and Hoban chose the iconic Mono Lake case²⁸ for their discussion of the Public Trust Doctrine (PTD) as a force for nature preservation. Mono Lake, the second largest lake in California, is situated to the east of Yosemite National Park at the base of the steep eastern escarpment of the Sierra Nevada.²⁹ The lake sits in an ancient caldera that traps all of the snowmelt and rainfall. Mono Lake, a desert lake, has an unusually productive ecosystem based on brine shrimp that thrive in its waters.³⁰ The brine shrimp ecosystem provides critical nesting habitat for two million migratory birds that feed on the shrimp.³¹ The lake also has provided boating, commercial brine shrimp harvesting, and is a major tourist attraction.³² The threat to public trust values at Mono Lake arises because in most years four of the lake's five freshwater tributaries are entirely diverted to meet the municipal and industrial needs of the City of Los Angeles (LA).³³ LA's unquenchable thirst for water previously led to the dewatering of the Owens Valley as depicted in the movie *Chinatown*.³⁴

In its landmark *Mono Lake* decision, the Supreme Court of California ruled that water rights are subject to limitations protecting the public trust in navigable waters.³⁵ The Court held that the state, under the PTD, had a continuing responsibility for the state's navigable waters and that the PTD

27. *Id.* at 50.

28. *Nat'l Audubon Soc'y v. Super. Ct. of Alpine City*, 658 P.2d 709, 711 (Cal. 1983) [hereinafter *Mono Lake*].

29. *Visit Mono Lake*, MONO LAKE COMMITTEE, <https://www.monolake.org/visit/> (last visited Mar. 2, 2019).

30. *About Mono Lake*, MONO LAKE COMMITTEE, <https://www.monolake.org/about/stats> (last visited Mar. 2, 2019).

31. *See Mono Lake Committee, About Mono Lake*, <https://www.monolake.org/about/stats> (last visited Mar. 2, 2019) (reporting the population numbers of specific birds at Mono Lake).

32. Mono Lake Committee, *Restoration*, <https://www.monolake.org/mlc/restoration> (last visited Mar. 2, 2019); *see also* Mono Lake Committee, *Science*, <https://www.monolake.org/mlc/science> (last visited Mar. 2, 2019).

33. *Historic Mono Basin Agreement to Settle Decades of Fighting Over Mono Lake Water*, CALIFORNIA TROUT INC. (Aug. 27, 2013), <https://caltrout.org/2013/08/historic-mono-basin-agreement-to-settle-decades-of-fighting-over-mono-lake-water/>.

34. *See* Louis Sahagun, *L.A. took their water and land a century ago. Now the Owens Valley is fighting back*, L.A. Times (July 13, 2017), <http://www.latimes.com/local/california/la-me-owens-valley-eminent-domain-20170712-story.html> (discussing the history of Owens Valley water rights, and efforts by Los Angeles officials to appropriate water for city use).

35. *Mono Lake*, 658 P.2d at 719.

prevented any party from appropriating water in a manner that harmed the public trust interests.³⁶ The Court said the state as a sovereign has the authority and the duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands."³⁷ This ruling established that the PTD and appropriative water rights are "part of an integrated system of water law."³⁸ Both must be considered when determining appropriate use of water in California.³⁹ The *Mono Lake* decision is regarded as a classic in the annals of environmental and natural resources law.⁴⁰ However, some commentators have questioned how much impact the decision has had on the development of water law in California and elsewhere.⁴¹ Nevertheless, the decision is credited with saving Mono Lake from almost certain ecological collapse. On the 20th anniversary of the decision, respected water law scholar, Professor Emeritus Hap Dunning wrote that but for the decision: "The lake's surface area would be 30% smaller in size. But ecologically things would be far worse than that: salinity would be up by 60%, pushing the unique Mono Lake ecosystem into collapse."⁴²

Fast forward and the PTD is now at the center of what has been dubbed "the trial of the century."⁴³ The case, *Juliana v. United States*,⁴⁴ involves a novel claim filed by 21 youth plaintiffs asserting a constitutional right to a stable climate and a livable planet.⁴⁵ The case asserts that the atmosphere is a public trust resource and that the government has a fiduciary obligation to protect it from the effects of carbon pollution.⁴⁶ According to plaintiffs, the government has for many decades ignored the growing body of science

36. *Id.* at 732.

37. *Id.* at 724.

38. *Nat. Audubon Soc. v. Super. Ct. of Alpine City*, 658 P.2d 709,732 (Cal.1983) *modified*, (Apr.14, 1983).

39. *Mono Lake*, 658 P.2d at 732.

40. *See, e.g.* Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1101 (2012) (discussing the importance of the Mono Lake Case in western water law).

41. Hasemeyer, *supra* note 22 ("This Court determined that Attorneys Linzey and Dunne have pursued certain claims and defenses in bad faith. Based upon prior CELDF litigation, each was on notice of the legal implausibility of the arguments previously advanced.").

42. Hap Dunning, *On saving Mono Lake, 20 years later*, MONO LAKE NEWS LETTER 3, Winter and Spring 2014, <http://monolake.org/today/wp-content/uploads/2014/11/On-saving-Mono-Lake-20-years-later-by-Hap-Dunning.pdf>.

43. *See* Chelsea Harvey, WASH. POST, *Trump Could Face the 'Biggest Trial of the Century' - Over Climate Change* (Dec. 1, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/01/trump-could-face-the-biggest-trial-of-the-century-over-climate-change/?noredirect=on&utm_term=.1415a526d550 (discussing the *Our Children's Trust* case relying on the public trust doctrine for part of its legal claim).

44. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1224 (D. Or. 2016).

45. *Id.*

46. *See id.* at 1233,1274 (stating the United States government knew about fossil fuels negatively affecting climate and the government has a sovereign interest over the atmosphere).

warning of catastrophic effects of climate change. Also, plaintiffs argue the government has either failed to take meaningful action to regulate and reduce Greenhouse Gas (GHG) emissions or made matters worse by subsidizing fossil fuels; promoting production of oil, gas, and coal from public lands and waters; and licensing construction of pipelines, terminals, railroads, and other fossil fuel infrastructure.⁴⁷ The plaintiffs further argue the government's actions or inactions have violated their constitutional rights to life, liberty, and property as protected under the Fifth Amendment to the US Constitution.⁴⁸

Environmental lawyers and scholars view with skepticism these claims of a constitutional right to a stable or "safe" climate grounded on a theory of a substantive federal public trust obligation.⁴⁹ Indeed, the first attempt to make a Constitutional claim failed to make it past a motion to dismiss.⁵⁰ But the youth plaintiffs in *Juliana* found a more receptive forum in the Federal District Court of Oregon. On November 10, 2016, Judge Ann Aiken issued a blockbuster opinion denying the government's motion to dismiss.⁵¹ Recognizing the novel and perhaps historic nature of the case Judge Aiken said, "This action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions—whether or not they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty."⁵²

Judge Aiken then set about to address each of the arguments advanced by the government challenging the court's jurisdiction to hear the case. First, the court rejected the "political question" argument the case presented, which created an issue of separation of powers.⁵³ Rather, the plaintiffs were seeking a declaration of their rights under the Constitution, which has been a core function of the courts since *Marbury v. Madison*.⁵⁴ Then, the court's disposal of standing was not a problem at this stage of the case because the plaintiffs had alleged facts that if proven would establish injuries that were "concrete, particularized and actual or imminent"; that

47. *Id.* at 1263.

48. *Id.* at 1241.

49. See Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 NW. ENVTL. L. 561, 620 (2015) (arguing that environmental protections should not be controlled by federal agencies).

50. Alec L. v. Jackson, 863 F. Supp. 2d 11, 13 (D.D.C. 2012); *aff'd per curiam sub nom.*, Alec L. v. McCarthy, 561 Fed. Appx. 7 (D.C. Cir. 2012), cert. denied, 135 S. Ct. 774 (2014) (mem.).

51. *Juliana*, 217 F. Supp.3d at 1225.

52. *Id.* at 1261.

53. *Id.* at 1241.

54. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is.").

were “fairly traceable” to the actions and inactions of defendants; and that were redressable by the relief sought.⁵⁵ In terms of potential remedies, Judge Aiken noted the limits of judicial authority to order the government to adopt specific policies. But Judge Akins said issuing a declaratory judgment clarifying the rights and responsibilities of the parties and requiring the government to develop a plan to deal with the threat of runaway climate change would constitute meaningful relief.⁵⁶

Turning to the substantive issues, Judge Aiken first determined that the plaintiffs properly alleged a violation of their “fundamental rights” under the Due Process Clause of the Fifth Amendment:

[T]his Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation[.]⁵⁷

Judge Aiken then found the plaintiffs had adequately alleged the government had knowingly created a danger to public health and safety, thereby triggering an affirmative duty under the Constitution to take action to ameliorate the threat.⁵⁸ Judge Aiken summed up the due process portion of her opinion by stating, “Exercising my ‘reasoned judgment,’ I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”⁵⁹

Judge Aiken then turned her attention to the PTD. Though plaintiffs alleged the atmosphere itself was a public trust resource, the Court chose to focus on the effects of carbon pollution on the oceans and coastal resources.⁶⁰ Further, Judge Aiken noted a long line of Supreme Court cases recognizing the plenary power of the federal government over submerged tidal lands. She concluded: “Because a number of plaintiffs' injuries relate

55. Juliana, 217 F. Supp.3d at 1244.

56. *Id.* at 1247 (“If plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet's greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO₂ and slow climate change, then plaintiffs' requested relief would redress their injuries.”).

57. *Id.* at 1250.

58. *Id.* at 1251–52 (“[D]efendants played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change; and that the Due Process Clause therefore imposes a special duty on defendant[.]”).

59. *Id.* at 1250 (citation omitted).

60. *Id.* at 1256.

to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets.”⁶¹ She then addressed the question whether the PTD applies to the federal government or only to the states.⁶² This issue turns on the meaning of some ambiguous language in the Supreme Court’s decision in *PPL Montana, LLC v. Montana*.⁶³ The case involved a question of ownership of the beds of three rivers in Montana under the equal footing doctrine.⁶⁴ Montana argued that the rivers were navigable under state law and that denying the state title to the riverbeds in dispute would “undermine the public trust doctrine.”⁶⁵ The Court disagreed, holding that navigability had to be determined under federal law.⁶⁶ In the course of explaining its decision, the Court said that “unlike the equal-footing doctrine, . . . which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law. . . .”⁶⁷ The Court further noted that “under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”⁶⁸

To Judge Aiken, this language was mere dicta and did not constitute a holding that the PTD was exclusively a state law doctrine:

The Court was simply stating that federal law, not state law, determined whether Montana has title to the riverbeds, and that if Montana had title, state law would define the scope of Montana’s public trust obligations. PPL Montana said nothing at all about the viability of federal public trust claims with respect to federally-owned trust assets.⁶⁹

Judge Aiken also rejected the alternative argument that even if the PTD applied to the federal government it has been displaced by the enactment of

61. *Id.* (citation omitted).

62. *Id.* at 1256 (articulating that the public trust doctrine does not have to only apply to states).

63. *See P.P.L. Montana, LLC., v. Montana*, 565 U.S. 576, 593 (2012) (holding that the trial court must acknowledge if the rivers were navigable under the equal footing doctrine).

64. *PPL Montana, LLC*, 565 U.S. at 581.

65. *Id.* at 603.

66. *Id.* at 589–90.

67. *Id.* at 603.

68. *Id.* at 604.

69. *Juliana*, 217 F. Supp.3d at 1257.

the Clean Water Act and the Clean Air Act.⁷⁰ This argument rests on the decision in *American Electric Power Company, Inc. v. Connecticut*.⁷¹ Here, the Supreme Court held that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”⁷² Judge Aiken rejected the conclusion of the District Court in the *Alec L*⁷³ case saying that this holding meant that any claim based on a federal PTD theory had also been displaced. After noting that the *American Electric Power* Court “did not have public trust claims before it and so it had no cause to consider the differences between public trust claims and other types of claims,” Judge Aiken observed that public trust claims are unique because they “concern attributes of sovereignty.”⁷⁴ She elaborated: “The public trust imposes on the government an obligation to protect the rest of the trust. A defining feature of that obligation is that it cannot be legislated away. Because of the nature of public trust claims, a displacement analysis simply does not apply.”⁷⁵

Having found that the Supreme Court had neither disowned nor displaced the PTD as a feature of federal law, Judge Aiken concluded that “plaintiffs’ public trust rights both predated the Constitution and are secured by it” through the substantive due process guarantees of the Fifth Amendment.⁷⁶ She capped her remarkable opinion with a pointed critique of the judicial timidity in the face of an existential environmental threat: “Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”⁷⁷

The trial of the century is now set to begin on October 29, 2018 in Eugene, Oregon.⁷⁸ It promises to be quite a show. In many ways it will be the Trump administration’s anti-science, anti-regulatory policies on trial. In *Green Justice*, Brooks and Hoban argued strongly against portraying

70. See *id.* at 1260 (“Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the rest of the trust.”).

71. *Id.* at 1259; see *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (holding a nuisance claim does not proceed because “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emission from fossil-fuel fired power plants.”).

72. *Am. Elec. Power Co.*, 564 U.S. at 424.

73. *Juliana*, 217 F. Supp.3d. at 1224.

74. *Id.* at 1260.

75. *Id.*

76. *Id.*

77. *Id.* at 1262

78. See *United States v. U.S. Dist. Court for the Dist. of Oregon*, 884 F.3d 830, 833 (9th Cir. 2018) (denying the Trump administration’s attempt to block the trial through a writ of mandamus was rejected by the Ninth Circuit).

environmental issues as good vs. evil.⁷⁹ But in this case it is hard to see it any other way. It may be an exaggeration to say the fate of the world hangs in the balance, but not by much.

The Common Law Meets the Anthropocene

The roots of modern U.S. environmental law lie in the common law inherited from England. In *Green Justice*, Brooks and Hoban chose the iconic *Boomer v. Atlantic Cement Co.*⁸⁰ case to illustrate how the common law of nuisance is used to address conflicts between property owners over polluting activities.⁸¹ The case is familiar to every first-year student and shows up in the texts for torts, property, and civil procedure. The facts are straightforward. Defendant operated a large cement plant near Albany, New York.⁸² The plaintiffs were neighboring property owners who lived there when the plant was built. The plaintiffs filed suit seeking an injunction and damages for injury to property from smoke, dirt, and vibrations.⁸³ The trial court found a nuisance but declined to issue an injunction citing the social utility of a plant that employed more than 300 people, as well as the lack of any readily available pollution control technologies that would eliminate the nuisance conditions.⁸⁴ The Court of Appeals agreed a permanent injunction resulting in closure of the plant was an unnecessarily harsh remedy. Instead, opted for awarding permanent damages based on the actual economic losses suffered by the plaintiffs.⁸⁵ The damage award would be a one-time payment that would in effect impose a servitude on the neighbor's property that would run with the land and bind future owners.⁸⁶ The Court of Appeals considered, but rejected as too speculative, the option of enjoining the operation for a period of time to see if abatement technologies could be developed.⁸⁷ Instead, the Court found the payment of permanent damages to be the fairest resolution of the dispute between the parties:

79. See THOMAS M. HOBAN & RICHARD O. BROOKS, *supra* note 1 at 219 (“[W]e must remember that if no one’s motives are pure, no one’s motives are totally corrupt either. The enemy is us, after all, and now we must determine some way to set matters right.”).

80. *Boomer v. Atl. Cement Co.*, 257 N.E. 2d, 870, 871 (1970).

81. *Id.* at 873.

82. *Id.* at 871.

83. *Id.*

84. *Id.* at 870.

85. *Id.* at 875.

86. *Id.* at 873.

87. *Id.* (“One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance.”).

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.⁸⁸

Boomer involved a private nuisance claim.⁸⁹ The common law also recognizes claims for public nuisance.⁹⁰ The exact contours of the public nuisance doctrine are unclear, hotly disputed, and vary from state to state.⁹¹ Tobacco, lead paint, the gasoline additive MTBE (Methyl tert-butyl ether), the industrial solvent PCE (Perchloroethylene), and other substances have all been the target of public nuisance lawsuits: some successful others not.⁹² The immediate question is whether, and under what circumstances producers and marketers of fossil fuels can be held liable under a public nuisance theory for causing or contributing to the damages from climate change. A wave of lawsuits has been filed by cities and counties across the country seeking compensation from oil and other fossil fuel producers for the costs of dealing with the consequences of global warming.⁹³ The first cases were filed in California by the Counties of San Mateo and Santa Cruz,⁹⁴ followed by a separate suit initiated by the Cities of San Francisco and Oakland.⁹⁵ The defendants include the major oil companies such as Chevron, Exxon Mobil, Shell, and BP.⁹⁶ These corporations have been dubbed the “carbon majors” by virtue of their outsized contributions of CO₂ and other greenhouse gases to the atmosphere and the resulting damages from sea level rise, storm surge and other calamities traceable to human caused emissions.⁹⁷ These cases were initially removed to the U.S. District

88. *Id.*

89. *See* RESTATEMENT (SECOND) OF TORTS § 821D (1979).

90. *Id.* at § 821B (“A public nuisance is an unreasonable interference with a right common to the general public.”).

91. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 889 n.664 (2001).

92. *See, e.g., Is the Public Nuisance Universe Expanding?*, BLOOMBERG NEWS (Jan. 31, 2017), <https://www.bna.com/public-nuisance-universe-n57982083122/>.

93. Hasemeyer, *supra* note 22.

94. *See Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 934 (N.D. Cal. 2018) (showing that counties and cities brought actions against oil and gas companies).

95. *See generally* Complaint *People of State of California v. Chevron Corp.*, (Cal. App. Dep’t Super. Ct. 2017) (No. 17-561370) (asserting claims in a complaint of nuisances under state law).

96. *Id.* at 1.

97. *See* Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 *CLIMATIC CHANGE*, 229–41 (2014 (cumulatively, ‘carbon major’ companies are the biggest contributors of “climate destabilization”)).

Court for the Northern District of California.⁹⁸ In the San Francisco cases, Judge William Alsup denied the cities' motion to remand to state court ruling that federal common law had not been entirely displaced by the Supreme Court's decision in AEP.⁹⁹ Common law was therefore controlling on the question whether the producers as opposed to the emitters of fossil fuels were liable.¹⁰⁰ However, in the San Mateo cases, Judge Vince Chhabria, sitting in the same courthouse as Judge Alsup, reached the opposite conclusion. He ruled that federal common law had been displaced and remanding the cases to the Superior Court of San Mateo.¹⁰¹

Aside from the jurisdictional squabbles, the central objection raised by the oil companies is that public nuisance is not an appropriate remedy for the global phenomenon of climate change.¹⁰² They challenge the scientific and legal basis for the claims arguing that courts have no business inserting themselves into what is essentially a political question.¹⁰³ They argue the legislature should balance the need to provide reliable sources of electricity and transportation fuels with the need to address the growing problem of climate change.¹⁰⁴

For the following reasons, I think the cases have merit. While the outcome is far from certain, the time may be right for the courts to hold these companies accountable for the foreseeable consequences of their actions and inaction that have contributed to the dangerous situation we find ourselves in today.

First, the latest scientific evidence underlying the public nuisance claims in these cases is rock-solid.¹⁰⁵ The claims are based on the well documented and highly visible impacts of sea level rise, coastal erosion,

98. See *Boomer*, 257 N.Y.2d at 871–74 (affirming that here, private actors caused a permanent damage).

99. See Complaint *City of Oakland v. Chevron Corp.*, (Cal. App. Dep't Super. Ct. 2017) (No. 17-06011) (granting a motion to dismiss on the amended complaints).

100. See *The People of the State of California v. BP P.L.C. et al.*, (N.D. Cal. Feb. 27, 2017) (No. 3:17-cv-06012) (discussing how in May, Judge Alsup heard arguments on defendants' motions to dismiss the case).

101. *City of San Mateo*, 294 F. Supp.3d at 938–39.

102. See Notice of Removal at 2, *California v. BP P.L.C.* (Cal. Super. Ct. S.F. Cty., Sep. 19, 2017), (No. CGC-17-561370) (arguing that public nuisance law does not apply to GHG emissions) available at https://imgquery.sftc.org/Shal_newApp/ViewPDF.aspx (last visited Mar. 2, 2019).

103. Hasemeyer, *supra* note 22.

104. *Id.*

105. See, e.g. Melillo, Jerry M., Terese (T.C.) Richond & Gary W. Yohe, U.S. GLOB. CHANGE RESEARCH PROGRAM, U.S. NATIONAL CLIMATE ASSESSMENT (2014) (“Scientists who study climate change confirm that these observations are consistent with significant changes in Earth’s climatic trends. Long-term, independent records from weather stations, satellites, ocean buoys, tide gauges, and many other data sources all confirm that our nation, like the rest of the world, is warming.”).

and increased flooding in California and elsewhere.¹⁰⁶ The process is straightforward. Greenhouse gases, chiefly carbon dioxide, trap heat in the lower atmosphere. The oceans have absorbed 90 percent of this human caused warming.¹⁰⁷ As the oceans warm, the volume of the ocean increases and sea levels rise albeit not uniformly across the globe.¹⁰⁸ Rising temperatures also cause glaciers and ice sheets to melt thereby increasing the amount of water in the oceans.¹⁰⁹ In short, the relationship between GHG emissions, global warming, and sea level rise is firmly grounded in the best available science, and plaintiffs should have no problem proving this element of their case.¹¹⁰ Further, the science of climate attribution is now able to quantify not only the degree to which human-caused climate change is contributing to sea level rise, but also the impact of heat-trapping emissions on changes in the frequency and severity of drought, wildfires, and other catastrophes.¹¹¹ A recent study by the Union of Concerned Scientists shows that emissions from the products of 90 major fossil fuel producers and cement manufacturers contributed nearly half of the global temperature rise and about 30 percent of global sea level rise between 1880 and 2010.¹¹²

Second, California will be especially hard hit by the accelerating melting of Greenland and Antarctica, and coastal communities will be facing enormous costs to either protect or relocate vulnerable properties and

106. See *Our Changing Climate*, NATIONAL CLIMATE ASSESSMENT, <https://nca2014.globalchange.gov/highlights/report-findings/our-changing-climate> (last visited Mar. 2, 2019) (discussing sea level rise and coastal communities reliance on sea ice to protect against erosion and storms).

107. Oceans, Ocean Scientists for Informed Policy, <https://www.oceanscientists.org/index.php/topics/ocean-warming> (last visited Mar. 2, 2019).

108. John A. Church et al., *Sea Level Change*. In: *Climate Change 2013: The Physical Science Basis*, 1137, 1143, https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter13_FINAL.pdf (arguing that “the mass loss from glaciers were the main contributors to the 20th century rise, that during the 21st century the rate of rise was projected to be faster than during the 20th century, that sea level will not rise uniformly around the world, and that sea level would continue to rise well after GHG emissions are reduced.”).

109. See *Our Changing Climate*, <https://nca2014.globalchange.gov/report/our-changing-climate/introduction>. (last visited Mar. 2, 2019).

110. See generally U.S. GLOB. CHANGE RESEARCH PROGRAM, U.S. NATIONAL CLIMATE ASSESSMENT (2014) (presenting a substantial body of scientific evidence to support the relationship between GHG emissions and climate change).

111. NATIONAL ACADEMIES OF SCIENCE, *Attribution of Extreme Weather Events in the Context of Climate Change* (2016), <https://www.nap.edu/read/21852/chapter/1#iv>.

112. Union of Concerned Scientists, TRACING FOSSIL FUEL COMPANIES’ CONTRIBUTIONS TO TEMPERATURE INCREASE AND SEA LEVEL RISE, <https://www.ucsusa.org/sites/default/files/attach/2017/10/gw-accountability-factsheet.pdf> (last visited Mar. 2, 2019).

populations.¹¹³ For every foot of global sea-level rise caused by the loss of ice on West Antarctica, sea-level will rise approximately 1.25 feet along the California coast.¹¹⁴ That may turn out to be a best case scenario. Any way you cut it, these communities are collectively facing billions of dollars of investments in both structural and non-structural adaptation measures.¹¹⁵ Taxpayers will undoubtedly be called upon to shoulder much of these costs. But is it fair to saddle taxpayers with the entire bill? California has done more than any other state—and certainly more than the federal government—to enact laws and fund programs to reduce emissions and promote cleaner electricity production and cleaner vehicles.¹¹⁶

Third, under California law a public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right.¹¹⁷ This principle was forcefully upheld in the landmark judgment recently affirmed by the California Court of Appeals against major manufacturers of lead paint. The court held the manufacturers responsible for the costs of abatement.¹¹⁸ The trial court found the companies liable for creating a public nuisance by affirmatively promoting the use of lead paint in residential homes while having “actual knowledge” at the time that it could pose a danger to the public, children in particular.¹¹⁹ The appeals court held that “the evidence, while circumstantial, was sufficient to support reasonable inferences that defendants must have known in the early 20th century that interior residential lead paint posed a serious risk of harm....”¹²⁰ Importantly, the appellate court rejected defendants’ argument that the decision violates constitutional separation of powers, i.e., that the legislature and not the courts should be creating public policy on lead paint and remediation.¹²¹

113. Gary Griggs, et. al, *Rising Seas in California: An Update on Sea-Level Rise Science*, California Ocean Science Trust, Apr. 2017, at 3, <http://www.opc.ca.gov/webmaster/ftp/pdf/docs/rising-seas-in-california-an-update-on-sea-level-rise-science.pdf>.

114. *Id.*

115. *Id.* at 39.

116. See Highlights of California Climate Change, <http://www.climatechange.ca.gov/state/highlights.html> (last visited Mar. 2, 2019) (highlighting achievement of the California Climate Change Program, spanning from 2004-2015).

117. See Tom Neltner, *Historic Court Decision on Lead-Based Paint in California Court of Appeals*, ENVIRONMENTAL DEFENSE FUND (Nov. 15, 2017) <http://blogs.edf.org/health/2017/11/15/california-court-decision-on-lead-based-paint/> (discussing public nuisance law and lead based paint).

118. See *People v. ConAgra Grocery Prod. Co.*, 17 Cal.App. 5th 51, 134 (2017) (holding that the trial court err in requiring ConAgra to prefund remediation cost, finding that it was well within the trial courts discretion).

119. *People v. ConAgra Grocery Products Co.*, 277 Cal. Rptr. 3d 499, 594 (Ca. App. 2017).

120. *ConAgra*, 17 Cal.App.5th at 85.

121. *Id.* at 117.

Fourth, plaintiffs in the climate change cases have alleged a massive campaign by defendants and their allies in the trade associations to deceive their customers, shareholders, regulators, elected officials, and the public about the dangers of carbon pollution.¹²² The defendant's own scientists had documented these dangers since at least 1968.¹²³ Investigators from various quarters have unearthed a trove of internal industry documents and "smoking guns" (ala' the tobacco cases). These documents showed that the companies not only knew of the dangers posed by continued production of fossil fuels but took affirmative steps to protect their own assets from effects such as sea level rise. At the same time, the companies were factoring into their business plans the opportunities to increase production in areas such as the Arctic, which were becoming more accessible as the sea ice melted.¹²⁴ History shows just how effective these efforts were in sowing doubts about the reality of human caused climate change. These efforts resulted in, among other things, the defeat of legislation such as the Waxman-Markey bill that would have created an economy-wide emissions trading program to avoid or mitigate the damage.¹²⁵ As a result of defendant's conduct, opportunities to reduce the loading of the atmosphere with CO₂ and ameliorate the damage that communities in California and many other places are now facing have been lost, perhaps forever.¹²⁶

Fifth, contrary to the oil companies allegations, the California municipal officials have not been duplicitous in their representations to their bondholders about the linkages between climate change and sea level rise.¹²⁷ In a detailed report commissioned by the Counties of San Mateo,

122. *Id.*

123. See Elliott Negin, *Documenting Fossil Fuel Companies' Climate Deception*, Union of Concerned Scientists (2015), <https://web.archive.org/web/20180310204215/https://www.ucsusa.org/publications/catalyst/su15-documenting-fossil-fuel-companies-climate-deception> (discussing the long effort by the petroleum industry to discredit climate change while possessing hard data that it actually existed) (last visited Mar. 2, 2019).

124. Amy Lieberman and Suzanne Rust, *Big Oil braced for global warming while it fought regulations*, L.A. TIMES (Dec. 31, 2015), <http://graphics.latimes.com/oil-operations/>.

125. Bryan Walsh, *Why the Climate Bill Died*, TIME (Jul. 26, 2010), <http://science.time.com/2010/07/26/why-the-climate-bill-died/> (suggesting "the threat of global warming didn't galvanize the public to the point where they would demand change," for reasons such as "disinformation campaigns by fossil fuel interests, the overblown controversy of 'climategate,' [and] a media corps that too rarely puts global warming in the right context.").

126. Complaint at ¶ 199, *County of San Mateo v. Chevron Corp.*, No. 17CIV03222, Cal. Sup. Ct. (2017) (No. 17 CIV 03222).

127. See John O'Brien, *Exon Prepares To Sue California Cities, Says They Contradict Themselves On Climate Change*, FORBES (Jan. 8, 2018), <https://www.forbes.com/sites/legalnewslive/2018/01/08/exxon-prepares-to-sue-california-cities-say-they-contradict-themselves-on-climate-change/#25a9ffa5522a> (explaining ExxonMobile's claim that the municipalities lied to investors of the bond offerings).

Santa Cruz, and Marin, the cities of Santa Cruz and Imperial Beach, and prepared by Martha Haines, the former head of the SEC's Office of Municipal Securities, the author concludes: "There is no inconsistency or conflict between the allegations in the complaints filed by the Municipal Governments in connection with their respective civil tort claims... regarding sea level rise and the disclosures made by such governments in their respective disclosure documents."¹²⁸ The rationale was that the maturity of the securities in question was so short that it was not reasonable to foresee any impact on their timely repayment from long-term sea level rise. She also pointed out that (a) some of the assets were on high ground and would not be affected by sea level rise; (b) many of the bond documents predated information about sea level rise risks to the community; and (c) certain of the more recent bond documents did disclose in far more detail the risks of climate change.¹²⁹

No one suggests that the courts are going to solve the climate crisis. It is indeed a global problem requiring the cooperation of all the nations of the world. Sadly and foolishly, the United States, under the Trump administration, walked away from the Paris Agreement and stands alone among the community of nations committed to addressing the crisis.¹³⁰ The administration is also working overtime to undo the policies and actions of the previous administration that were beginning to move the nation towards cleaner, more efficient energy and transportation systems. And no one expects to see positive legislation coming out of a gridlocked Congress.

None of this matters to the climate. It will continue changing in response to anthropogenic sources of carbon pollution and the damages will continue to mount. It is certainly true that we are all responsible as fossil fuel consumers. It is also true that the law demands more of those who have profited enormously from the continued promotion of products they knew were dangerous. It is these parties who not only failed to disclose the risks or take actions to shift to cleaner sources of energy but who worked diligently and in concert to block the kinds of laws and policies that would have made a real difference in slowing the onslaught of climate related damages. Fairness, not to mention the rule of law, dictates that those who were in a position to do something about the problem, but chose to conceal

128. MARTHA MAHAN HAINES, EXPERT REPORT OF MARTHA MAHAN HAINES 2 (2018), <https://www.documentcloud.org/documents/4449179-Bond-Analysis-Report-and-Letter-to-SEC-FINAL.html>.

129. *Id.* at 2, 8, 17.

130. Donald Trump, President of the United States, Rose Garden Statement on the Paris Climate Accord (June 1, 2017).

it, be held accountable for the foreseeable consequences of their actions. Indeed, this is exactly what the courts are for.

Conclusion

Green Justice is just one of many scholarly contributions that Dick Brooks has made to the field of environmental and land use law. He is also the author of a multi-volume treatise¹³¹ on Act 250, Vermont's landmark development control law, as well as a pathbreaking book on law and ecology,¹³² numerous articles on legal philosophy, law school pedagogy, and the design of a global environmental curriculum. Dick is truly a renaissance man with a curious mind, a scholar's attention to detail, and a commitment to truth seeking. He is a lover of good books, fine wine, and long conversations on the meaning of, well, everything. Dick has a deep respect for nature and the ideals of the law, as well as a healthy skepticism of grandiose notions of a perfect world untouched by human hands. He has been a wonderful friend and colleague for over three decades. His vision and hard work launched the Environmental Law Center in 1978 and put this little law school—the only law school in a town without a stop light as we are fond of saying—on the map.¹³³ He has left his mark not only on the literature of environmental law but on the minds and careers of hundreds of students he has taught, inspired, and sent out into the world well equipped to tackle the daunting challenges of the day.

Hats off to you, Professor Brooks.

131. See e.g. Richard O Brooks, *Toward Community Sustainability: History, Plans, and Administration of Act 250*, I & II V.L.S. ENVTL.L.CTR. (1996).

132. See e.g. RICHARD O. BROOKS, *LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME* (2012).

133. *Honoring Professor Richard Brooks and the Environmental Law Center*, VERMONT L. SCHOOL (April 30, 2018) <https://www.vermontlaw.edu/blog/tribute/richard-brooks>.

THE WEST’S HOT TOPIC: SNUFFING OUT POOR WILDFIRE POLICY IN NATIONAL FORESTS

Kyle Sasser

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INTRODUCTION

*“Unless we are willing to escape into sentimentality or fantasy,
often the best we can do with catastrophes, even our own, is to find
out exactly what happened and restore some of the missing parts.”*

— Norman Maclean, *Young Men and Fire* (1992)¹

A falling tree crushed 19-year-old Trenton Johnson on July 19, 2017,
when his firefighting unit responded to a small blaze in the Lolo National

1. NORMAN MACLEAN, *YOUNG MEN AND FIRE* 46 (The University of Chicago Press 1992 ed. 1976).

Forest.² Less than two weeks later, another falling snag killed 29-year-old Brent Witham while his unit was felling trees to slow the Lolo Peak fire, a different blaze in the same national forest.³ Johnson worked for a private crew contracted by the Forest Service, and Witham worked for a Forest Service Hotshot Crew.⁴

The Forest Service is familiar with death. The Lolo Peak fire's public information officer explained that the agency conducts drills to prepare for these situations.⁵ He added, "[b]ut everyone knows this is dangerous work, and even with the right protections and protocols, accidents can happen."⁶ Falling snags killed both of the young men in the national forest.⁷ Hazardous trees killed 18 firefighters between 1990 and 2014.⁸ These incidents reflect only four percent of the 440 individuals who died fighting wildland fires during that period.⁹

Falling trees are not the only danger, nor are human lives the only loss. The Forest Service spent \$2.41 billion on fire suppression in 2017.¹⁰ For the first time in the agency's 110-year history, it spent over half of its budget fighting fire.¹¹ The Forest Service concedes that this focus on fire prevents the agency from performing other vital functions: promoting outdoor recreation, protecting wildlife habitat, and providing clean air and water.¹² In 2017, the agency transferred \$576.5 million from other programs to fund fire suppression.¹³

Given the danger and expense of fire suppression, the question remains—is it effective? Many ecologists think not.¹⁴ They believe fire is integral to healthy western forests.¹⁵ Many species of plants and animals rely

2. Rob Chaney & David Erickson, *Trenton Johnson Was a Scholar and Standout Athlete, but Fate and the Forest Still Took His Life*, MISSOULIAN (July 20, 2017), http://missoulain.com/news/local/trenton-johnson-was-a-scholar-and-standout-athlete-but-fate/article_0821d92a-48c0-52f3-8887-8ae8d16cf8a1.html.

3. Rob Chaney & Eve Byron, *Firefighter Killed in Lolo Peak Accident was Experienced Hotshot*, MISSOULIAN (Aug. 3, 2017), http://missoulain.com/print-specific/firefighter-killed-in-lolo-peak-accident-was-experienced-hotshot/article_c7dbaddb-539b-5984-864c-b02674a405ca.html.

4. Chaney, *supra* note 2; Chaney, *supra* note 3.

5. Chaney, *supra* note 3.

6. *Id.*

7. Chaney, *supra* note 2; Chaney, *supra* note 3.

8. Chaney, *supra* note 3.

9. *Id.*

10. U.S. DEP'T OF AGRIC., WEEKLY FIRE UPDATE – OCTOBER 23, 2017 [hereinafter Weekly Fire Update].

11. U.S. DEP'T OF AGRIC., FISCAL YEAR 2017 BUDGET OVERVIEW 6 (2016).

12. *Id.*

13. WEEKLY FIRE UPDATE, *supra* note 10.

14. Ashley K. Hoffman & Sean M. Kammer, Note, *Smoking out Forest Fire Management: Lifting the Haze of an Unaccountable Congress and Lighting up a New Law of Fire*, 60 S.D. L. REV. 41, 67 (2015).

15. *Id.*

on fire-ravaged habitats to thrive.¹⁶ Fire suppression projects have actually made national forests more susceptible to higher intensity fires by perverting this natural phenomenon.¹⁷ Paradoxically, fire suppression strategies have produced fuel buildup that creates a ladder between the understory and forest ceiling and results in high-intensity crown fires.¹⁸

Fire suppression may be ineffective, but that has not deterred government officials from implementing suppression policies. The Secretary of the Interior, Ryan Zinke, met with the Secretary of Agriculture, Sonny Perdue, on August 24, 2017, to discuss the Lolo Peak Fire.¹⁹ Zinke blamed environmental extremists for the increase in wildfires, claiming that frivolous litigation prevented the government from managing forests properly.²⁰ Perdue added that the government would change how it manages land to reduce the impact of forest fires.²¹ Perdue did not elaborate, but Zinke released a memo the following month calling for aggressive fuel reduction.²² As explained below, fuel reduction projects may allow the forest to harvest small and large diameter trees, making the projects more akin to outright suppression.

Neither have legislators been deterred. As of 2017, Congress has proposed several bills that would drastically influence forest fire policy.²³ Most bills would allow the Forest Service to expedite fuel reduction projects by excluding such projects from complying with environmental protection statutes.²⁴

The following argument addresses the deficiencies of current forest fire policy. The Forest Service has unsuccessfully attempted to control fire since the agency's inception. Modern fire management techniques are highly contentious. Legislation is trending toward restoring deference for Forest Service management decisions.²⁵ Legislative deference accords the agency great discretion in choosing which fire management techniques to pursue.

16. ROBERT H. NELSON, A BURNING ISSUE: A CASE FOR ABOLISHING THE U.S. FOREST SERVICE 15-18 (2000).

17. *Id.* at 17.

18. *Id.*

19. Chris D'Angelo, *Montana Lawmakers Say 'Environmental Extremists' to Blame for Wildfires*, HUFFINGTON POST (Aug. 24, 2017), https://www.huffingtonpost.com/entry/montana-wildfires-environmental-extremists_us_599f328be4b05710aa5aefa.

20. *Id.*

21. *Id.*

22. Press Release, U.S. Dep't of Agric., Secretary Zinke Directs Interior Bureaus to Take Aggressive Action to Prevent Wildfires (Sept. 12, 2017).

23. Matthew Daly, *GOP Targets Environmental Rules After Wildfires*, ASSOCIATED PRESS (Oct. 26, 2017), <https://www.apnews.com/814f362197074ebdb9de4caa4f5d2579/GOP-targets-environmental-rules-after-wildfires>.

24. *Id.*

25. *Id.*

This can result in extreme environmental harm.²⁶ Proposed legislation will only perpetuate poor wildfire policy. Therefore, Congress should enact new legislation that will limit the Forest's Service discretion and require sound management practices.

I. BACKGROUND

Congress began delegating forest fire management to federal agencies in the late 19th century.²⁷ The Organic Administration Act of 1897 granted the Secretary of Agriculture broad authority to “make provisions for the protection against destruction by fire and depredations upon the public forests and national forests.”²⁸ The Act also allowed the executive branch to establish national forest reserves to “secur[e] favorable conditions of water flows” and “furnish a continuous supply of timber.”²⁹ Thus, this organic legislation created a conflict between wildfire and timber production—Congress granted the agency great leeway to prevent wildfires in order to promote a continuous supply of timber.

The Transfer Act of 1905 created the United States Forest Service (USFS) and tasked the agency with managing national forest reserves.³⁰ President Theodore Roosevelt appointed Gifford Pinchot as the first Chief Forester.³¹ Pinchot branded his own form of conservation, “utilitarian conservation.”³² This belief held that USFS should manage economic ventures in national forests in a way that allowed benefits in the present and recurring yields in the future.³³ At its inception, the Forest Service embraced the idea that it could allow economic harvest in national forests so long as it assured a sustainable yield.³⁴

Pinchot believed the forest reserves should serve public gain, but he was not completely sympathetic toward industry.³⁵ He preserved roughly three-quarters of the current National Forest System despite opposition from the

26. Justin Gillis, *Let Forest Fires Burn? What the Black-Backed Woodpecker Knows*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/science/let-forest-fires-burn-what-the-black-backed-woodpecker-knows.html>.

27. Forest Reserve Act of 1891, 26 Stat. 1095, 1103 (repealed 1976).

28. Act of June 4, 1897, ch. 2, 30 Stat. 35 (codified as amended at 16 U.S.C. § 551 (2012)).

29. 16 U.S.C. § 475 (2012).

30. Hoffman & Kammer, *supra* note 14, at 59.

31. FPinchot, *Gifford*, THEODORE ROOSEVELT CENTER AT DICKINSON STATE UNIVERSITY, <https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Conservation/Gifford-Pinchot>.

32. Hoffman & Kammer, *supra* note 14, at 59.

33. *Id.*

34. *Id.* at 11.

35. *Id.* at 59.

timber industry.³⁶ Interestingly, environmentalists now fault Pinchot for timber harvests on national forest land.³⁷ While Pinchot did not exclusively reserve national forest land for industrial purposes, he believed that timber harvests should be their dominant purpose.³⁸ He only limited timber harvests to the extent that it would guarantee a sustainable yield in the future.³⁹

Pinchot's view of national forests as a sustainable source of timber drastically narrowed the various management objectives that Congress had considered.⁴⁰ Congress first enabled the President to establish forest reserves in 1891.⁴¹ At that time, legislators expressed various possible uses.⁴² Pinchot, however, rejected these considerations in favor of reserving the land for timber harvests and grazing.⁴³ This demonstrates that one of the Forest Service's earliest objectives was to preserve timber for harvest, even at the expense of other resource values.

Since its inception, the Forest Service perceived wildfire as a threat to its timber resources.⁴⁴ The agency created a policy to locate and extinguish all wildfires in order to protect timber reserves.⁴⁵ Congress agreed and established a virtually unlimited funding process to support the Forest Service's firefighting efforts.⁴⁶ The Forest Service applied this approach to suppressing forest fire for most of the 20th century.

II. ARGUMENT

Congress's legislative attempts in the area of fire management have created an environment of competing interests that choke each other of vital resources and inhibit productive growth. Subparts A, B, and C explain the general elements of the argument. Subpart A explains that current management techniques vary in harm, expense, and danger. Subpart B explains that legislation accords the Forest Service great deference, allowing the agency to make management decisions political rather than ecological.

36. *Id.* at 60.

37. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 120 (1992).

38. Hoffman & Kammer, *supra* note 14, at 60.

39. *Id.*

40. SAMUEL P. HAYS, *THE AMERICAN PEOPLE AND THE NATIONAL FORESTS* 13 (2009).

41. Forest Reserve Act of 1891, ch. 563, 26 Stat. 1095–1103 (repealed 1976).

42. Hoffman & Kammer, *supra* note 14, at 60.

43. *Id.* (citing HAROLD K. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 95 (2004)).

44. Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 305 (2006).

45. U.S. DEP'T OF AGRIC., FOREST SERV., *THE USE OF THE NATIONAL FOREST RESERVES: REGULATIONS AND INSTRUCTIONS* 63 (1905).

46. STEPHEN J. PYNE, *FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND RURAL FIRE* 263–64 (1982).

Subpart C explains that this deference provides the agency excessive leeway in choosing which techniques to use, and this can cause extreme environmental harm. Subpart D then demonstrates that proposed legislation would exacerbate the issue by according the Forest Service even greater deference.

A. Current Management Practices are Harmful, Expensive, and Dangerous.

Land management agencies use multiple methods to combat forest fire, and each has potential pitfalls.⁴⁷ Modern ecologists view fire as a natural part of the landscape—for centuries lightning ignited fires out West, altering the landscape in cyclical intervals.⁴⁸ Paradoxically, a century of fire suppression on federal lands has perverted the natural ecological processes and made forests more susceptible to high-intensity fires.⁴⁹ This has only complicated the tensions between industrial, ecological, and residential concerns.

One important consideration of forest management is that different stands of timber respond differently to fire.⁵⁰ For example, the Southwest's Ponderosa Pine forests were historically prone to "high frequency, low intensity fires" that removed understory without damaging mature trees.⁵¹ These low intensity fires were relatively beneficial for the environment—they replenished soil without causing erosion, altering vegetative patterns, or displacing wildlife.⁵² Contrarily, the lodgepole pine forests prevalent in the Northwest were historically prone to "infrequent, high intensity fires."⁵³ These high intensity fires could be ecologically harmful—altering tree structures, damaging soil, and displacing wildlife.⁵⁴ Finally, other western stands of timber were composed of Redwood, Douglas fir, and Rocky Mountain ponderosa pine trees.⁵⁵ These stands fluctuated between the two extremes, experiencing high-intensity fires and low-intensity fires at regular intervals.⁵⁶ Regardless of the history of federal land management, an effective fire policy would need to consider the different composition of western forests.

47. Tom Zimmerman, *Improving Wildland Fire Management Strategies*, WILDFIRE MAGAZINE, (Jan. 4, 2016), wildfiremagazine.org/article/improving-wildland-fire-management-strategies/.

48. Keiter, *supra* note 44, at 313.

49. NELSON, *supra* note 16, at 17.

50. Keiter, *supra* note 44, at 314.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

This area-specific approach is necessary now more than ever. Fire suppression has permanently altered the ecology of western forests.⁵⁷ The absence of fire has caused fuels to build up in national forests.⁵⁸ Additionally, federal efforts have created forests that are “older, denser, and less healthy, and thus prone to larger and more intense fires than was historically true.”⁵⁹ As noted above, pre-management wildfires in Ponderosa pine stands typically burned the understory without damaging mature trees.⁶⁰ That is no longer the case. Now, fuel buildup often creates a ladder between the understory and the forest canopy, allowing for high-intensity crown fires.⁶¹ Fire suppression efforts throughout the last century were an enormous factor in creating the higher-intensity forest fires that plague the West today.⁶²

The situation has created a significant policy dilemma: should land managers focus their efforts on protecting human lives or the ecological integrity of western forests? To answer in the extreme would be to select one of two management strategies: “suppress all fires under the discredited notion that an uncharred forest is both healthy and safe” or “permit wildfires to burn under the dubious assumption that fire will always benefit forest ecosystems.”⁶³

Neither extreme is a sufficient response. Complete fire suppression has failed and left forests more prone to catastrophic fires.⁶⁴ Additionally, modern suppression techniques can have adverse consequences because they entail developing access roads, spraying fire-retardant chemicals, and exposing firefighters to blazes.⁶⁵ A hands-off approach to fire is not much better. Such an approach may have worked a century ago, but it will not restore historical fire because suppression efforts permanently changed the ecology of western forests.⁶⁶ Allowing fires to burn in remote areas could prove beneficial, but such a technique would prove dangerous in areas where high intensity fires might endanger human life or important natural resources.⁶⁷

Federal land managers adopted middle-ground approaches instead of embracing the extreme techniques mentioned above. One popular method

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Hoffman & Kammer, *supra* note 14 at 68.

62. NELSON, *supra* note 16, at 17.

63. Keiter, *supra* note 44, at 315.

64. *Id.*

65. *Id.* at 316.

66. *Id.*

67. *Id.*

reflects the age-old adage of fighting “fire with fire:” prescribed burning.⁶⁸ Advocates prefer this method because they deem it a more natural solution than other alternatives.⁶⁹ It is relatively inexpensive and “minimizes intensive human intrusions into the natural environment.”⁷⁰

However, prescribed burning has its downsides. For one, “[m]any scientists believe it is not possible to rely solely on prescribed fire to restore historical fire regimes because the fuel loads are so high in many locations that the resulting fires would be more intense than historically was the case.”⁷¹ This makes prescribed burning impractical in forests that abut residential areas. Specific attempts have been disastrous. For example, the Cerro Grande fire of 2000 started as a prescribed burn which grew out of control and overran the town of Los Alamos, New Mexico.⁷² The fire created political obstacles to prescribed burns and required additional expenses that mitigate its cost-effective nature.⁷³ Agencies now prepare additional resources to control prescribed burns in case they grow out of control which increases overall costs.⁷⁴ Environmental compliance requirements can further raise expenses.⁷⁵ Finally, prescribed burns are feasible only during certain times of year when the weather will allow agencies to maintain control of the blaze.⁷⁶ These limitations severely restrict the use of prescribed burning in national forests.

Another popular technique is forest thinning, also known as hazardous fuel reduction.⁷⁷ This method can take three increasingly intense forms: defensible zones near communities, fuel breaks in remote areas, or complete forest restoration.⁷⁸ Advocates claim that this method reduces the fuel buildup caused by a century of fire suppression.⁷⁹ Specifically, projects can target buildup in the understory that operates as a ladder to the forest canopy.⁸⁰ Proponents justify fuel reduction in residential areas to preserve human life and justify thinning in remote areas to protect important natural resources.⁸¹

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 316–17.
72. *Id.* at 317.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 318.
79. *Id.* at 317.
80. *Id.*
81. *Id.* at 318.

Fuel reduction has its cons. Thinning is labor intensive and inherently expensive.⁸² Environmental compliance only compounds this significant cost.⁸³ Agencies can mitigate this cost by harvesting large, old growth trees in addition to understory fuels, but this strategy is not popular with environmentalists.⁸⁴ Given the extractive nature of federal land agencies, many environmental groups fault them for using fuel reduction as a guise to harvest mature timber.⁸⁵ Also, experts disagree on how much fuel should be removed to ensure forest health.⁸⁶ Fuel reduction, therefore, is a highly contentious technique in the environmental realm and one that allots agencies significant discretion.

Discretion is the heart of the argument. The ultimate policy question is twofold: (1) which technique should agencies favor; and (2) where agencies should use them. The environmental camp advocates using fuel reduction in residential areas, a hands-off approach in remote areas, and prescribed burns on the lands in between.⁸⁷ The industrial camp advocates using fuel reduction in all areas when necessary to preserve human life or protect natural resources.⁸⁸ These questions are further complicated because different regions call for different techniques. The ponderosa pine forests of the Southwest may require extensive thinning instead of prescribed burns.⁸⁹ Contrarily, neither fuel reduction nor prescribed burns may prove effective in the lodgepole forests of the Northwest.⁹⁰ These various considerations may have prevented Congress from enacting legislation that provides the Forest Service sufficient guidance. However, Congress's limited attempts to address the issue have accorded the Forest Service great deference and allowed the agency to prioritize politics over science when answering difficult policy questions.

B. Legislative history demonstrates a trend towards restoring the Forest Service's deference.

Early legislation supported the Forest Service's fire suppression policy. The Organic Administration Act of 1897 encouraged the President to

82. *Id.*

83. *Id.*

84. *Id.* at 318–19.

85. *Id.* at 319.

86. *Id.*

87. *Id.*

88. *Id.* at 318.

89. *See id.* at 320 (explaining that fuel loads are too high for agencies to safely implement prescribed burns).

90. *See id.* (explaining that thinning would be ineffective and expensive and prescribed burns would be dangerous).

establish forest reserves to provide for the “continuous supply of timber.”⁹¹ The Act also tasked the Secretary of Agriculture with implementing rules to protect the reserves from wildfire.⁹² Congress later enacted the Weeks Act of 1911.⁹³ The Weeks Act allowed the Secretary of the Interior to partner with states to implement fire protection programs in private and state forests abutting navigable waterways.⁹⁴ Finally, Congress passed the Clarke-McNary Act in 1924.⁹⁵ Notably, the Clarke-McNary Act allowed the federal government to expend significant sums to promote coordinated federal, state, and private fire suppression projects.⁹⁶ Collectively, these acts demonstrated significant Congressional support for fire suppression.

The wind shifted later in the century. Congress passed the Multiple-Use Sustained-Yield Act (MUSY) in 1960.⁹⁷ MUSY failed to address wildfire, but it demonstrated a Congressional interest in preserving national forests for their recreational value.⁹⁸ Congress then passed the Wilderness Act in 1964.⁹⁹ Congress proposed the Wilderness Act after a large public movement called for protection of primitive areas.¹⁰⁰ The Wilderness Act is important because it demonstrates a significant “stripping away” of Forest Service authority.¹⁰¹ Though neither act had a major impact on wildfire policy, they both demonstrated a shift in Congress’s perception of national forests. Both acts limited the Forest Service’s previously unfettered discretion because Congress recognized that national forests are valuable for more than timber.¹⁰²

The wind continued to turn throughout the subsequent decade. Congress passed NEPA in 1969.¹⁰³ Academics have dubbed NEPA the “Magna Carta” of environmental law.¹⁰⁴ Generally, NEPA requires federal agencies to

91. 16 U.S.C. § 475 (2012).

92. 16 U.S.C. § 551 (2012).

93. Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (1911) (codified as amended at 16 U.S.C. §§ 480, 500, 515-19, 521, 552, 563 (2018)).

94. 16 U.S.C. § 563 (2012).

95. Clarke-McNary Act, Pub. L. No. 68-270, 43 Stat. 653 (1924) (codified as amended at 16 U.S.C. §§ 505, 568-570 (2018)).

96. *Id.* at §§ 1-3.

97. Multiple-Use Sustained-Yield Act of 1960; Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528-31 (2012)).

98. 16 U.S.C. § 528 (2012).

99. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-36 (2012)).

100. Hoffman & Kammer, *supra* note 14, at 64.

101. *Id.*

102. 16 U.S.C. § 1131(c); 16 U.S.C. § 528.

103. National Environmental Policy Act of 1969, Pub. L. No. 90-190, 83 Stat. 852 (1969) (codified as amended at 42 U.S.C. §§ 4321, 4331-4335, 4341-47 (2012)).

104. Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J. L. & POL’Y 293, 293 (2010).

prepare an environmental assessment (EA) or environmental impact statement (EIS) for “any action significantly affecting the human environment.”¹⁰⁵ However, NEPA alone proved inadequate in the realm of forest management.¹⁰⁶ For one, “NEPA does not regulate the substance of agency decisions, including the content of forest plans, at all.”¹⁰⁷ NEPA’s requirements are “essentially procedural.”¹⁰⁸ Despite its insufficiencies, NEPA is important because it forces the Forest Service to consider environmental impacts when making land management decisions.¹⁰⁹ Therefore, it limited the Forest Service’s discretion.

Congress passed the National Forest Management Act (NFMA) in 1976 to place procedural and substantive requirements on the Forest Service.¹¹⁰ Congress enacted NFMA to cure the insufficiencies of MUSY, which lacked a true enforcement mechanism.¹¹¹ Among others, NFMA includes procedural provisions requiring the Forest Service to develop land and resource management plans¹¹² and maintain renewable resource assessments.¹¹³ It also contains substantive provisions that limit timber harvests,¹¹⁴ restrict clearcutting,¹¹⁵ and require biological diversity.¹¹⁶ Together, NEPA and NFMA significantly restricted the Forest Service’s discretion in land management decisions and put an end to the agency’s unfettered discretion.¹¹⁷

However, NEPA and NFMA claims have had mixed results in holding the Forest Service accountable for adhering to substantive requirements.¹¹⁸ The *Chevron* doctrine creates a substantial hurdle for plaintiffs suing under either statute.¹¹⁹ The doctrine holds, “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious,

105. 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. §§ 1502.1, 1508.9 (2017).

106. Hoffman & Kammer, *supra* note 14, at 64–65.

107. *Id.* at 65.

108. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

109. *See* Mandelker, *supra* note 104, at 293 (describing the function of NEPA).

110. *See generally* National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1969) (codified as amended at 16 U.S.C. §§ 472, 476, 500, 513–16, 518, 521, 528, 576, 594–2, 160002, 1604, 1606, 1608–14 (2012)) (imposing new provisions to better manage renewable resources).

111. Hoffman & Kammer, *supra* note 14, at 64–65.

112. 16 U.S.C. § 1604(a).

113. *Id.* § 1601.

114. *Id.* § 1604(g)(3)(E).

115. *Id.* § 1604(g)(3)(F).

116. *Id.* § 1604(g)(3)(B).

117. Keiter, *supra* note 44, at 333.

118. *See id.* at 343–344 (describing when the statutes hold the Forest Service accountable).

119. *See infra* Subpart C.

or manifestly contrary to the statute.”¹²⁰ The doctrine accords the Forest Service great deference to implement regulations because neither NEPA nor NFMA specifically addresses wildfire.¹²¹ Additionally, courts have found that trained experts—not the judiciary—should be responsible for making highly technical fire policy decisions.¹²² Thus, courts have upheld most agency decisions to conduct hazardous fuel reduction projects.¹²³

NEPA and NFMA created an additional problem by failing to address wildfire specifically—they allowed fire policy to become political. Absent guidance from Congress, different presidential administrations have been free to pursue radically different fire policies.¹²⁴ The Clinton Administration relied on prescribed burns, acknowledging that fire is “an important ecological process.”¹²⁵ Conversely, the Bush Administration relied on mechanical thinning and salvage logging operations, depicting fire as “a political and legal problem” needed “to curtail catastrophic wildfire events.”¹²⁶

President Bush forced this shift after complaints from the Forest Service during the Clinton Administration.¹²⁷ The Forest Service claimed that environmental enforcement statutes, including NEPA and NFMA, spurred costly litigation and administrative appeals. This tied the agency’s hands and prevented it from managing forests effectively.¹²⁸ After a severe fire season in 2002, President Bush introduced the Healthy Forests Initiative.¹²⁹ Generally, the initiative sought to curb litigation and appeals by expediting fuel reduction on public lands—the concept being that the agency could spend more time managing land if it spent less time justifying its decisions in court.¹³⁰ The administration designed the initiative to weaken obligations under NEPA, NFMA, and other environmental statutes.¹³¹ Under NEPA, the initiative minimized analysis obligations to prevent administrative appeals and judicial review of fire projects.¹³² Under NFMA, the Forest Service revised planning rules to eliminate biodiversity standards and documentation

120. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

121. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2012); 16 U.S.C. § 1604(g) (2012).

122. Keiter, *supra* note 44, at 326.

123. *Id.* at 336.

124. *Id.* at 366.

125. *Id.*

126. *Id.*

127. Keiter, *supra* note 44, at 312.

128. *Id.* at 337.

129. *Id.* at 312.

130. *Id.*

131. *Id.*

132. *Id.* at 339.

requirements.¹³³ However, the Healthy Forest Initiative failed to achieve its intended purpose of reducing litigation.¹³⁴

The reforms encompassed in the Healthy Forest Initiative are not as important as the message they convey. Various jurisdictions limited the reforms in the litigation that ensued.¹³⁵ The Administration eventually suspended its amended NFMA regulations, “believing them too burdensome, expensive, and difficult to administer,” and again amended the regulations in 2005.¹³⁶ The Obama Administration amended the regulations again in 2012.¹³⁷ The takeaway is that different presidential administrations have significant discretion to dictate forest fire policy by amending regulations under the existing environmental statutes. President Bush exploited that failure by presenting wildfire as a primarily economic problem, adding a political patina to an otherwise ecological issue.¹³⁸

Congress also retained the political veneer when it finally addressed wildfire. President Bush signed the Healthy Forests Restoration Act (HFRA) in 2003.¹³⁹ HFRA is the first piece of legislation to govern wildfire policy specifically.¹⁴⁰ Congress enacted HFRA after three severe fire seasons.¹⁴¹ HFRA’s stated purposes demonstrate that “Congress perceives fire primarily as a political rather than an ecological matter.”¹⁴² One purpose is “to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects.”¹⁴³ Another purpose is “to enhance efforts to protect watersheds and address threats to forest and rangeland health, including catastrophic wildfire, across the landscape.”¹⁴⁴ HFRA defines fire as a catastrophic event, not an important ecological process.¹⁴⁵ Like Bush’s Healthy Forest Initiative, Congress employed fear rhetoric to plunge fire policy further into the political mire.

133. *Id.* at 343.

134. *Id.* at 342.

135. *Id.* at 341–42.

136. GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LANDS AND RESOURCES LAW* 735 (6th ed. 2007).

137. Rules and Regulations of Department of Agriculture, 77 Fed. Reg. 21162, 21162 (Apr. 9, 2012) (codified at 36 C.F.R. pt. 219).

138. See Keiter, *supra* note 44, at 312 (“The issue no longer focused on fire control or restoration policy, but rather the overlay governing fire-related activities on public lands. Put simply, the fire problem was recast as a litigation problem.”).

139. COGGINS ET AL., *supra* note 136, at 738.

140. Keiter, *supra* note 44, at 344.

141. *Id.*

142. *Id.*

143. Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6501(1) (2012).

144. *Id.* § 6501(3).

145. Keiter, *supra* note 44, at 344.

HFRA's similarities to the Healthy Forest Initiative do not end there. For one, HFRA included several provisions used in Bush's reforms.¹⁴⁶ Additionally, HFRA generally expedites fire projects by reducing environmental analyses under NEPA and limiting administrative and judicial review.¹⁴⁷ HFRA also endorses one technique over another—only once does it list prescribed burning as an acceptable method of preventing wildfire.¹⁴⁸ Instead, HFRA directs agencies to “implement authorized hazardous fuel reduction projects.”¹⁴⁹ A final similarity is that HFRA may fail to curb litigation. It may be too soon to tell, but academics speculate that, “Fuel reduction sales under the HFRA and salvage sales are likely to dominate Forest Service litigation in the upcoming years.”¹⁵⁰ Essentially, HFRA may allow environmental harm to avoid litigation costs, though it is unclear whether it will accomplish that objective.

HFRA places substantive limitations on Forest Service actions, but these are outweighed by procedural provisions that reduce environmental compliance and review. Substantively, HFRA includes provisions that: prohibit fuel reduction in wilderness areas¹⁵¹; recommend restoration of old growth stands¹⁵²; and encourage removal of small diameter trees rather than large ones.¹⁵³ HFRA contains procedural provisions: requiring parties to file administrative appeals before a final decision is issued¹⁵⁴; limiting judicial review to federal courts where the project was located¹⁵⁵; and categorically excluding projects from NEPA analysis that span less than 1,000 acres.¹⁵⁶ Ultimately, the procedural provisions prevent the substantive provisions from having any teeth—provisions that “recommend” or “encourage” certain conduct are powerless if decisions under the statute are reviewed only on a limited basis.¹⁵⁷

Finally, HFRA contains several limitations that inhibit its effectiveness in the realm of forest fire policy. First, HFRA principally targets the Wildland Urban Interface (WUI), the term defining residential areas that abut federal public land.¹⁵⁸ Therefore, NEPA and NFMA continue to govern most

146. *Id.*

147. *See generally* 16 U.S.C. §§ 6501–91.

148. *Id.* § 6512(f)(1)(A).

149. *Id.* § 6512(a).

150. COGGINS ET AL., *supra* note 136, at 740.

151. 16 U.S.C. § 6512(d)(1).

152. *Id.* § 6512(e)(2).

153. *Id.* § 6512(f)(1)(A)-(B).

154. *Id.* § 6515(a).

155. *Id.* § 6516(a).

156. *Id.* § 6554(d).

157. Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6501(1).

158. *See id.* § 6501(1) (listing a stated purpose of the act as reducing wildfire risk by implementing hazardous fuel reduction projects); *see also id.* § 6513(d)(1)(a) (requiring agencies to

management projects. Second, HFRA requires that fuel reduction projects remain consistent with resource management plans under NFMA.¹⁵⁹ As demonstrated above, planning regulations can change drastically under different presidential administrations. Thus, in an attenuated fashion, fuel reduction projects under HFRA are subject to the political issue that plagues NFMA.

HFRA has not had an overwhelming effect on forest fire policy, but it reveals yet another shift in congressional opinion of wildfire policy. Though HFRA places some limitations on Forest Service action, its primary purpose is to expedite fuel reduction by limiting review of Forest Service actions and reducing compliance obligations under NEPA.¹⁶⁰ In this sense, the statute constitutes a step back from NEPA, allowing the Forest Service to conduct dangerous fuel reduction projects in areas where they may have been prohibited before HFRA. Ironically, an act that portends to restore national forests seems, more accurately, to restore a slight portion of the Forest Service's deference.

C. Litigation reveals the deficiencies of current legislation.

Montana provides an appropriate example of the relationship between fire policy and the law. Two young firefighters died in the Lolo National Forest in the summer of 2017, while combatting forest fires from dangerous fuel reduction projects.¹⁶¹ Shortly after the young men passed, Secretary of the Interior Ryan Zinke met with Secretary of Agriculture Sonny Perdue in Montana to discuss the Lolo Peak Fire.¹⁶² There, Zinke blamed catastrophic wildfires on "environmental extremists," claiming that "frivolous lawsuits" prevented the Interior and the Forest Service from managing forests in a way that would prevent wildfires.¹⁶³ Zinke and Perdue refused to admit that other factors, like climate change or a century-old policy of fire suppression, could be responsible for the increased intensity of forest fires in recent years.¹⁶⁴ Fuel reduction litigation in Montana demonstrates the deficiencies of NEPA, NFMA, and HFRA in limiting the Forest Service's use of hazardous fuel reduction strategies.¹⁶⁵

spend at least half of the funds authorized for hazardous fuel reduction projects on projects within the WUI).

159. *Id.* § 6512(b).

160. *Id.* § 6501(1).

161. Chaney, *supra* note 3.

162. D'Angelo, *supra* note 18.

163. *Id.*

164. *Id.*

165. Montana proposed a recent bill to establish a pilot arbitration program. This program would essentially force arbitration—controlled by the Forest Service—to resolve the Montana's

The Forest Service's first HFRA project in Montana spurred litigation.¹⁶⁶ In *WildWest Institute v. Bull*, the Ninth Circuit decided whether the proposed Middle East Fork Hazardous Fuel Reduction Project violated NEPA, NFMA, and HFRA.¹⁶⁷ The court held that it did not.¹⁶⁸

Prior to the case, severe wildfires ravaged Montana's Bitterroot National Forest in 2000.¹⁶⁹ The Forest Service evacuated the entire Middle East Fork area, but the fires did not destroy the community.¹⁷⁰ The court explained that the burn, however, left many unburned fuels, making the community susceptible to future fires.¹⁷¹ The Forest Service proposed the fuel reduction project to protect the community from future harm.¹⁷²

WildWest filed suit in the United States District Court for the District of Montana after the Forest Service issued its final decision to conduct the project.¹⁷³ After the court denied WildWest's request for a temporary restraining order and preliminary injunction, the parties filed cross-motions for summary judgment.¹⁷⁴ The district court granted the Forest Service's request for summary judgment, and WildWest eventually appealed to the Ninth Circuit.¹⁷⁵

Several of WildWest's arguments demonstrate the obstacles to NEPA, NFMA, and HFRA claims. First, WildWest alleged that the Forest Service violated NFMA's soil productivity requirement.¹⁷⁶ NFMA prohibits the agency from harvesting timber if it will irreversibly damage "soil, slope, or other watershed conditions."¹⁷⁷ The Forest Service applied its regional soil quality standards to the project because the Bitterroot National Forest Plan does not provide specific standards.¹⁷⁸ Specifically, WildWest argued that the agency erred in analyzing the soil conditions of specific harvesting units

"chronic litigation" issue. The result is that "hazardous fuel reduction projects developed...will be implemented more quickly" at the expense of environmental law compliance. Scott Shindledecker, *Senator Daines Touts Forest Management Bill*, Daily Inter Lake, (Aug. 24, 2018), https://www.dailyinterlake.com/local_news/20180824/senator_daines_touts_forest_management_bill.

166. Perry Backus, *Forest Service Wins Suit Over Fuel Reduction Project*, Billings Gazette (Nov. 6, 2008), http://billingsgazette.com/news/state-and-regional/montana/forest-wins-suit-over-fuel-reduction-project/article_c51b49ad-469d-501d-9e39-10b9f7ceeee2.html.

167. *WildWest Inst. v. Bull*, 547 F.3d 1162, 1165 (9th Cir. 2008).

168. *Id.* at 1163.

169. *Id.* at 1166.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1167.

174. *Id.* at 1168.

175. *Id.*

176. *Id.* at 1171.

177. 16 U.S.C. § 1604(g)(3)(E)(i).

178. *WildWest* 547 F.3d at 1172.

rather than the broader landscape.¹⁷⁹ In rejecting WildWest's argument, the court explained that the agency retains the "discretion to determine the physical scope used for measuring environmental impacts" if it does not act arbitrarily.¹⁸⁰ The court determined that the Forest Service satisfied this standard by explaining in its final EIS that WildWest's requested methodology was impossible "because of the variability in soil texture, the amount of organic matter and ground cover, soil response to past projects, and the intensity of past projects."¹⁸¹ This serves as an example of how courts frequently defer to technical agency decisions under the "arbitrary" standard.¹⁸²

Second, WildWest alleged that the Forest Service violated NEPA by disregarding the opinion of WildWest's soil expert.¹⁸³ The court explained that NEPA requires agencies, in a final EIS, to discuss and respond to opposing views that were not discussed adequately in the draft EIS.¹⁸⁴ The Forest Service incorporated WildWest's findings into the Draft EIS, but WildWest's expert testified that the agency had edited the findings, causing "deliberate removal of information that accurately portrayed the conditions of the soils and the prescriptions and mitigations needed to address those degraded soil conditions."¹⁸⁵ The Forest Service created a peer review group to evaluate WildWest's findings before the Final EIS.¹⁸⁶

The peer review group used a different method than did WildWest.¹⁸⁷ The group conceded that WildWest's method may be more appropriate for specific project areas but claimed that its own methodology was more appropriate for determining a project baseline.¹⁸⁸ The Forest Service used the group's method, claiming that WildWest's method "overestimated the amount of detrimental soil damage."¹⁸⁹ The court held that this reasoning, paired with other references to WildWest's data in the Final EIS, sufficiently satisfied the NEPA standard.¹⁹⁰ This issue reveals the difficulty of contesting agency science under NEPA.

179. *Id.* at 1173.

180. *Id.*

181. *Id.*

182. Charles J. Cooper, *The Flaws of Chevron Deference*, 21 Tex. Rev. L. & Pol. 307, 308 (2016).

183. *WildWest*, 547 F.3d at 1171.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* (describing the different methodologies).

188. *Id.*

189. *Id.* at 1171–72.

190. *See id.* at 1172 (describing the data considered in the Final EIS).

Finally, the court considered a HFRA claim. HFRA requires the Forest Service to “maintain, or contribute toward the restoration of, the structure and composition of old growth stands” when implementing fuel reduction projects.¹⁹¹ Specifically, WildWest contested the method the Forest Service used to classify old growth trees, arguing that the agency relied on an “imminently dead” standard.¹⁹² The court explained that the agency used the “imminently dead” standard to mark trees, not determine whether the stand constituted an old growth forest.¹⁹³ It went further, adding, “And in any event, WildWest’s arguments on this point are not convincing. The Forest Service properly applied its selected methodology, and it disclosed such methodology, as well as its findings, to the public. It further addressed objections to its methodology raised during the comment period.”¹⁹⁴ Contesting agency science is incredibly difficult because the Forest Service need only disclose its methodology, explain its reasoning, and respond to contrary opinions.¹⁹⁵

The court best encapsulated the issue in a footnote to the opinion:

[W]e do not “act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, choose among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty.” Rather, we only require “that the Forest Service . . . support its conclusions that a project meets the requirements of the NFMA and relevant Forest Plan with studies that the agency, in its expertise, deems reliable. The Forest Service must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable. We will conclude that the Forest Service acts arbitrarily and capriciously only when the record plainly demonstrates that the Forest Service made a clear error in judgment in concluding that a project meets the requirements of the NFMA and relevant Forest Plan.”¹⁹⁶

191. Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6512(e)(2) (2012).

192. *WildWest*, 547 F.3d at 1174.

193. *Id.*

194. *Id.*

195. *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1077 (10th Cir. 2014).

196. *WildWest*, 547 F.3d at 1171 n.4 (quoting *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008)).

WildWest demonstrates the great deference the statutes provide the Forest Service in scientific issues.¹⁹⁷ Furthermore, the court in *WildWest* validated the Forest Service's discretion in choosing which specific management techniques it may use.¹⁹⁸ The case is important because it demonstrates that courts will often side with the Forest Service in disputes involving dangerous fuel reduction projects. Though many ecologists do not agree with using such strategies to combat forest fires, the Forest Service will almost always secure a favorable decision in court if it can articulate a reasonable basis for its decision.¹⁹⁹ Interested parties have little recourse to combat such decisions with outside science.²⁰⁰

In a more recent HFRA case, *Decker v. U.S. Forest Service*, the United States District Court for the District of Colorado determined that clearcutting was an appropriate implementation tool under the statute.²⁰¹ The court found that it must accord the Forest Service Chevron deference in making its decision because HFRA is ambiguous and the Forest Service used a "sufficiently formal process."²⁰² The Court acknowledged that *Chevron* only applies to formal decision making, but it concluded that the Forest Service met this burden by notifying the public in a "Supplemental EA" and allowing for public comment.²⁰³ The case is very troubling for those who oppose fuel reduction as a way of combatting forest fires. Subpart A of this note explains the contentious nature of modern forest management techniques. *Decker* reveals that the Forest Service has great discretion to choose such techniques because of HFRA's ambiguity.²⁰⁴ Further, a reviewing court may apply *Chevron*, a highly deferential standard, so long as the Forest Service used a "sufficiently formal process" that includes notification and public comment.²⁰⁵

Together, *WildWest* and *Decker* demonstrate the deferential nature of current legislation, regarding both science and technique. *WildWest* highlights another important point—HFRA has not foreclosed litigation. *WildWest* filed the case roughly three years after the enactment of HFRA²⁰⁶

197. See *id.* at 1171 (noting the Forest Service only needs to support conclusions with reliable expertise not specific measurements).

198. *Id.* at 1173.

199. Cooper, *supra* note 182, at 307.

200. *Id.*

201. *Decker v. U.S. Forest Service*, 780 F. Supp. 2d 1170, 1176–77 (D. Colo. 2011).

202. *Id.* at 1176.

203. *Id.*

204. *Id.*

205. *Id.*

206. See also COOGINS ET AL., *supra* note 136, at 738 (observing that President Bush signed HFRA into law December 2003).

in response to Montana's first fuel reduction program under HFRA.²⁰⁷ Litigation then ensued for two-and-a-half years.²⁰⁸ Montana's Ravalli County intervened in the case on the Forest Service's behalf.²⁰⁹ When asked about the case, county attorney George Corn called the lawsuit frivolous.²¹⁰ He elaborated, "They just kept throwing something up against the wall in hopes that something would stick."²¹¹ He added, "This lawsuit wasted a lot of resources of the Forest Service, the county and the judicial system."²¹² What will happen if environmental advocates continue to throw at the wall? Public backlash could result in even less favorable legislation. The case casts serious doubts on whether HFRA will accomplish its intended purpose of reducing litigation. If it cannot achieve that purpose, then it will limit environmental compliance and review in vain, probably to the detriment of national forests and at-risk communities.

D. Proposed Legislation would provide the Forest Service even greater deference and, thereby, perpetuate poor management practices.

As of the writing of this Note, Congress has proposed several bills that would overhaul fire management policy, but only the Resilient Federal Forests Act of 2017 (RFFA) is likely to become law.²¹³ The bill passed the House on November 1, 2017 and was referred to the Senate Committee on Agriculture, Nutrition, and Forestry on November 2.²¹⁴ The bill has received significant support—18 representatives cosponsored the bill, including representatives from each side of the aisle.²¹⁵ The official title demonstrates RFFA's potential issues. It reads, "To expedite under the National Environmental Policy Act of 1969 and improve forest management activities on National Forest System lands, on public lands under the jurisdiction of the Bureau of Land Management, and on Tribal lands to return resilience to overgrown, fire-prone forested lands, and for other purposes."²¹⁶ If HFRA demonstrated a shift in the political wind, RFFA constitutes a complete reversal. RFFA would allow land managers to skirt environmental

207. Backus, *supra* note 166.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Resilient Federal Forests Act of 2017, H.R. 2936, 115th Cong. (2017) (passing the House vote 232 to 188.)

214. *Id.*

215. *Id.*

216. H.R. 2936.

compliance on large swaths of federal land and severely limit review of agency decisions.²¹⁷

Principally, RFFA undermines many NEPA protections. It accomplishes this in several ways. First, the Act allows the Forest Service to consider only two alternatives if the agency proposes a management project that falls under a broad list of activities.²¹⁸ The alternatives an agency may consider are a no-action alternative or the alternative of conducting the project.²¹⁹ This all-or-nothing approach would prevent the Forest Service from considering other viable projects. The requirement applies to projects that: (1) are developed through a collaborative process; (2) are proposed by a resource advisory committee; (3) occur on land the Secretary determines are suitable for timber production; (4) lands subject to HFRA; or (5) are covered by a community wildfire protection plan.²²⁰

Provision (3) is radically self-serving. If the Secretary of Agriculture determines that an area is suitable for timber harvests, the Forest Service must only consider two alternatives—implementing the project or not implementing it—to comply with NEPA.²²¹ Under current regulations, the Forest Service must establish several requisites before determining that land is suitable for timber harvests.²²² However, as demonstrated in *WildWest*, courts will likely be extremely deferential when reviewing agency decisions under the agency's own regulations.²²³ This provision would surely expedite the NEPA process and streamline timber reduction in national forests.

RFFA would further expedite projects under NEPA by creating a long list of categorical exclusions. These would include projects intended to: (1) address insect or disease infestations; (2) reduce hazardous fuels; (3) protect municipal water sources; (4) protect critical habitat from catastrophic events; (5) increase water yield; (6) produce timber; or (7) any combination of these provisions.²²⁴ Provisions (2) and (6) are especially worrisome given the Forest Service's extractive history, even more so because RFFA would expand the allowed area for such exclusions to 10,000 acres.²²⁵ Further, the Act would increase the allowed area to 30,000 acres if a project is developed through a collaborative process, proposed by a resource advisory committee,

217. *Id.*

218. H.R. 2936 § 101(b).

219. *Id.*

220. *Id.* § 101(a).

221. *Id.* § 101(b).

222. Forest Service, 36 C.F.R. § 219.11 (2017).

223. *WildWest Inst.*, 547 F.3d at 1173 (“Agencies have ‘discretion to determine the physical scope used for measuring environmental impacts.’”).

224. H.R. 2936 § 111(b).

225. *Id.* § 111(d)(1).

or covered under a community wildfire program.²²⁶ By categorically excluding such projects, RFFA dissuades the Forest Service from conducting either an EA or an EIS for timber projects that fit within the acreage requirements.²²⁷

The above examples are only two of the ways in which RFFA would expedite projects under NEPA. However, RFFA would also severely limit review of Forest Service actions. First, RFFA includes the flat prohibition “no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay any fees or other expenses under such sections to any plaintiff related to an action challenging a forest management activity carried out pursuant to this Act.”²²⁸ Practically, this denies plaintiffs the ability to receive any attorney fees in citizen-suits involving forest management.²²⁹ The provision may prevent citizens from filing suit if they fear they cannot cover the cost of hiring an attorney.

Second, RFFA limits injunctive relief.²³⁰ RFFA requires a court considering a request for injunction to balance the short and long-term effects of implementing a forest management project against those of not implementing the project.²³¹ If the court decides to grant the request, the injunction will last no more than 60 days unless the court decides to renew it.²³² While modest, this provision requires parties seeking an injunction to move for renewal on a frequent basis in order to prevent agency action.²³³

Most importantly, RFFA would establish a pilot arbitration program that precludes judicial review.²³⁴ Under the program, the Secretary of Agriculture or Interior retains sole discretion to determine whether complaints are subject to arbitration or judicial review.²³⁵ Annually, the Secretary may only assign ten objections to arbitration in each Forest Service Region.²³⁶ However, this limitation applies only to specific management activities not yet subject to arbitration.²³⁷ Thus, if numerous parties complain about the same activity, the Secretary could send all their complaints to arbitration, but the consolidated complaint would only count as one objection toward the ten-

226. *Id.* § 111(d)(2).
 227. 40 C.F.R. § 1508.4.
 228. H.R. 2936 § 301.
 229. H.R. 2936.
 230. *Id.*
 231. H.R. 2936 § 302(a).
 232. *Id.* § 302(b).
 233. *Id.*
 234. H.R. 2936 § 311(a)(1).
 235. *Id.* § 311(a)(2).
 236. *Id.* § 311(a)(3).
 237. *Id.* § 311(a)(4).

objection maximum.²³⁸ The practical result is that the Secretary may send complaints regarding ten different Forest Service activities in the same Forest Service Region to arbitration each fiscal year before a court can hear any claims from opposing parties.²³⁹ It is hardly a limitation at all.

The arbitration program also requires that the agency and the complaining party agree in selecting an arbiter.²⁴⁰ If they cannot agree within 14 days, the Secretary selects an arbiter from a list of at least 20 arbiters that he or she prepares.²⁴¹ Therefore, the agency need only hold out for 14 days before it can select its own arbiter to settle the dispute.²⁴² Even then, the arbiter may not modify any proposal and must choose between either the agency's proposal or an intervening party's proposal.²⁴³ The program then requires the arbiter to consider each proposal's consistency with the relevant forest plan in making that decision.²⁴⁴ The entire program is tailor-made to keep forest management activities out of the courts. It would substantially limit judicial review, though the program would terminate seven years after enactment.²⁴⁵ RFFA's provisions allow the Forest Service greater deference in implementing one kind of policy—dangerous fuel reduction. Some deference is necessary because different forests require different management strategies. However, the public must be involved in those decisions to ensure that the Forest Service balances ecological and economic concerns.

RFFA would cripple NEPA and, thereby, afford the Forest Service a level of deference comparable to that of its outright suppression days. Like HFRA and Bush's Healthy Forest Initiative, it focuses on reducing environmental compliance and limiting judicial review in order to curb litigation.²⁴⁶ However, it ignores a much important concern—ecological integrity.²⁴⁷ Like HFRA, RFFA mentions prescribed burns only once and nowhere does it recognize fire as a natural ecological process.²⁴⁸ Additionally, it allows the agency to spend countless sums fighting fire unsuccessfully. By limiting judicial review, RFFA precludes outside parties

238. H.R. 2936.

239. *Id.*

240. *Id.* § 311(c)(3)(A).

241. *Id.* § 311(c)(1)–(3)(B).

242. *Id.* § 311(c)(1), (c)(3)(A)–(B).

243. *Id.* § 311(d)(1).

244. *Id.* § 311(d)(2)(A).

245. *Id.* § 311(a)(5).

246. Press Release, The Wilderness Society, Memo: House farm bill forestry title potentially disastrous for national forests (Apr. 19, 2018) (on file with author), <https://www.wilderness.org/articles/media-resources/memo-house-farm-bill-forestry-title-potentially-disastrous-national-forests>.

247. *Id.*

248. *Id.* §§ 115(b)(2)(A).

from contesting the Forest Service's methods and proposing techniques that are more effective and less harmful.²⁴⁹ This reduction in scrutiny will not help federal land managers discover how to restore fire as an ecological process, which should be the primary goal. In a worst-case scenario, RFFA may subject national forests to aggressive timber extraction and irreparable environmental harm.

III. SOLUTION

Henry David Thoreau admonished, "There are a thousand hacking at the branches of evil to one who is striking at the root."²⁵⁰ By focusing on litigation, recent legislation has undoubtedly hacked at the branches. Public interest litigation may hinder effective land management to some degree, but the ultimate hindrance is the Forest Service's preference for timber extraction over ecological health. First and foremost, future legislation should acknowledge that wildfire is a natural process that carries certain ecological benefits. Congress should then balance the competing interests of preserving human life and restoring historical fire regimes. Only then can federal land managers move toward a safe, viable solution to wildfire policy.

Subpart A of this note demonstrates that modern management techniques are contentious at best. Congress must provide substantive requirements for which techniques to use and where to use them. Legislation should adopt a middle-ground approach that allows fuel reduction projects in the WUI only when needed to preserve human life. In areas that fail to implicate human life, Congress should require the Forest Service to prefer prescribed burning over fuel reduction. Because fuel reduction projects are expensive, dangerous, and possibly ineffective, they should be a last resort option available only in instances where prescribed burns may grow out of control.

Subpart B of this note demonstrates that legislation shifted back to restoring the Forest Service's deference. The Forest Service enjoyed significant discretion until the passage of NEPA and NFMA. However, the legislature restored agency deference in the area of fire management by enacting HFRA. Congress should reverse this trend. Unfettered discretion and lack of scrutiny allowed the Forest Service to pursue an outright suppression strategy that left national forests choked with fuel. This contributed to the more frequent, higher intensity fires that occur today. Subpart B further demonstrates that legislation allowed fire policy to become a partisan issue, changing drastically under different presidential

249. *Id.* §§ 111–15, 311(a)(1).

250. HENRY DAVID THOREAU, *WALDEN AND ON THE DUTY OF CIVIL DISOBEDIENCE* 101 (Floating Press 2014) (1854).

administrations. Congress should alleviate this problem by depicting fire policy as an ecological, rather than a political problem.

Subpart C demonstrates current legislation's deficiencies in governing agency decision making. Namely, NEPA, NFMA, and HFRA allow the Forest Service to conduct any project that it can reasonably justify so long as the agency invites public comment and addresses the public's concerns. Future legislation must require more than reasonable justification. If such legislation allows hazardous fuel reduction projects primarily in the WUI, it could also force the Forest Service to collaborate with the municipal leaders of endangered areas. It could then require that projects be approved at the local level. Employing a referendum mechanism would allow the Forest Service to incorporate its own science into management projects, but it would require a majority vote from the at-risk community before the project could proceed. For projects outside the WUI, Congress would need to establish a mechanism that requires the Forest Service to incorporate opposing science unless it is inherently flawed or inapplicable. This may prove difficult, but it would place a larger burden on the Forest Service by requiring it to disprove opposing science rather than justify its own science. Subpart C further demonstrates that *Chevron* accords the Forest Service great deference when Congressional language is ambiguous. For that reason, future legislation must specifically address the recommendations above.

Finally, Subpart D demonstrates that the Resilient Federal Forests Act of 2017 could prove detrimental. It attacks fire policy from the wrong angle—focusing on litigation rather than forest health. RFFA would have devastating impacts by expediting timber harvests and limiting judicial review. Accordingly, Congress should reject RFFA outright.

CONCLUSION

Attempts to control forest fire have proven largely ineffective. Congressional attempts to limit the Forest Service's autonomy have proven slightly more successful. However, they allowed the Forest Service to retain its discretion in the area of fire management. The current administration intends to apply the same ineffective strategies, and Congressional proposals would expedite the process. Congress should instead consider legislation that would limit the Forest Service's discretion in fire policy and require sound management practices. Failing to implement such legislation will have dire consequences. The Forest Service will continue to send young men to their death. It will spend billions of dollars each year fighting forest fires, diverting millions from other valuable federal programs—all for a political agenda that will irreparably alter the ecology of western forests.