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The University of the Pacific
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Volume 47 | Issue 1 | 2015

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The University of the Pacific
LAW REVIEW

Volume 47 Issue 1 2015

COMMENTS

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Note from the Editor-in-Chief

Welcome to the first issue of *The University of the Pacific Law Review*! This new journal represents the amalgamation of two scholarly publications with long histories at McGeorge School of Law: *McGeorge Law Review* and the *Global Business and Development Law Journal*, colloquially known as the *Globe*.

Name changes are nothing new for McGeorge School of Law's journals. *McGeorge Law Review* was once *Pacific Law Journal*, and the *Globe* was originally titled *The Transnational Lawyer*. Although we have carried forward the volume number of *McGeorge Law Review* for continuity, this journal is a true merger of two very different publication emphases. As such, we will carry on the *McGeorge Law Review* tradition of covering California public policy with the annual Greensheets issue, and discuss international and transnational law in the same vein as the *Globe* with an international issue to be published in the spring. Additional coverage includes articles from symposia, plus student and professional scholarship regarding cutting-edge legal issues.

With the journals' restructuring into one publication, we are also integrating online publishing to supplement our print publications. It is our goal to increase access to *The University of the Pacific Law Review* content, not only in the legal community, but also with professionals who feel the impact of judicial decisions and statutory and regulatory changes in their industries. This is a natural progression given that everything is on the Internet today, and a development that aligns with Dean Francis J. Mootz's vision of McGeorge as a law school for the future. Please be sure to read Under the Dome, our policy and legal issue blog, for additional content.

Finally, thank you to the Boards of Editors of *McGeorge Law Review*, Volume 46, and *Global Business and Development Law Journal*, Volume 28, led by Jason Miller and Tiangay Kemokai, respectively, for their fortitude and dedication to building the foundation for *The University of the Pacific Law Review*. Our small but spirited board and staff look forward to further implementing and expanding the plans developed over the course of the last academic year. And, of course, thank you to our readers. We are pleased to have you join in our journey.

Amanda Kelly
Editor-in-Chief
The University of the Pacific Law Review,
Volume 47

Note from the Chief Comment Editor

Hello, and welcome to the student Comment issue of Volume 47 of the newly renamed *The University of the Pacific Law Review*. As Chief Comment Editor, it has been my privilege to work with each of the writers whose Comments will be featured in the pages to come. However, their articles and my own could not possibly be at this point without all the work of the Board of Editors of Volume 46 of the *McGeorge Law Review*. In particular, Chief Comment Editor Jacqueline Loyd, Chief Managing Editor Jill Schubert, Chief Technical Editor Anthony Serrao, and Editor-in-Chief Jason Miller played huge roles in taking each of these Comments from fledgling ideas to what you will read here.

Writing a Comment is a unique experience for law students, and similar opportunities are exceptionally rare during the practice of law. As lawyers, our job is to advocate for others. Whether we are drafting contracts, negotiating settlements, or litigating in a courtroom, we represent the interests of our clients to the best of our abilities. Even representing clients with interests that are aligned with ours, the battles we fight are framed by the particular problems presented by the case before us. Writing a Comment represents a unique moment in your law school career to take a stand on an issue that matters to you, and to frame it in whatever way you choose. It is the ultimate opportunity to choose your battle and advance a cause you believe in.

In this issue, you have the chance to read the results of six future lawyers pouring their hearts and souls into creating solutions for problems that matter to them. Through the inevitable crests and troughs of a seemingly interminable writing process, and through the butchery of rounds and rounds of editing, these Comments began as and remain labors of love for their authors. So whether you picked up this issue to read about climate change, railroads, the future of fast food workers, or municipal liability for the cities where Tamir Rice and so many more were murdered, read knowing that these are not just six more legal memoranda drafted because they had to be. Infused with the passion of their authors, they become something more.

Finally, I would like to thank the Board of Editors of Volume 47 of *The University of the Pacific Law Review*. In particular, Chief Managing Editor Emily Wieser, Chief Technical Editor Kayla Thayer, and Editor-in-Chief Amanda Kelly worked tirelessly to help make this issue a reality. So, again, welcome to the Comment issue. Please enjoy.

Ryan Matthews
Chief Comment Editor
The University of the Pacific Law Review,
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Comments

Congress and Chaos: Reexamining the Role of Congress in Combating Climate Change

*Ryan Matthews**

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2016; B.A., History, University of California, Los Angeles, 2013. I would like to thank my advisor, Professor Stephen McCaffrey, for all of his help, his excellent suggestions, and most of all, his relentless positivity and good humor. I would also like to thank all of the editors whose tireless work made this Comment possible. Finally, I want to thank my parents, who were and remain my first and best teachers.

I. INTRODUCTION

The "butterfly effect," one of the fundamental principles of chaos theory, postulates that small changes in complex systems can lead to massive and, at times, catastrophic results.[1] Scientists studying chaos theory grapple with the multitude of problems arising from vast systemic complexity.[2] The study of chaotic systems presents the challenge of predicting inherently unpredictable phenomena.[3] This amorphous scientific discipline has emerged from efforts to analyze entities like global economies, weather systems, and brain states.[4] The challenge of finding patterns in these systems, however, seems relatively simple when compared with the immense difficulty of implementing predictable changes in them.[5]

The global climate is a prime example of a system to which the principles of chaos theory apply.[6] A litany of factors including the Earth's obliquity, ocean currents, massive polar ice sheets, and greenhouse gases affect weather patterns across the globe.[7] These factors are profoundly interconnected, and small changes in any single variable can create massive fluctuations in all the others that combine to affect global weather systems in myriad ways.[8] Chaos theory principles add depth to the challenge of creating environmental legislation; not only do legislators—the group currently responsible for crafting climate change policy in the United States—have to grapple with scientific issues which fall outside their areas of expertise, but any legislative change they make has the potential to set off new and unforeseeable global effects.[9]

While the interconnectivity of environmental variables creates an opaque picture, climatic trends have become increasingly clear in recent decades.[10] The

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1. *What is Chaos Theory?*, FRACTAL FOUNDATION (Nov. 3, 2014), http://fractalfoundation.org/resources/what-is-chaos-theory/ [hereinafter FRACTAL FOUNDATION] (on file with *The University of the Pacific Law Review*).

2. Arie Uittenbogaard, *Chaos Theory for Beginners: An Introduction*, ABARIM PUBLICATIONS, http://www.abarim-publications.com/ChaosTheoryIntroduction.html#.VDH0vCtdUro (on file with *The University of the Pacific Law Review*).

3. *See* John Matson, *Chaos Theory Simplified: Just Follow the Bouncing Droplet*, SCIENTIFIC AMERICAN (Dec. 23, 2008), *available at* http://www.scientificamerican.com/article/chaos-theory-simplified-droplet/ (on file with the *University of the Pacific Law Review*) (giving an overview of the basics of chaos theory).

4. FRACTAL FOUNDATION, *supra* note 1.

5. *See id.* (discussing the challenges of complex systems).

6. *See* Uittenbogaard, *supra* note 2 (stating that the Chaos Theory "dawn[ed] on people" after the study of a weather model).

7. *See generally* MYLES R. ALLEN ET AL., CLIMATE CHANGE 2014 SYNTHESIS REPORT 3–8 (The Core Writing Team et al. eds., 2015), *available at* https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf (on file with *The University of the Pacific Law Review*) (discussing the current changes in global climate and the various factors that contribute to climate change).

8. *See* FRACTAL FOUNDATION, *supra* note 1 (discussing the connections between climate factors).

9. *See* Uittenbogaard, *supra* note 2 (discussing the ramifications of chaos theory on the behavior of complex systems like the environment).

10. *See* ALLEN ET AL., *supra* note 7, at 2 (discussing observations of a clear warming trend).

Intergovernmental Panel on Climate Change (IPPC) released its fifth Assessment Report in 2014, which "provides a clear and up to date view of the current state of scientific knowledge relevant to climate change."[11] The report goes well beyond acknowledging that global warming is occurring and that humans cause it; it asserts that continued global inaction will lead to severe, irreversible effects.[12] According to the report, the leading cause of climate change is anthropogenic greenhouse gas emissions.[13]

Faced with the increasingly ominous specter of climate change, the effort to implement environmental policy on a national level in the United States continues to lack coherency.[14] The inability of Congress to adopt a cohesive approach to the problem of climate change stems from an inability to agree not just on the best way to attack the issue, but on whether the issue exists at all.[15] This failure to recognize the significance of the issue substantially hinders efforts to tackle it.[16] The Environmental Protection Agency (EPA) administers federal environmental regulation.[17] The Clean Air Act empowered the EPA to regulate the emission of airborne pollutants nationwide in response to widespread air quality deterioration in the 1970s.[18] After multiple frustrated attempts by politicians to implement meaningful legislation to regulate carbon emissions, the EPA declared greenhouse gases, including carbon dioxide, to be pollutants under the Clean Air Act and asserted its power to regulate these gases under that pre-existing law.[19] However, the Supreme Court limited the EPA's power to regulate carbon emitters in *Utility Air Regulatory Group v. Environmental Protection Agency*,[20] ensuring that the need for additional congressional action remains as acute as ever despite the positive impact of the EPA's new regulatory power.[21]

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11. *Fifth Assessment Report (AR5)*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *available at* http://www.ipcc.ch/ (on file with *The University of the Pacific Law Review*).

12. ALLEN ET AL., *supra* note 7, at 7.

13. *See id.* at 3 (stating that the increase in anthropogenic greenhouse gas emissions is "extremely likely to have been the dominant cause of [global] warming since the mid-20th century").

14. *Legislation in the 112th Congress Related to Global Climate Change*, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, http://www.c2es.org/federal/congress/112 (on file with *The University of the Pacific Law Review*).

15. Jeff Spross & Ryan Koronowski, *The Anti-Science Climate Denier Caucus: 113th Congress Edition*, CLIMATEPROGRESS (June 26, 2013, 9:55 AM), http://thinkprogress.org/climate/2013/06/26/2202141/anti-science-climate-denier-caucus-113th-congress-edition/ (on file with *The University of the Pacific Law Review*).

16. *See generally id.* (discussing congressional failure to recognize the importance of anthropogenic climate change).

17. *Our Mission and What We Do*, ENVIRONMENTAL PROTECTION AGENCY, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (on file with *The University of the Pacific Law Review*).

18. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

19. *See* Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2431 (2014) (discussing the EPA's implementation of greenhouse gas regulations).

20. *Id.* at 2431–32.

21. *See generally id.* (refusing to grant the EPA carte blanche authority to regulate carbon emissions).

The "glacial" nature of Congress effectively ensures governmental stability, but poses a serious challenge when attempting to regulate systems governed by principles of chaos theory.[22] The United States faced a similar problem when confronted with seemingly interminable economic volatility in the decades that followed the Civil War.[23] After a series of reactive measures from Congress and other organs of government, and increasing instability through the peak of the Industrial Revolution, Congress passed the Federal Reserve Act in order to delegate the task of managing a chaotic system to a flexible panel of experts in the field.[24] Since then, the Federal Reserve Act has empowered the Federal Reserve to react to the inevitable fluctuations in a chaotic system like the economy with real-time shifts in monetary policy.[25] The Federal Reserve represents a model that could work for the environment as well as the economy.[26] Empaneling experts to address complex scientific issues and empowering them to flexibly and powerfully react to the fluid circumstances characteristic of chaotic systems provides a solution suitable for the challenges presented by climate change.[27]

The economic panics of the second half of the 19th century and the economic volatility of the Industrial Revolution posed serious risks to the stability of the United States[28] However, because climate change poses an imminent threat of irreversible damage to the global environment, it represents a broader and more calamitous challenge.[29] Given the growing importance of global climate change, as well as the complex nature of it, the EPA should be restructured and given more power in order to control carbon emissions in the United States in the same way that the Federal Reserve controls monetary policy.

Part II of this Comment discusses the history of modern environmental policy in the United States.[30] Part III explains the Federal Reserve's success in adapting to the challenges presented by chaos theory in the economic arena.[31] Part IV examines how the Federal Reserve can serve as a model for a reorganized and reinvigorated EPA and suggests that Congress should empower the EPA to

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22. *Glacial Pacing in the Halls of Congress*, LOCAL GOVERNMENTS FOR SUSTAINABILITY, http://www.icleiusa.org/blog/glacial-pacing-in-the-halls-of-congress (on file with *The University of the Pacific Law Review*).

23. *History of the Federal Reserve*, FEDERAL RESERVE EDUCATION, http://www.federalreserveeducation.org/about-the-fed/history/ (on file with *The University of the Pacific Law Review Law Review*).

24. *Id.*; Federal Reserve Act, Pub. L. No. 63-43, § 2, 38 Stat. 251 (1913).

25. Federal Reserve Act, § 13.

26. *See infra* Part IV (arguing that the EPA's authority should be modeled similarly to the Federal Reserve's authority).

27. *See History of the Federal Reserve*, *supra* note 23 (discussing the success of the Federal Reserve); *see also* FRACTAL FOUNDATION, *supra* note 1 (discussing the challenges of chaos theory).

28. *History of the Federal Reserve*, *supra* note 23.

29. *See* ALLEN ET AL., *supra* note 7, at 7 (discussing the pending irreversible effects of climate change).

30. *Infra* Part II.

31. *Infra* Part III.

react to new environmental crises, including the current struggle with anthropogenic climate change, in a flexible and impactful way.[32]

II. MODERN ENVIRONMENTAL PROTECTION IN THE UNITED STATES

This section will discuss the creation of the EPA, the reforms implemented in the Clean Air Act, the regulatory powers vested in the EPA in the aftermath of *Utility Air Regulatory Group v. EPA*, and the current environmental legislation Congress is considering.[33]

A. The Birth of the EPA: The National Environmental Policy Act

The National Environmental Policy Act (NEPA),[34] which established the EPA, has been described as "the most important piece of environmental legislation in our history."[35] NEPA represented the beginning of a new era of federal policy reflecting a revolutionary prioritization of environmental protection.[36] The 1960s saw an increasingly concerned public rally around the environmentalist banner, driven by growing fear of environmental deterioration, the wild popularity of Rachel Carson's *Silent Spring*, and widespread disillusionment created by the Vietnam War.[37] The increasing public sentiment in favor of serious environmental protection culminated in 1970 with NEPA's passage.[38]

The law's passage empowered the new administrative agency to engage in a multitude of activities promoting a healthy environment.[39] The EPA's mission statement encompassed creating and enforcing new environmental standards, acting as a leader in environmental research, reinforcing the pro-environmental efforts of other groups, and playing a key role in the executive branch's development of environmental policy.[40] However, despite the far-reaching responsibilities given to the EPA, Congress tasked the organization with more than simply increasing environmental regulation.[41] The passage of NEPA represented a fundamental change in perspective on managing the environment,

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32. *Infra* Part IV.

33. *Infra* Part II.A–C.

34. National Environmental Policy Act of 1969, Pub. L. 91-190, § 2, 83 Stat. 852 (1970).

35. Jack Lewis, *The Birth of EPA*, ENVIRONMENTAL PROTECTION AGENCY (Nov. 1985), http://www.2epa.gov/aboutepa/birth-epa (on file with *The University of the Pacific Law Review*).

36. *Id.*

37. *Id.* at 7–8.

38. *Id.*

39. National Environmental Policy Act § 101.

40. Lewis, *supra* note 35.

41. *See id.* (discussing the role of the EPA as being more than simply regulatory).

ending the piecemeal approach to pollution regulation and creating a new, holistic approach to attacking the problem of pollution.[42]

B. Smiting the Smog in the Sky: The Clean Air Act

Congress enacted the Clean Air Act (CAA) on New Year's Eve in 1970—364 days after the President signed NEPA into law.[43] While NEPA embodied a broad mission statement describing a new policy of holistic environmental protection, Congress tailored the CAA to reverse the rapid deterioration of air quality in the United States.[44] The passage of the CAA targeted automobile emissions in particular, in addition to establishing new Ambient Air Quality Standards and requiring state plans for achieving them and increasing the EPA's enforcement authority.[45]

The CAA underwent two major amendments in 1977 and 1990.[46] The 1977 amendments contained minor adjustments to the 1970 version, but in 1990, with the ambitions of its drafters still unrealized after two decades, Congress overhauled the CAA.[47] That sprawling legislation passed totaled over 800 pages, dwarfing the less than fifty pages taken up by the original CAA twenty years before.[48] To address continued problems with ambient air quality, the CAA amendments created more robust requirements for the attainment of the previously established Ambient Air Quality Standards.[49] In addition, the 1990 amendments created a new program to control nearly 200 toxic pollutants and another program to eliminate chemicals that contributed to stratospheric ozone layer depletion.[50] The EPA tested the limits of its authority under the CAA when it attempted to regulate greenhouse gases in 2014.[51]

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42. *See id.* at 10–11 (discussing President Nixon's emphasis on "viewing the environment as a whole.") (internal quotation marks omitted).

43. *Clean Air Act: 40th Anniversary of the Clean Air Act*, ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/air/caa/40th.html (on file with *The University of the Pacific Law Review*); National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (1970).

44. *See* Lewis, *supra* note 35 (discussing the passage of the Clean Air Act).

45. Clean Air Act of 1970, Pub. L. No. 91-604, § 108, 84 Stat. 1676 (1970).

46. *History of the Clean Air Act*, ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/air/caa/amendments.html (on file with *The University of the Pacific Law Review*).

47. *Id.* ("[T]he 1977 amendments primarily concerned provisions for the Prevention of Significant Deterioration (PSD) of air quality in areas attaining the [National Ambient Air Quality Standards]"). *See* William Reilly, *The New Clean Air Act: An Environmental Milestone*, 17 EPA J. 2, 3 (1991) (noting the history of amendments to the CAA).

48. Reilly, *supra* note 47, at 3.

49. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

50. *Id.* at § 103.

51. *See* Util. Air Regulatory Group v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2431 (2014) (discussing the actions of the EPA that plaintiffs challenged in *Utility Air*).

C. *The Limits of Greenhouse Gas Regulation:* Utility Air Regulatory Group v. Environmental Protection Agency

In response to congressional inaction, the EPA took unprecedented steps by attempting to regulate carbon emissions under the CAA.[52] The worsening environmental problems that plagued the years leading up to the 1990 CAA amendments, such as ozone depletion and air pollution, manifested themselves with visible effects, including thick smog layers in cities like Los Angeles.[53] Currently, global warming and the resultant climate changes represent the most prevalent issues.[54] With Congress light years from any kind of meaningful legislative action, the EPA declared carbon dioxide to be an atmospheric pollutant under the CAA and began to regulate greenhouse gas emitters under the existing regulatory scheme.[55]

After the EPA proposed the new regulations—which included subjecting stationary emitters of greenhouse gases like power plants to established permitting requirements—several of the affected emitters sued the EPA alleging that the agency had exceeded the bounds of its authority.[56] The Supreme Court ruled that while some of the EPA's new regulations—including its permitting requirements—exceeded its authority under the CAA, others had not.[57] The holding specified that the EPA had not exceeded its authority in requiring those emitters already subject to permitting to implement Best Available Control Technology (BACT) to control greenhouse gas emissions.[58]

Utility Air Regulatory Group represented a victory for the EPA.[59] Justice Scalia declared that the EPA got "almost everything it wanted in [the] case."[60] Indeed, the EPA sought to control greenhouse gas emissions from stationary facilities, and as Scalia noted, it retained the authority to regulate eighty-three percent of those emissions.[61] However, while Scalia's rosy view of the outcome

52. Robert Barnes, *Supreme Court: EPA Can Regulate Greenhouse Gas Emissions, With Some Limits*, THE WASH. POST, June 23, 2014, http://www.washingtonpost.com/politics/supreme-court-limits-epas-ability-to-regulate-greenhouse-gas-emissions/2014/06/23/c56fc194-f1b1-11e3-914c-1fbd0614e2d4_story.html (on file with *The University of the Pacific Law Review*); *see also Utility Air*, 134 S. Ct. at 2431 (discussing the challenged actions of the EPA).

53. *See* Reilly, *supra* note 47, at 3 (discussing pollution issues, including smog and carbon monoxide, in Southern California).

54. *See* ALLEN ET AL., *supra* note 7 (discussing the potentially severe and irreversible effects of climate change).

55. *Utility Air*, 134 S. Ct. at 2431.

56. *Id.* at 2432 (holding that the EPA could implement carbon permitting requirements over those stationary emitters which they already regulated for different chemical emissions, but not over those who had not been subject to any prior permitting requirements).

57. *Id.*

58. *Id.*

59. Barnes, *supra* note 52.

60. *Id.*

61. *Id.*

for the EPA is mathematically sound, it fails to take into account the type of regulation that is permissible under *Utility Air Regulatory Group*.[62] BACT does not impose a hard cap on emissions and cannot be used to condemn existing facilities—this regulatory power applies only to the use of controls on emissions emanating from existing facilities.[63] In addition, the EPA remains unable to regulate nearly a fifth of existing stationary emitters using their existing authority under the CAA, and with congressional deliberation continuing to emulate an indecisive tortoise, those sources of greenhouse gases are in little danger of being subjected to any new regulation in the near future.[64]

III. THE MODEL: THE FEDERAL RESERVE AND THE ENDLESS STRUGGLE WITH CHAOS

This section will first discuss the formation, powers, and organization of the Federal Reserve. It will then examine the degree of the Federal Reserve's success in combating the challenges presented by a chaotic system—namely, the economy.

A. The Formation, Powers, and Organization of the Federal Reserve

This subsection will discuss three topics: the formation of the Federal Reserve, the authority Congress granted it, and its organization.

1. The Formation of the Federal Reserve

The global climate is not the first chaotic system the United States has sought to regulate.[65] The debate over how to best manage the nation's economy began at its founding with Alexander Hamilton and Thomas Jefferson arguing vociferously over the wisdom of a national bank.[66] Hamilton's eventual victory resulted in the creation of the first of several iterations of a United States national bank—a tool for economic regulation that Congress and various presidents changed, dissolved, and reconstituted over the course of the next century.[67]

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62. *See Utility Air*, 134 S. Ct. at 2432 (ruling on the types of permissible carbon emission regulation under the CAA).

63. *Id.* at 2431.

64. *See Glacial Pacing in the Halls of Congress*, *supra* note 22 (discussing the slow pace of congressional deliberation on the issue of climate change).

65. *History of the Federal Reserve*, *supra* note 23.

66. Elise Stevens Wilson, *The Battle Over the Bank:* Hamilton v. Jefferson, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, http://www.gilderlehrman.org/history-by-era/age-jefferson-and-madison/resources/battle-over-bank-hamilton-v-jefferson (on file with *The University of the Pacific Law Review*).

67. *See History of the Federal Reserve*, *supra* note 23 (discussing the changes made to the central banking system).

The fluctuating means with which the country exerted control over the economy worked with a measured degree of success until the second half of the nineteenth century.[68] At that point, with the country expanding to the west and rapidly industrializing in the east, economic volatility spiked and the United States suffered through a series of economic panics—mini-recessions that felt far from miniature to those who endured them.[69] As the twentieth century began, Congress realized that a more permanent, stable solution was needed.[70] That solution came when Congress enacted the Federal Reserve Act in 1913 and established the Federal Reserve.[71]

2. The Powers of the Federal Reserve

The aforementioned Federal Reserve Act established the Federal Reserve to control monetary policy in the United States.[72] The bill's stated purpose was to "establish a more effective supervision of banking in the United States," and in pursuit of this goal, it authorized the Federal Reserve Board to actively issue and retire Federal Reserve notes.[73] Congress tasked the Board with using this power to manage inflation and keep a stable currency environment in the United States.[74] Congress also made the Federal Reserve a "lender of last resort," meant to provide liquidity during periods of economic contraction.[75]

In 1977, Congress entrusted the Federal Reserve with a new mission: to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."[76] This expanded purpose effectively placed the welfare of key economic indicators—unemployment, inflation, and interest rates—in the hands of the Federal Reserve Board and its subsidiary banks.[77] The 1977 legislation does not preclude Congress from taking additional legislative action to intervene in Federal Reserve policies; indeed, Congress did just that when it passed the Emergency Economic Stabilization Act of 2008 during the depths of the most recent financial crisis.[78] However, the congressional expansion of

68. *See id.* (discussing the history of central banking in the United States).

69. *See id.* (discussing the economic volatility of the second half of the nineteenth century).

70. *See id.* (discussing the problems facing the national economy in the years leading up to the Federal Reserve Act).

71. Federal Reserve Act, Pub. L. No. 63-43, § 1, 138 Stat. 251 (1913).

72. *Id.*

73. *Id.* at § 13.

74. *Id.*

75. Gary Richardson, *The Great Depression*, FEDERAL RESERVE HISTORY, http://www.federalreserve history.org/Period/Essay/10 (on file with *The University of the Pacific Law Review*).

76. 12 U.S.C. § 225(a) (1977).

77. *See id.* (tasking the Federal Reserve with additional responsibilities).

78. Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

Federal Reserve power in 1977 allowed the organization to react flexibly to economic fluctuation with a wide range of tools in order to promote economic stability and health in the United States.[79]

3. The Organization of the Federal Reserve

The Federal Reserve Act primarily created the Federal Reserve Banks—twelve banks that would serve as the outposts of the central banking system.[80] An extensive discussion of the functionality of the individual Federal Reserve Banks is beyond the scope of this Comment as this Comment does not advocate structuring the EPA into regional policy divisions.[81] The group assigned to oversee the twelve banks plays a more important role in the future envisioned for the EPA—the Federal Reserve Board.[82]

Seven members make up the Federal Reserve Board.[83] Two of these members must be the Secretary of the Treasury and the Comptroller of the Currency, and the President appoints and the Senate confirms the remaining five members.[84] The Federal Reserve Act designed the appointments so that each Presidential appointee serves a single fourteen-year term.[85] The length of these terms reflects a desire to foster a degree of political independence for Board members.[86] The Federal Reserve Act laid out additional requirements for Board members.[87] The Act requires that at least two of the presidential appointees have a background in finance or banking.[88] However, the Board is not intended to be a group of bankers; the appointees are meant to represent a broad swath of commercial, agricultural, and industrial interests that span the breadth of the country.[89] Additionally, no Board member may hold any form of employment with a bank during their term or hold stock in any financial institution.[90] These requirements are designed to ensure that the members of the Federal Reserve Board have the financial acumen to effectively govern the nation's monetary policy while

79. *See* 12 U.S.C. § 225(a) (discussing the new authority of the Federal Reserve).

80. *History of the Federal Reserve*, *supra* note 23.

81. *See* Part I, *supra* (defining the purpose of this Comment).

82. *See* Federal Reserve Act, Pub. L. No. 63-43, § 10–11, 138 Stat. 251 (1913) (discussing the formation of the Federal Reserve Board).

83. *Id.* at § 10.

84. *Id.* at § 10.

85. 12 U.S.C.A. § 241 (2015).

86. *Board of Governors of the Federal Reserve System*, FEDERAL RESERVE BANK OF NEW YORK (Nov. 2008), http://newyorkfed.org/aboutthefed/fedpoint/fed46.html (on file with *The University of the Pacific Law Review*).

87. *See* Federal Reserve Act §10 (discussing the qualification requirements for members of the Federal Reserve Board).

88. *Id.*

89. *Board of Governors of the Federal Reserve System, supra* note 86.

90. *See* Federal Reserve Act §10 ("The five members of the Federal Reserve Board . . . shall devote their entire time to the business of the Federal Reserve Board.").

attempting to stave off the specter of corrupt bank officials using Federal Reserve appointments for personal benefit.[91]

B. The Federal Reserve's Record Against Chaos

While the mission of promoting economic health and long-term stability evokes optimism, some critics have questioned how successful the Federal Reserve has been since its inception.[92] Critics note that the Federal Reserve has failed to limit inflation, especially when compared with inflation levels in the decades before its inception.[93] These skeptics also point to other economic indicators to show what they believe to be the general failure of the Federal Reserve to achieve its mission.[94]

An in-depth analysis of the economic nuances of the Federal Reserve's record is beyond the scope of this Comment; however, because of its use as a model for the future of the EPA, some analysis of the Federal Reserve's success in combating economic crises is necessary.[95] The Federal Reserve's first opportunity to confront a major economic crisis proved to be the greatest failure in its history.[96] The Great Depression was the greatest economic disaster in American history, and the Federal Reserve exacerbated the situation through a series of poor policy choices.[97] As former Federal Reserve Chairman Ben Bernanke admitted in a 2002 speech, "[r]egarding the Great Depression, . . . we did it. We're very sorry . . . [and] we won't do it again."[98] The Federal Reserve's failure in reacting to the Great Depression was one of mistaken policy rather than inaction.[99] First, the Federal Reserve raised interest rates in 1928, 1929, and 1931, which created disastrous results in an already contracting credit market. Second,

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91. *See id.* (discussing the requirements to be a member of the Federal Reserve Board).

92. *See generally* George Selgin, William Lastrapes & Lawrence White, *Has the Fed Been a Failure?*, CATO INSTITUTE (Nov./Dec. 2012), http://www.cato.org/policy-report/novemberdecember-2012/has-fed-been-failure (on file with *The University of the Pacific Law Review*) (criticizing the record of the Federal Reserve).

93. *Id.* From 1790 to 1913, the purchasing power of the dollar decreased by only eight percent, whereas from 1913 to 2012, it increased by over 2,000 percent. *Id.*

94. *See id.* (discussing perceived policy failures of the Federal Reserve).

95. *See supra* Part IV (discussing the use of the Federal Reserve as a model for a more dynamic EPA).

96. *See* Richardson, *supra* note 75 (discussing the actions of the Federal Reserve in relation to the Great Depression).

97. *Id.*

98. Ben Bernanke, Governor, Fed. Reserve Board, Remarks at the Conference to Honor Milton Friedman: On Milton Friedman's Ninetieth Birthday (Nov. 8, 2002) (transcript on file with *The University of the Pacific Law Review*).

99. David C. Wheelock, *Monetary Policy in the Great Depression: What the Fed Did, and Why,* 74 FED. RES. BANK OF ST. LOUIS REV. 3, 27 (1992), *available at* https://research.stlouisfed.org/publications/review/92/03/Depression_Mar_Apr1992.pdf (on file with *The University of the Pacific Law Review*).

it refused to act as a "lender of last resort," further constricting the liquidity of the economy as a whole.[100]

While those decisions were incontrovertibly disastrous, they were policy failures rather than institutional ones.[101] They were not the result of an inability to effect change in the face of a crisis; rather, they represented the flaws of the misguided economic philosophy of President Hoover's Secretary of the Treasury, Andrew Mellon.[102] As such, the failures of the Federal Reserve leading up to and during the Great Depression do not indicate the organization's inability to react to and regulate a chaotic system—instead, they represent isolated policy failures to which any organ of government is prone.[103]

As the Federal Reserve matured, its responses to crises improved.[104] This was particularly true in the years following the 1977 expansion of its purview.[105] The congressional decision to give the Federal Reserve broad discretion and flexibility allowed the organization to react effectively to the volatility and oscillations characteristic of a chaotic system like the economy.[106] The Federal Reserve has had several crucial occasions to exert its influence.[107] It provided much-needed liquidity during the Savings and Loan Crisis of the late 1980s, keeping the minor crisis from becoming something more serious.[108] In the wake of the September 12, 2001 attacks, the Federal Reserve announced that it would remain open and provide credit and capital to the American economy, helping to stem the stock market sell-off that had begun.[109] Finally, the Federal Reserve began a series of transactions with troubled financial institutions in the early 2000s at the outset of the subprime mortgage crisis.[110] This action proved to be the opening steps of a widespread governmental response that culminated in the Emergency Economic Stabilization Act.[111] While the Federal Reserve's actions

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100. *See* Richardson, *supra* note 75 (stating that the Federal Reserve raised interest rates in 1928 and 1929 and repeated this mistake again in 1931 in response to the international financial crisis).

101. *See id.* (discussing the failed policies that exacerbated the Great Depression); *but see id.* (noting that the "decision-making structure was decentralized and often ineffective.").

102. *See id.* (arguing that one of the Federal Reserve's initial failures was its increase in interest rates during the Great Depression); *Andrew W. Mellon*, FEDERAL RESERVE HISTORY, http://www.federalreservehistory.org/People/DetailView/244 (on file with *The University of the Pacific Law Review*) (stating that Mellon, as a member of the Federal Reserve, "favored interest rate hikes").

103. *See* Richardson, *supra* note 75 (noting that the Federal Reserve's contribution to the Great Depression was the result of failed economic policies).

104. *See generally History of the Federal Reserve, supra* note 23 (providing a timeline of financial crises and the Federal Reserves' respective responses).

105. *Id.*

106. 12 U.S.C. § 225(a) (1977); FRACTAL FOUNDATION, *supra* note 1.

107. *See History of the Federal Reserve, supra* note 23 (noting that trading continued one day after the stock market crashed on October 19, 1987).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*; Emergency Economic Stabilization Act, Pub. L. No. 110–343, 122 Stat. 3765 (2008).

were not the only factor, the period following the 1977 expansion of its mission witnessed "the longest peacetime economic expansion" in American history.[112] Volatility is unavoidable in a chaotic system, but the flexibility and broad empowerment afforded to the Federal Reserve in 1977 allows the organization to effectively combat the symptoms of economic chaos.[113]

IV. THE VISION: USING THE FEDERAL RESERVE AS A MODEL FOR A REINVIGORATED EPA

This section discusses the benefits of using the organizational structure and broad empowerment of the Federal Reserve as a model for a new, dynamic EPA that serves as the primary creator of climate change policy for the United States.[114]

A. Starting at the Top: Creating an EPA Board to Oversee Climate Change Policy in the United States

This section will examine two key benefits of creating an EPA board modeled after the Federal Reserve Board: allowing environmental experts to make key policy decisions and reducing gridlock in the decision-making process.

1. The Right Stuff: Trusting Experts with Key Policy Decisions

Appointing experts in finance and economics is one of the cornerstones of the success of the Federal Reserve.[115] The requirement that the Secretary of the Treasury, the Comptroller of the Currency, and two appointees with backgrounds in finance and economics serve on the Federal Reserve Board clearly reflects a congressional desire to entrust critical policy decisions to those who are best suited to make them.[116] Congress understood, both in 1913 and later on in 1977, that allowing great financial and economic minds to craft monetary policy would be vastly preferable to having members of Congress—elected, but with many having no particular expertise in the field—make these decisions.[117]

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112. *History of the Federal Reserve, supra* note 23.

113. *See id.* (discussing the Federal Reserve's responses to numerous financial crises); *see also supra* text accompanying notes 76–77 (discussing the expanded power granted to the Federal Reserve in 1977).

114. *Supra* Part IV.A–C.

115. *See* Federal Reserve Act, Pub. L. No. 63-43, § 10, 38 Stat. 251 (1913) (explaining the requirement that the Secretary of the Treasury, the Comptroller of the Currency, and two appointees with a background in finance serve on the Federal Reserve Board).

116. *See id.* (ensuring that at least four of the seven members would have experience in economics or finance).

117. *See id.* (requiring that board members be experienced in finance and banking and inferring that Congress found these people to be more qualified to make decisions regarding monetary policy).

Whatever the educational makeup of the Congress that passed the Federal Reserve Act, the contemporary Congress is not filled with science experts.[118] A mere eight percent of Congressmembers majored in any sort of science in college, and fewer still are experts in environmental science.[119] The number of Congressmembers that do not acknowledge either the existence of climate change or its anthropogeneity reflects this lack of expertise.[120] More than half of Republican members of the House of Representatives in the 113th Congress either denied the existence of climate change or denied that humans are causing it.[121]

While congressional skepticism in the face of overwhelming scientific evidence is alarming, it is not in and of itself the main reason that this Comment suggests empaneling experts to make policy decisions.[122] Many of those who recognize the imminent nature of the climate change problem have sought solutions that, while well meaning, lack the expertise necessary to create long-term answers for promoting stability in a chaotic system like the global climate.[123] The realization that experts are simply better equipped to attempt to regulate complex systems, like the environment and the economy, led Congress to create the Federal Reserve in 1913.[124] All the benefits realized by leaving monetary policy to experts would translate to empowering experts to answer the complex questions involved in combating climate change.[125]

2. Strength in Small Numbers: Reacting Nimbly to Crises

The Federal Reserve Board's small size also contributes to its success.[126] Some of the organization's best moments have resulted from quick and decisive action in moments of crisis.[127] The Federal Reserve's hair-trigger responses

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118. *See* THE AMERICAN ACADEMY OF ARTS & SCIENCES, HUMANITIES REPORT CARD 2013 (2013), *available at* http://www.humanitiesindicators.org/images/humanitiesReportCard/2013/Factoid_5.pdf [hereinafter HUMANITIES REPORT CARD 2013] (on file with *The University of the Pacific Law Review*) (noting that eight percent of Congress members pursued undergraduate science degrees).

119. *Id.*

120. Spross & Koronowski, *supra* note 15 ("Over 56 percent—133 members—of the current Republican caucus in the House of Representatives deny the basic tenets of climate science.").

121. *Id.*

122. *See id.* (discussing Congress members who do not believe in climate change).

123. *See* FRACTAL FOUNDATION, *supra* note 1 (discussing the complexity of systems like the global climate).

124. *See* Federal Reserve Act, Pub. L. No. 63-43, § 10, 38 Stat. 251 (1913) (empaneling finance and banking experts to manage monetary policy in the United States).

125. *See History of the Federal Reserve, supra* note 23 (noting several of the successes of the Federal Reserve).

126. *See generally id.* (discussing the successes of the Federal Reserve); *see also supra* text accompanying note 83 (discussing the size of the Federal Reserve).

127. *See id.* at 6 (noting the successes during the Savings and Loan crisis and in the aftermath of September 11).

during situations like the Savings and Loan Crisis of the 1980s and the aftermath of the attacks on September 11, 2001 helped maintain a greater degree of stability than would otherwise have been possible.[128]

The climate change crisis is entirely different from the lightning-quick changes characteristic of the economic panics that Congress designed the Federal Reserve to combat.[129] While climate change will continue to span decades, economic crises can begin and end in hours.[130] Still, while environmental crises may develop slowly, they can still necessitate swift and decisive action.[131] During the 1970s, it became clear that chemicals called chlorofluorocarbons (CFCs) were damaging the stratospheric ozone layer.[132] In the 1980s, it was announced that the damage to the ozone layer would be significant if the world continued to use the chemicals.[133] Even after further investigation revealed that the damage was more significant than originally thought, it took until 1996 for governments in developing countries to finally phase out CFCs.[134] Global cooperative efforts averted the crisis after significant ozone depletion; it appears that natural atmospheric process will restore the ozone layer in the next fifty years.[135]

While CFCs did not cause permanent damage, the United States' failure to cobble together an adequate response to the crisis for a full twenty years after it became apparent that the chemicals were dangerous is alarming.[136] As the dangers of climate change have become clearer and more imminent, the congressional response has taken the same torpid pace.[137] While Congress has been unable to come to anything resembling a consensus on how to address the problem, a smaller body resembling the Federal Reserve Board would have a much greater chance of reaching an agreement.[138] Despite the differentiated pacing of environmental and economic problems, the benefits of quick and decisive action

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128. *History of the Federal Reserve, supra* note 23.

129. *See generally* ALLEN ET AL., *supra* note 7, at 3 (depicting the slow but inexorable nature of the climate change crisis); *see also History of the Federal Reserve*, *supra* note 23 (describing nineteenth century economic panics).

130. *See* ALLEN ET AL., *supra* note 7, at 3 (illustrating the chronological scope of the climate change issue); *see* Richardson, *supra* note 75 (describing the stock market crash).

131. *See also Ozone Science: The Facts Behind the Phaseout*, ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/ozone/science/sc_fact.html (last updated Aug. 19, 2010) (on file with *The University of the Pacific Law Review*) (discussing the chlorofluorocarbon ozone crisis).

132. *Id.*

133. *See id.* (stating that measurements showed the ozone layer had been damaged more than expected and inferring that such action would continue if action was not taken to reduce CFCs).

134. *Id.*

135. *Id.*

136. *Id.*; *see also supra* text accompanying notes 131–35 (discussing the United States' delayed response as well as the possibility of the ozone's natural healing after five decades).

137. *Glacial Pacing in the Halls of Congress*, *supra* note 22.

138. *Id.*; *see History of the Federal Reserve*, *supra* note 23 (noting the quick action taken by the Federal Reserve Board on several occasions).

remain applicable to both.[139] As the Intergovernmental Panel on Climate Change has emphasized, the global climate system is nearing a point of no return—quick and decisive action is exactly what is needed now.[140]

B. Loading the Guns: Arming the New EPA for the Struggle with Chaos

This section discusses the benefits of empowering the EPA in a manner analogous to the Federal Reserve and proposes basic logistical means for doing so.

1. The Benefits of the New Board

The organization of the Federal Reserve Board allows it to react quickly to the crises that inevitably pop up in a chaotic system, but its responses would be impotent without a versatile problem-solving arsenal.[141] The organization's authority to set interest rates, control currency circulation, and regulate its lending flow allows it to attack problems in a variety of ways.[142] Even with its nimble organization, if the Federal Reserve Board had to consult with Congress each time it came upon a new problem for the authority to deal with it, the organization would be rendered completely ineffective.[143]

As the climate change problem has what the IPCC terms "tipping points,"[144] congressional inaction and the Court's ruling in *Utility Air* have hamstrung the EPA's efforts to play a mitigating role.[145] With legislative gridlock grinding ever closer to a total halt, the EPA tried to use the only weapon it had—its authority under the Clean Air Act.[146] While the Court did not entirely condemn the agency's effort to put the decades-old legislation to new use, it did set clear limits on the EPA's power to regulate carbon emissions.[147] The Court left the EPA with a near-empty quiver with which to combat the growing effects of climate change.[148]

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139. *See Ozone Science: The Facts Behind the Phaseout*, *supra* note 131 (discussing the damage that resulted from the United States' failure to respond to the ozone crisis).

140. ALLEN ET AL., *supra* note 7, at 8.

141. *See History of the Federal Reserve*, *supra* note 23 (describing the Federal Reserve's responses to various crises).

142. *See* Federal Reserve Act, Pub. L. No. 63-43, § 11, 38 Stat. 251 (1913) (enumerating the powers of the Federal Reserve); *see also* 12 U.S.C. §225(a) (1977) (describing the authority given to the Federal Reserve).

143. *See Glacial Pacing in the Halls of Congress*, *supra* note 22 (noting the intractability of congressional deliberation and the body's inability to make decisions).

144. ALLEN ET AL., *supra* note 7, at 128.

145. *Glacial Pacing in the Halls of Congress*, *supra* note 22; *see* Util. Air Regulatory Group v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2449 (2014) (holding that the EPA can regulate only some stationary carbon emissions).

146. *See Utility Air*, 134 S. Ct. 2427, 2435 (discussing the actions taken by the EPA).

147. *Id.* at 2449.

148. *See id.* (limiting the EPA's ability to regulate carbon emitters).

If Congress tasked the EPA with a mission statement similar to the one it gave the Federal Reserve in 1977—to promote long-term climate stability—and gave the EPA full regulatory authority over emissions to create such stability, Congress would create a new and improved EPA with the power to steer the world away from the climatic cliff it has been careening towards for the past hundred years.[149] However, Congress should go further than to empower the EPA to regulate greenhouse gases: it should give the EPA both the authority and the mandate to regulate any new pollutants that will affect climate stability in the future.[150]

Congress did not create the Federal Reserve to deal with an individual economic panic.[151] It created the Federal Reserve as a permanent solution that would help promote economic stability.[152] In contrast, Congress established the EPA to combat the growing problem of pollution.[153] NEPA and the CAA aimed to minimize pollution to improve environmental quality and promote human health.[154] The drafters could not have contemplated global climate change at the time of that legislation.[155] Climate change is a new and infinitely more intricate problem that requires a more dynamic solution.[156]

Congress established the Federal Reserve as a dynamic, long-term solution to both the problems of 1913 and those that were yet to come.[157] The solution could adapt to the volatility inherent in a chaotic system; it could adapt to new and unforeseeable problems that could possibly stem from solutions to old ones.[158] That volatility, and the certainty that new and unforeseeable problems will follow this one, is the reason why Congress should empower the EPA to go beyond the problem of greenhouse gas emissions.[159] The EPA should be a dynamic force for long-term climatic stability so that when carbon emissions have been curtailed and global climate catastrophe has been averted, the agency can turn its eyes forward and ensure that the world never approaches a climatic point of no return again.[160]

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149. 12 U.S.C. § 225(a) (1977).

150. *See also* FRACTAL FOUNDATION, *supra* note 1 (discussing the drastic effects that changes can have in complex systems).

151. *See* Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913).

152. *See id.*

153. National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (1970).

154. Lewis, *supra* note 35.

155. *See id.* (discussing the problems that led to the EPA's creation).

156. *See generally* ALLEN ET AL., *supra* note 7, at 3–8 (noting the intricacies of climate change).

157. Federal Reserve Act pmbl.

158. *See supra* Part III (discussing the ability of the Federal Reserve to manage a chaotic system).

159. *See* FRACTAL FOUNDATION, *supra* note 1 (noting that changes can create extremely unpredictable results in chaotic systems like the environment).

160. *See* ALLEN ET AL., *supra* note 7, at 8 (discussing the imminence of the climate change threat); *see also* FRACTAL FOUNDATION, *supra* note 1 (discussing the inevitability of volatility in a complex system).

2. *Logistics: Putting the Board Together and Empowering It to Battle Chaos*

The reorganized EPA this Comment proposes will mirror the governance structure of the Federal Reserve Board.[161] The decision to make the Federal Reserve Board consist of seven members allows the Board to represent a wide array of policy interests while remaining small enough to be a nimble and decisive body.[162] Modeling the structure of the proposed EPA Board on the Federal Reserve Board would promote these same values.[163] Adapting the Federal Reserve Act requirement that at least two of the Board appointees have a background in banking and finance to requiring a background in environmental law would ensure that the new EPA Board members have the benefit of scientific expertise.[164] In addition, ensuring that the Board members represent a variety of interests beyond pure environmentalism would allay the fears of many whose economic priorities outweigh their environmental concerns and represent a check on the new EPA Board's implementation of environmental policies that could create major negative economic consequences.[165]

A failure to provide sufficient discretionary authority would hamstring the new EPA Board and leave it as powerless to effect real change as the current EPA.[166] The key, then, to enabling this new EPA governance structure to have a legitimate impact on the environment beyond the current crisis of climate change will be to task it with a mission statement similar to the one given to the Federal Reserve in 1970 and to empower it to carry out that mission.[167] The global climate system presents challenges that are greater in both scope and complexity than the global economy; while both are prime examples of chaotic systems, the scale of the climate system and the broad range of variables affecting it render the challenge of regulating it much more daunting.[168]

The nature of chaotic systems suggests that it is a near certainty that anthropogenic climate change caused by greenhouse gas emissions will not be

161. *See* Federal Reserve Act § 10 (detailing the structure of the Federal Reserve Board).

162. *Board of Governors of the Federal Reserve System*, *supra* note 86.

163. *See id.* (discussing the desire for the Federal Reserve Board to reflect a variety of political and economic interests).

164. *See* Federal Reserve Act § 10 (requiring that at least two of the President's appointees to the Federal Reserve Board have experience in finance or banking).

165. *See* Brian Bennett, *Marco Rubio Says Human Activity Isn't Causing Climate Change*, L.A. TIMES (May 11, 2014, 11:35 AM), http://www.latimes.com/nation/politics/politicsnow/la-pn-rubio-denies-climate-change-20140511-story.html (on file with *The University of the Pacific Law Review*) (noting Senator Rubio's concerns that environmental reform could have major economic consequences).

166. *See* Util. Air Regulatory Group v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2449 (2014) (holding that the EPA lacked authority under the CAA to regulate some sources of greenhouse gas emissions).

167. *See* 12 U.S.C. § 225(a) (1977) (entrusting the Federal Reserve with promoting economic stability through monetary policy).

168. *See generally* ALLEN ET AL., *supra* note 7, at 8 (discussing the scale of the climate change crisis).

the final climatic crisis.[169] However, given the challenges inherent in predicting long-term climatic behavior, it is impossible to say what the next crisis will be.[170] As such, the task of empowering an agency to tackle enigmatic future crises presents substantial difficulties.[171] Given the absence of a crystal ball, the three major atmospheric crises of the last half-century may prove to be instructive.[172] Over the last fifty years, the United States has grappled with three primary atmospheric crises: air pollution in the 1960s and 1970s, tropospheric ozone depletion in the 1980s, and anthropogenic climate change in the 21st century.[173] These three crises share a common cause: chemical emissions.[174] The CAA gave the EPA authority to regulate a wide range of air-polluting chemicals in 1970, and Congress acted independently to ban CFCs in response to the ozone crisis.[175] Both the EPA and Congress have taken baby steps to limit the greenhouse gas emissions that caused the current crisis, but the greater part of the work remains unfinished.[176] In order to empower the new EPA Board to respond to climatic crises that stem in large part from chemical emissions, Congress should give the new EPA authority to regulate all chemical emissions in the United States in order to maintain climatic stability for both current and future generations.[177]

C. Making It Happen: The Challenge of Implementing Environmental Reform in a Hostile Legislative Climate

Despite the attraction of appointing a group of brilliant scientists to save the world from the sins of industrialization and to stand ready to handle whatever counterstroke arises from the rescue, there lies a counterintuitivity in writing on the necessity of congressional action to save the environment from congressional inaction.[178] Congress has not approached an agreement on any kind of climate

169. *See* FRACTAL FOUNDATION, *supra* note 1 (discussing the challenges of chaotic systems).

170. *See id.* (noting the unpredictability of chaotic systems).

171. *See id.* (expounding on the inherent unpredictability of chaos theory).

172. *See* Lewis, *supra* note 35 (discussing the air pollution problems of the 1960s); *see also Ozone Science: The Facts Behind the Phaseout*, *supra* note 131 (discussing the challenges of the ozone depletion crisis); *see generally* ALLEN ET AL., *supra* note 7, at 2–4 (discussing the climate change issue).

173. *See* Lewis, *supra* note 35 (discussing the air pollution problems of the 1960s); *see also Ozone Science: The Facts Behind the Phaseout*, *supra* note 131 (discussing the challenges of the ozone depletion crisis); *see generally* ALLEN ET AL., *supra* note 7, at 4–6 (discussing the climate change issue).

174. *See supra* notes 171–72.

175. *See* Lewis, *supra* note 35 (discussing the air pollution problems of the 1960s); *see also Ozone Science: The Facts Behind the Phaseout*, *supra* note 131 (discussing the challenges of the ozone depletion crisis).

176. Util. Air Regulatory Group v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2449 (2014); ALLEN ET AL., *supra* note 7, at 4–4.

177. *See* ALLEN ET AL., *supra* note 7, at 8 (discussing the imminence of the long-term consequences of the climate change crisis).

178. *See Glacial Pacing in the Halls of Congress*, *supra* note 22 (discussing congressional inaction).

change legislation; it could be called the worst sort of optimism to think that they would now create a revamped and reorganized EPA.[179]

Congressional hostility towards environmental science manifested itself in the EPA Advisory Board Reform Act of 2013, which passed in the House in November 2014.[180] The bill purports to "reform" the EPA Advisory Board to consist of a group of appointed members that advise the EPA Administrator on scientific issues.[181] In an apparent effort to remove biased individuals from consideration, the bill prohibits scientists who have written peer-reviewed work on pertinent scientific subjects from serving on the Board while explicitly permitting individuals with corporate conflicts of interest to serve as long as those conflicts are disclosed.[182] This disclosure requirement furthers the supposed goal of "transparency" that House Republicans have indicated the bill seeks to achieve.[183]

Critics of the bill include the Union of Concerned Scientists, which stated that the bill's provisions "turn[] the idea of conflict of interest on its head, with the bizarre presumption that corporate experts with direct financial interests are not conflicted while academics who work on these issues are."[184] One House Democrat put it "more blunt[ly], telling House Republicans . . . 'I get it, you don't like science. And you don't like science that interferes with the interests of your corporate clients. But we need science to protect public health and the environment.'"[185] It is unclear whether this bill will pass in the Senate, and the White House has already issued a statement vowing to issue a veto if it does pass the second house of the legislature.[186] The bill did not secure a two-thirds majority in the house, so an override of a hypothetical veto is exceedingly unlikely.[187] Still, the support of a provision so hostile to expert involvement in environmental policy making is troubling given that empowering experts to formulate environmental policy is exactly what this Comment suggests.[188]

The Republican victory in the 2014 midterm elections exacerbated the obstacles to meaningful climate change legislation by reinforcing the opponents

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179. *Id.*

180. *H.R. 1422 (113th): EPA Science Advisory Board Reform Act of 2014*, GOVTRACK.US, *available at* https://www.govtrack.us/congress/bills/113/hr1422 [hereinafter *H.R. 1422*] (on file with *The University of the Pacific Law Review*).

181. EPA Science Advisory Board Reform Act of 2014, H.R. 1422, 113th Cong. § 2 (2014).

182. *Id.* at § 2(b).

183. Beverly Mitchell, *House Passes Bill that Prohibits Expert Scientific Advice to the EPA*, INHABITAT (Nov. 20, 2014), http://inhabitat.com/house-passes-bill-that-prohibits-expert-scientific-advice-to-the-epa/ (on file with *The University of the Pacific Law Review*).

184. *Id.* (internal quotes omitted).

185. *Id.*

186. *Id.*

187. *H.R. 1422*, *supra* note 180.

188. *See supra* Part I.

of climate reform in Congress.[189] Since the swearing in of the 114th Congress, far-right Senator Ted Cruz, who has denied the existence of climate change, became the Chairman of the Senate Subcommittee on Space, Science, and Competitiveness.[190] Cruz's fellow GOP member Senator Marco Rubio will now oversee the Senate subcommittee that governs the National Oceanic and Atmospheric Administration.[191] While Rubio has conceded the existence of climate change, he remains convinced that human activity is not causing it.[192]

While it is clear that the current Congress is unlikely to support anything resembling pro-environmental legislation, the focus of this Comment is in line with the proposal it sets forth for the EPA: a long-term solution that looks beyond the isolated problem of climate change.[193] According to the world's leading environmental scientists, the global climate is approaching a tipping point.[194] Still, vainly hoping for a new paradigm of environmental policy from a congressional majority that regards the issue with far less concern is futile.[195] The true power of the solution this Comment suggests will not be mitigated by a delay in its implementation. While the passage of time will make the task of the new EPA more difficult, this solution is aimed at more than just the problem of climate change.[196] This vision for a reinvigorated EPA is predicated on the idea that global climate change is not the last climatic problem that humanity will face.[197] Chaos theory indicates that small changes to the global climate will instigate larger ones, and a massive reduction in greenhouse gas emissions is far from a small change.[198] It is impossible to foresee what the next great environmental challenge will be; the only thing that is certain is that this is not the last mountain that the global community will have to climb.[199] A postponement of a few years will not affect the far-reaching nature of this solution; the fact that this Congress is unlikely to implement it will not eliminate its ultimate usefulness.[200]

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189. *See* Dan Hirschhorn, *Republicans Win the Senate in Midterm Elections*, TIME (Nov. 5, 2014, 7:39 AM), http://time.com/3556003/election-day-midterm-2014-republicans-senate-democrats-obama-mcconnell/ (on file with *The University of the Pacific Law Review*) (stating that Republicans now control both chambers of Congress).

190. Colin Lecher, *Senator Ted Cruz Appointed to Oversee NASA In Congress*, THE VERGE (Jan. 11, 2015, 3:03 PM), http://www.theverge.com/2015/1/11/7528337/senator-ted-cruz-nasa-subcommittee (on file with *The University of the Pacific Law Review*).

191. *Id.*

192. Bennett, *supra* note 165.

193. *See* Mitchell, *supra* note 183 (noting the anti-environmental character of the Congress' actions).

194. *See* ALLEN ET AL., *supra* note 7, at 8 (discussing the potential irreversibility of harm caused by greenhouse emissions).

195. *See* Mitchell, *supra* note 183 (detailing Congress' hostility to pro-environmental policy).

196. *See* ALLEN ET AL., *supra* note 7, at 8 (noting the long-lasting effects of climate change); *supra* Part I.

197. *See supra* Part IV (discussing the vision for the new EPA and the focus on empowering it to address not just this problem, but the ones that arise after it gets solved).

198. FRACTAL FOUNDATION, *supra* note 1.

199. *See id.* (discussing the unpredictability of chaotic systems like the environment).

200. *See* Mitchell, *supra* note 183 (noting the GOP hostility to pro-environmental legislation).

Additionally, a more politically neutral Congress could theoretically enact this solution more easily.[201] The actual changes this Comment suggests offer Congress what amounts to an elegant punt.[202] To implement it, Congress would not have to decide on an actual course of environmental policy.[203] The houses of Congress can disagree on environmental policy to their heart's content. While this Comment advocates taking *an* approach to climate change, it does not presume to offer a scientific solution.[204] Instead, this Comment suggests that Congress delegate the problem to a small group of individuals with more collective knowledge on the topic than the 535 members of Congress combined.[205] The Senate would retain the ability to approve any of the President's appointees, and Congress would not be precluded from passing any sort of environmental policy measure in the future.[206] Congress should do what it did in 1913—it should empower experts in the field to battle a chaotic system that the legislative branch is simply not equipped to handle on its own.[207]

V. CONCLUSION

Science inherently lacks certainty, and the specter of utter unpredictability grows more intimidating in the context of the amorphous science of chaos theory.[208] That inherent uncertainty hinders decisiveness and impairs action.[209] Part of what makes the empowerment of experts so necessary is the unpredictability of global climate change.[210] If a change as small as a butterfly flapping its wings can create drastic changes, what titanic shifts will attempting to reverse global climatic trends create?[211]

The effects of chaos theory are readily apparent in the global economy.[212] Recognizing its inability to react quickly and decisively to increasing economic

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201. *See supra* text accompanying notes 15–16 (discussing Congress' failure to uniformly recognize the issue of climate change and subsequently determine a solution).

202. *See supra* Part IV (offering a solution to the issue of climate change).

203. *See supra* Part IV (arguing that the EPA's authority should be expanded and that Congress should model the organization after the Federal Reserve).

204. *See supra* Part I (suggesting a solution to climate change by reorganizing the EPA).

205. *See* HUMANITIES REPORT CARD 2013 *supra* note 118 (indicating the scientific illiteracy of a stunning number of Congresspeople).

206. *See* Federal Reserve Act, Pub. L. No. 63-43, § 10, 38 Stat. 251 (1913) (laying out the advice and consent principle that would be used to appoint EPA board members).

207. *See id.* (establishing the Federal Reserve and creating the Federal Reserve Board).

208. FRACTAL FOUNDATION, *supra* note 1.

209. *See Glacial Pacing in the Halls of Congress*, *supra* note 22 (discussing congressional inaction); *see also* Spross & Koronowski, *supra* note 15 (discussing how many members of Congress question whether climate change is real).

210. *See supra* Part I (discussing the unpredictability of the global climate).

211. *See* FRACTAL FOUNDATION, *supra* note 1 (discussing the butterfly effect).

212. *See History of the Federal Reserve*, *supra* note 23 (discussing the extreme volatility in the nineteenth century economy).

volatility, Congress established the Federal Reserve and entrusted it with broad discretion to manage American monetary policy and minimize volatility.[213] The considerations that led Congress to establish the Federal Reserve are entirely transferrable to the climate change predicament.[214] The deliberate, measured nature of the legislative branch provides balance and stability for the federal government, but managing chaotic systems requires a different, more nimble hand.[215] Congress is simply not suited to regulate environmental chaos,[216] and should reorganize the EPA and empower it to promote stability and lead the world away from the climatic point of no return.[217]

213. *See generally* Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (establishing the Federal Reserve).

214. *See supra* Part IV.

215. FRACTAL FOUNDATION, *supra* note 1 (discussing the unpredictability of chaotic systems).

216. *See* HUMANITIES REPORT CARD 2013, *supra* note 118 (noting the small percentage of Congressmembers with an educational background in science).

217. *Supra* PART 1; ALLEN ET AL., *supra* note 7, at 8 (discussing the severity of climate change).

Rough Waters: Assessing the Fifth Amendment Implications of California's Sustainable Groundwater Management Act

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I. INTRODUCTION

As California's record-breaking drought enters its fourth year, the demand for groundwater resources only increases.[1] Business is booming for well drilling

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companies as California's Central Valley agricultural industry continues to rely on the water running underneath the earth's surface.[2] For example, in Fresno, Arthur & Orum Well Drilling, Inc. maintains a waiting list that is over a year long.[3] Meanwhile, researchers have demonstrated that over-reliance on groundwater resources leads to adverse and irreversible environmental effects, including groundwater overdraft and land subsidence.[4] To address this troublesome predicament, in late 2014, California lawmakers came together with the goal of making California's groundwater management sustainable and enacted the Sustainable Groundwater Management Act (SGMA).[5]

As eminently laudable and sensible as SGMA may be, when viewed against the backdrop of the existing groundwater regulation framework, the legislation raises important questions.[6] Does the jurisdictional shift contained within the new legislation unfairly upset the expectations of water right holders and property owners?[7] If so, does this shift result in a "taking" of private property without just compensation within the meaning of the Fifth Amendment to the U.S. Constitution?[8]

The development of the law surrounding groundwater management, allocation, and conservation in California has been a power struggle rife with plot twists. Lawmakers, advocates, rights holders, and members of the public have debated for decades about the degree of ultimate oversight that the state should possess over groundwater.[9] Now, as new laws demand sustainable use and grant powers that the state once lacked, a look back through California's groundwater saga provides the context necessary to understand its newest chapter.[10]

The State Water Resources Control Board ("the Board") is a state entity that oversees and protects California's water resources and administers the California

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1. Lesley Stahl, *Depleting the Water*, CBS NEWS, Nov. 16, 2014, http://www.cbsnews.com/news/depleting-the-water/ (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *See* Devin Galloway & Francis S. Riley, *San Joaquin Valley, California: Largest Human Alteration of the Earth's Surface*, 1182 U.S. GEOLOGICAL SURV. CIRCULAR 23 (1999) (demonstrating the connection between groundwater over-draft and land subsidence, an irreversible environmental alteration that has many adverse effects on property).

5. *See infra* Part III (outlining the Sustainable Groundwater Management Act and the push for sustainability in general).

6. *See infra* Part IV (detailing the questions raised by SGMA).

7. *See id* (posing that question).

8. *See infra* Part IV.C (dealing with the takings question).

9. Reid Wilson, *California Debates New Regulations for Diminishing Groundwater Amid Historic Drought*, WASH. POST, Aug. 6, 2014, http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/06/california-debates-new-regulations-for-diminishing-groundwater-amid-historic-drought/ (on file with *The University of the Pacific Law Review*).

10. *See infra* Parts II–III (outlining the long history of the Board's jurisdiction and the latest step in its expansion).

permitting system.[11] Section 1200 of the California Water Code establishes the parameters of SWRCB's jurisdiction.[12] The statute provides: "whenever the terms stream, lake, or other body of water . . . occurs in relation to [applications, permits, or licenses to appropriate], such terms refer only to surface water, and to subterranean streams flowing through known and definite channels."[13] As a result, pumping from "subterranean streams" is subject to the SWRCB's permitting authority,[14] but groundwater that does not flow through a "known and definite channel" is not subject to the SWRCB's permitting authority.[15] This latter category is known as "percolating groundwater," and common law principles and the courts regulate the use of such water, rather than the SWRCB.[16]

Also relevant to the discussion is Article X, Section 2 of the California Constitution.[17] In pertinent part, the constitutional amendment[18] mandates that "the water resources of the State be put to beneficial use," and "that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."[19] The text also grants the legislature power to "enact laws in the furtherance of the policy" it sets forth.[20] Commentators have argued that Article X, Section 2 was an expansion of state jurisdiction over groundwater rights;[21] this Comment will demonstrate that, in fact, there has been a clear trend of increased oversight powers notwithstanding the "subterranean stream" limitation of Water Code Section 1200.[22] The Sustainable Groundwater Management Act further expands the Board's jurisdiction over percolating groundwater, expressly relying on the

11. *See About the Water Board*, CAL. STATE WATER RES. CONTROL BD., http://www.swrcb.ca.gov/about_us/ (last visited Feb. 7, 2015) (on file with *The University of the Pacific Law Review*) (displaying the mission statement of the Board: "To preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations.").

12. CAL. WATER CODE § 1200 (West 2015) [hereinafter "Section 1200"].

13. *Id.*

14. *See Water Rights: Frequently Asked Questions*, CAL. STATE WATER RES. CONTROL BD., http://waterboards.ca.gov/waterrights/board_info/faqs.shtml (last visited Feb. 7, 2015) [hereinafter *Frequently Asked Questions*] (on file with *The University of the Pacific Law Review*) (stating that "[i]f you have a pre-1914 [appropriative] right, you do not need a water right permit," implying that post-1914 appropriative rights are subject to the Board's permitting jurisdiction).

15. Andrew H. Sawyer, *Subterranean Blues: Groundwater Classification in California*, 6 CAL. WATER L. SYMP. 1, 15 (Jan. 13, 2010), *available at* http://www.ourstreamsflow.org/documents/Subterranean%20streams_1.pdf) (on file with *The University of the Pacific Law Review*).

16. *Id.* at 3

17. CAL. CONST. art. X, § 2.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See* Joseph L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 308 (2002) (noting that attorneys for the Board have argued that Article X, Section 2 of the State Constitution allows for the Board's jurisdiction to include unreasonably used groundwater).

22. *See infra* Part II.B.4 (describing the trend of increased Board jurisdictional authority over groundwater).

legislature's prerogative under Article X, Section 2.[23] Under SGMA, the Board will have the ability to limit pumping to achieve sustainability under circumstances that previously would have been within courts' exclusive jurisdiction.[24] If this jurisdictional shift amounts to a taking of private property for public use within the meaning of the U.S. Constitution, then water rights holders should receive just compensation. Likewise, if SGMA's pumping limits require private property owners to bear a burden that is properly borne by the public as a whole, then water right holders should receive just compensation. Unfortunately for opponents of SGMA's passage, existing California law would likely render a facial takings claim unsuccessful. There are, however, certain limited factual scenarios where application of SGMA could create a claim for just compensation.

To reach those conclusions, Part II of this Comment explores the current framework of the Board's jurisdiction over groundwater.[25] Part III describes the Sustainable Groundwater Management Act, passed in late 2014, and the jurisdictional changes contained within that Act.[26] Part IV addresses questions raised by the Act about whether the expanded Board jurisdiction therein is consistent with the protections against uncompensated takings contained within the Fifth Amendment to the U.S. Constitution.[27] Finally, assuming that the expansion of the Board's jurisdiction implicates a takings question, the remainder of this Comment explores whether a takings claim should be recognized if the Board exercises the new authority granted by SGMA to restrict pumping.[28]

II. THE EXISTING FRAMEWORK: UNDERSTANDING THE SCOPE OF THE BOARD'S JURISDICTION

A statutory framework interpreted by decades of case law governs the power of the Board to limit the pumping of groundwater resources; this framework makes it clear that the Board has limited regulatory jurisdiction over groundwater.[29] This Section examines two of the most distinct aspects of the Board's jurisdiction over groundwater. First, this Section outlines why the Board

23. *See infra* Part IV.A (concluding that the legislature has expanded Board jurisdiction).

24. *Id.*

25. *See infra* Part II (demonstrating the current limitations on the Board's jurisdiction).

26. *See infra* Part III (outlining the basics of the powers granted to the Board by the Act and the legislation related to it).

27. *See infra* Part IV.C (answering this question in detail).

28. *See infra* Part IV.C.3 (recognizing that a facial takings claim against SGMA as a whole will likely prove unsuccessful, but also noting that California should recognize two specific "as applied" takings arguments).

29. *See, e.g.*, CAL. WATER CODE §§ 1200–1202 (limiting the Board's regulatory jurisdiction to subterranean streams); *see also* Katz v. Walkinshaw, 141 Cal. 116, 119, 141 (1903) (a case interpreting that framework and holding against regulatory jurisdiction over percolating groundwater).

only has jurisdiction over certain types of groundwater rights.[30] Then, this Section explores four developing areas of groundwater law that have expanded the Board's ability to regulate groundwater usage and pumping under certain circumstances.[31] In doing so, this section will outline the general parameters of the Board's jurisdiction over groundwater in California and demonstrate its expansion.[32]

A. Only Some Groundwater

The California Water Code and the courts interpreting it have together created a distinction between percolating groundwater and subterranean streams.[33] Percolating groundwater is "water held in the earth,"[34] and is not subject to the provisions of the Water Code addressing jurisdiction over groundwater.[35] Because percolating groundwater typically exists in the soil of an overlying landowner's property,[36] it was historically considered "open for exploitation."[37] Thus, in the past, courts would say that "no law will prevent or interfere with" its extraction.[38] However, as the law evolved, courts began to recognize that percolating groundwater is not a purely private property right and that the state may regulate its use in some circumstances.[39]

In contrast, subterranean streams are waters that move underground "in channels with definite beds and banks . . . in definite streams."[40] Because the law subjects water found in a definite channel to appropriation,[41] and due to Water Code Section 1200's unambiguous language,[42] the Board possesses clear jurisdiction over subterranean streams.[43] Section 1200 of the Water Code

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30. *See infra* Part II.A (outlining the difference between percolating groundwater and subterranean streams, and the role that difference plays in determining whether the Board has jurisdiction to regulate).

31. *See infra* Parts II.B.1–4 (addressing these potential limitations).

32. *See id.* (demonstrating the trend).

33. *Katz*, 141 Cal. at 141.

34. *Id.*

35. *See* CAL. WATER CODE §1200 (stating that the Code applies only to "surface water" and "subterranean streams," while explicitly not mentioning the percolating groundwater in the soil).

36. *See* Cross v. Kitts, 69 Cal. 217, 222 (1886) (holding that "[w]ater percolating in the soil belongs to the owner of the freehold.").

37. *Katz*, 141 Cal. at 128.

38. *Id.*

39. *See, e.g.*, *id.* at 134 (noting that percolating groundwater use must be "reasonable").

40. Wells A. Hutchins, *California Groundwater: Legal Problems*, 45 CAL. L. REV. 688 (1953).

41. *See* CAL. WATER CODE §1201 (stating that "[a]ll water flowing in any natural channel" that has not already been put to beneficial use is "public water of the State and subject to appropriation in accordance with [the Water Code].").

42. *See id.* § 1200 (conferring jurisdiction to the Board over subterranean streams).

43. *See, e.g.*, North Gualala Water Co. v. State Water Res. Control Bd., 139 Cal. App. 4th 1577, 1583 (2006) (noting that the Board argued that the groundwater in question belonged to a subterranean stream, and was thus "subject to [its] jurisdiction.").

expressly grants jurisdiction over the use of such waters, stating that "whenever the [term] . . . water occurs in relation to applications to appropriate water or permits or licenses to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels."[44]

The judiciary has affirmed a legal test that the Board devised for classifying groundwater as either percolating or part of a subterranean stream.[45] Pursuant to this test, a watercourse is a subterranean stream, and therefore subject to the Board's jurisdiction, when (1) a "subsurface channel [is] present;" (2) that "channel [has] a relatively impermeable bed and banks;" (3) "the course of the channel [is] known or capable of being determined by reasonable inference;" and (4) there is groundwater "flowing in the channel."[46] This framework limits the scope of the Board's jurisdiction, because if a party can successfully demonstrate that a given source of groundwater is percolating, then prior to enactment of SGMA, the Board arguably has little, if any, authority over groundwater pumping.[47]

B. Limited Regulatory Jurisdiction over Percolating Groundwater

This section explores four of the most important contours of the Board's jurisdiction over groundwater prior to the enactment of SGMA. Subpart 1 explains the Board's permitting and regulatory jurisdiction, the two possible sources of authority to limit groundwater extraction.[48] Subpart 2 looks at the Water Code's water quality provisions and the limits they place on the Board's jurisdiction.[49] Subpart 3 examines how courts have employed the public trust doctrine to regulate groundwater in some situations.[50] Finally, Subpart 4 examines how the legislature and the Board itself have expanded Board jurisdiction by relying largely on Article X, Section 2 of the California Constitution.[51]

1. Permitting vs. Regulatory Jurisdiction

California groundwater law requires water users who pump from a subterranean stream to obtain a permit from the Board before pumping or diverting a supply of water, but the law does not require water users who pump

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44. WATER § 1200.

45. *North Gualala*, 139 Cal. App. 4th at 1585.

46. *Id.*

47. *See id.* (implying that the Board's jurisdiction is not absolute because of the distinction between percolating groundwater and subterranean streams).

48. *See infra* Part II.B.1.

49. *See infra* Part II.B.2.

50. *See infra* Part II.B.3.

51. *See infra* Part II.B.4.

percolating groundwater to obtain any Board permit.[52] This limited permitting authority begs a question left almost untouched by California's judiciary: does the Board's power to grant permits for water use differ from its power to regulate water use?

No court has directly addressed that issue, although one recent case is relevant: in *Light v. State Water Resources Control Board*, the Board issued a regulation prohibiting certain uses of surface water[53] on the basis that such use was unreasonably and adversely affecting local aquatic habitat.[54] Multiple surface water users sued, asserting that the Board lacked jurisdiction over their riparian and pre-1914 appropriative surface water rights.[55] Despite the fact that the Water Code establishes that the Board does not have permitting authority over riparian and pre-1914 water rights, the court held that "if . . . the [l]egislature has the power to enact general rules governing the reasonable use of water, the Board has a similar regulatory authority" pursuant to Article X, Section 2.[56] In doing so, the court rejected the argument that the Board's authority is limited to enforcement actions and instead reasoned on policy grounds that "[e]fficient regulation of the state's water resources . . . demands that the Board have the authority to enact tailored regulations."[57]

Although the *Light* holding only applies to riparian and early appropriator surface rights, and not groundwater rights, the holding can be extended by analogy to groundwater. For all three types of water rights, the Water Code establishes a lack of Board jurisdiction;[58] likewise, for all three types of water rights, Article X, Section 2 imposes a duty of reasonableness.[59] *Light*'s citation to the broad role of the Board, and the court's concern for efficient regulation applies equally to percolating groundwater as to riparian and pre-1914 rights. [60] *Light* suggests that it is possible to have a water right that is subject to the Board's regulatory power, but not to the Board's permitting authority—a concept rarely invoked prior to the case.[61]

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52. CAL. WATER CODE §§ 1200, 1221.

53. *See* Light v. State Water Res. Control Bd., 226 Cal. App. 4th 1463, 1472 (2014) (explaining that landowners were diverting the water flowing through a stream and using it to irrigate local vineyards and orchards).

54. *Id.*

55. *See id.* (explaining the plaintiffs' argument that they were exempt from Board jurisdiction due to their possession of groundwater rights as "riparian users and early appropriators, whose diversion is beyond the permitting authority of the Board.").

56. *See id.* at 1484–85 (stating that "[t]he Water Code authorizes the Board, in carrying out its statutory duty to administer the state's water resources, 'to exercise the adjudicatory and regulatory functions of the state.'").

57. *Id.* at 1487.

58. *Id.*

59. CAL. CONST. art. X, § 2.

60. *See Light*, 226 Cal. App. 4th at 1487.

61. *See id.* at 1472–73 (referring to permitting and regulatory jurisdiction as two separate possible sources of power over water resources).

Despite the *Light* court's suggestion that permitting and regulatory authority are not necessarily co-extensive, practicalities and policy suggest a more nuanced analysis. As a practical matter, permitting requires a water user to do two things: (1) to affirmatively obtain permission to divert water and (2) to comply with the terms and conditions that the Board may impose.[62] In contrast, a regulatory process without permitting requires a water user to comply with Board rules, but only after the water user establishes a water right.[63] In both cases, a water user's property interest in water is subject to Board rules. In the end, what matters to groundwater pumpers is whether the Board may compel them to limit pumping, which it may do regardless of whether it has permitting jurisdiction.[64] In this regard, exercise of regulatory jurisdiction overwhelms the absence of permitting authority, leaving the question of why the legislature failed to grant such authority in the first place.

As a policy matter, a legal structure that has no upfront permitting requirement, but nonetheless allows regulation of use after the fact, seems to be a recipe for poor planning, chaos, and discontentment. Without a permit requirement, a water user may invest in pumping and rely on pumped water, but thereafter be limited or excluded from realizing that investment due to a regulatory action by the Board. This scenario is arguably inefficient from an economic, social, and water resource perspective. However, the courts may nonetheless trend in the direction of upholding Board jurisdiction, as in *Light*, simply because, without legislative action, management of percolating groundwater basins would continue to be subject to the vagaries of local resources and influences—a practicality that was a driving force behind SGMA.

2. Water Quality Regulation

In 1969, the California legislature enacted a suite of laws to ensure heightened water quality standards.[65] One of those provisions, Water Code Section 2100, gave the Board the authority to file suit in court in order to limit pumping to protect groundwater quality.[66] Notably, the Board could not impose such pumping cuts directly, much like the scope of authority granted to the Board under other Water Code provisions.[67] The Board has never in fact filed such

62. *Frequently Asked Questions*, *supra* note 14.

63. *Id.*

64. *See, e.g.*, *Light*, 226 Cal. App. 4th at 1487 (noting that the right holders were outside permitting jurisdiction but nonetheless fell within the rules regarding reasonableness).

65. CAL. WATER CODE §§ 2100–2102.

66. *Id.* § 2100 ("the board may file an action in the superior court to restrict pumping, or to impose physical solutions, or both, to the extent necessary to prevent destruction of or irreparable injury to the quality of [groundwater].")

67. *See, e.g.*, *id.* § 275 (stating that "[t]he department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state").

adjudication, although there are some examples of the Board invoking its Section 2100 authority in an effort to compel local action.[68]

3. The Public Trust Doctrine

With roots stretching back to English common law, the public trust doctrine imposes an obligation on the state to protect navigable and tidally influenced waters for common use by the public.[69] In the touchstone case, *National Audubon Society v. Superior Court*, the Supreme Court of California held that state water right allocation must ensure protection of trust uses where feasible.[70] The Court also held that as a matter of logic, this obligation extends to non-navigable streams where water use and diversion affect navigable watercourses.[71] Under this reasoning, the Board's authority to protect the public trust might extend to percolating groundwater, at least where pumping impacts navigable or tidally influenced water subject to the trust.[72]

The recent case of *Environmental Law Foundation v. State Water Resources Control Board* addressed that precise issue.[73] There, the petitioner alleged that groundwater pumping had diminished the flow of the Scott River, damaging fish populations and decreasing opportunities for recreational activities like boating and swimming.[74] In July 2014, addressing a motion for judgment on the pleadings, the superior court issued an opinion holding that where pumping causes harm to navigable waters, the public trust doctrine allows the Board to restrict pumping in order to protect those waters held in the public trust.[75] It is important to keep in mind that this was a superior court holding, and thus, it has limited value as of yet.[76] However, the decision does represent a willingness to move closer to regulating groundwater not previously within the government's reach. Judicial receptiveness to the application of the public trust doctrine to

68. *See, e.g.*, STATE WATER RES. CONTROL BD., RESOLUTION NO. 88-114, RESOLUTION CALLING FOR JOINT ACTION BY FEDERAL, STATE, AND LOCAL AGENCIES TO REMEDY CONTAMINATION IN THE MAIN SAN GABRIEL GROUND WATER BASIN (1988).

69. Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393, 396–97 (2009).

70. 33 Cal. 3d 419, 426 (1983).

71. *Id.* at 437.

72. *See, e.g.*, Press Release, Envtl. Law Found., Court Rules Groundwater Protected as Public Trust (July 16, 2014) (on file with *The University of the Pacific Law Review*) (advocating the use of the public trust doctrine to proscribe use of groundwater resources where pumping causes harm to waters protected by the public trust).

73. Order after Hearing on Cross Motions for Judgment on the Pleadings at 2, Envtl. Law Found. v. State Water Res. Control Bd., No. 34–2010–80000583 (Cal. Super. Ct. 2014), 2014 WL 8843074.

74. *Id.* at 3–4.

75. *Id.* at 13.

76. *Id* at 1.

groundwater resources is part of a trend toward broader Board authority to regulate groundwater use.[77]

4. Article X, Section 2 of the California Constitution

Enacted by voters in 1928,[78] Article X, Section 2 of the California Constitution mandates a standard of "reasonable" use, stating that "the right to water or to the use . . . of water . . . is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use."[79] Article X, Section 2 also requires that "the water resources of the state be put to beneficial use to the fullest extent of which they are capable."[80] Although Article X, Section 2 is self-executing, the Water Code authorizes the Board to take measures necessary to "prevent . . . unreasonable use."[81] The exact scope of the authority that Article X, Section 2 grants is unclear.[82] Given this ambiguity, water interests clash over the question of whether the constitutional provision provides sufficient regulatory power to the Board to give the Board jurisdiction over certain water rights—such as rights to percolating groundwater—which the Board otherwise clearly does not have jurisdiction.[83]

Despite this ambiguity, the Board has in fact invoked Article X, Section 2 to assert regulatory jurisdiction over rights that would not otherwise be within its jurisdiction.[84] California's judiciary has thus far upheld such Board action,[85] although it could be argued that the few cases that exist are limited to their facts. One of the first cases to convey this type of reasoning is *SWRCB v. Forni*.[86] There, without reference to the constitutional provision, the court found that the constitutional and statutory requirements of reasonable and beneficial use applied to a riparian right holder.[87] In reaching the decision to uphold the Board's action, the court relied heavily on Water Code Section 275, and ultimately held that the

77. *See id.* at 13. (paving the way and bolstering the argument for such an expansion).

78. Bryan E. Gray, *In Search of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 HASTINGS CONST. L.Q. 225 (1989).

79. CAL. CONST. art. X, § 2.

80. *Id.*

81. CAL. WATER CODE § 275; *see, e.g.*, Imperial Irrigation Dist. v. State Water Res. Control Bd., 186 Cal. App. 3d 1160, 1163 (1986) (stating that "the Board has adjudicatory power in the matter of unreasonable use of water").

82. Sax, *supra* note 21, at 313.

83. *Id.* at 308.

84. People ex rel. State Water Res. Control Bd. v. Forni, 54 Cal. App. 3d 743 (1976); *Imperial Irrigation*, 186 Cal. App. 3d at 1163 (1986); Light v. State Water Res. Control Bd., 226 Cal.App.4th 1463, 1487 (2014).

85. *See, e.g.*, *Imperial Irrigation*, 186 Cal. App. 3d at 1163 (stating that "the Board has adjudicatory power in the matter of unreasonable use of water."); *Light*, 226 Cal. App. 4th at 1473 (following the same logic).

86. 54 Cal. App. 3d 743 (1976).

87. *Id.* at 752–53.

code section confers an affirmative power to the Board that allows it to "bring an action in which the reasonableness of . . . water use could be adjudicated."[88] Water Code Section 275 states that the "board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."[89] However, the court substantially rested its decision on the fact that the Board was exercising only the power to bring the action to court, and not to direct regulation.[90]

Courts became more overtly supportive to the idea of broader Board jurisdiction over unreasonable uses over time: a decade after *Forni*, the court in *Imperial Irrigation District v. SWRCB* addressed whether the Board's determination that a water district's failure to implement conservation measures constituted unreasonable use was binding on the District, despite the fact that the district held pre-1914 rights.[91] Ultimately, the court held that the Board has adjudicatory power as to unreasonable water use.[92] Rather than relying on Section 275, the court based this notion on Article X, Section 2.[93] The *Imperial Irrigation* decision appears to be the earliest direct authority for Board exercise of broad regulatory jurisdiction over the question of reasonable use under Article X, Section 2. The *Imperial Irrigation* court, however, never grounded its decision in any specific legal authority other than the desirability of the Board wielding comprehensive power over the question of reasonable use.[94]

Despite this slim foundation, the idea of broad Board authority under Article X, Section 2 appears to be trending toward acceptance. Nearly forty years after *Forni*, the court in *Light* again questioned whether the Board had the authority to enact regulations concerning unreasonable use.[95] Unlike *Forni*, *Light* considered whether the Board imposed the regulation directly on the water user rather than relying on a court process (although the regulation itself was fairly restrained, requiring the water users to develop their own management plans rather than the Board imposing plans on them).[96] The *Light* petitioners argued that in adopting this regulation, the Board had exceeded its authority under Water Code Section 275 to bring actions before the judiciary, legislature, and other administrative agencies. Thus, the *Light* court was squarely focused on the scope of the Board's

88. *Id.* at 753.

89. CAL. WATER CODE § 275.

90. *Forni*, 54 Cal. App. 3d at 754.

91. Imperial Irrigation Dist. v. State Water Res. Control Bd., 186 Cal. App. 3d 1160, 1162–63 (1986).

92. *Id.*

93. *Id.*

94. *Id.*

95. 226 Cal. App. 4th at 1472–73.

96. *Compare id.* at 1472 (dealing with a Board regulation on unreasonable use) *with SWRCB v. Forni*, 54 Cal. App. 3d 743 (1976) (addressing whether the Board could bring an action concerning unreasonable use, and concluding that such action comes within the express language of Water Code section 275).

jurisdiction under Article X, Section 2.[97] The court held that the constitutional provision confers broad jurisdiction, and by specifying that the Board could take actions to court, Section 275 simply outlined one approach that the Board could take and did not limit other approaches.[98] Invoking *Imperial Irrigation*'s broad principles, the *Light* court held that the Board has the "authority to prevent . . . unreasonable use of water, regardless of the basis under which the right is held."[99] The *Light* opinion stated that Article X, Section 2 confers upon the Board a "separate and additional power" from that given in Section 275 "to take whatever steps are necessary to prevent unreasonable use."[100] The court also relied upon Water Code Section 174, which grants the Board the power to "exercise the adjudicatory and regulatory functions of the state in the field of water resources,"[101] and Section 186, which affords the Board "any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law."[102]

Although these holdings are potentially very powerful, it is notable that their reasoning is rather thin. For instance, the court in the *Imperial Irrigation* case grounded the Board's regulatory power over pre-1914 rights—rights over which the Board otherwise does not have jurisdiction—in Article X, Section 2 and in so doing, referenced several provisions of the Water Code.[103] However, neither Article X, Section 2 nor those Water Code provisions specifically grant the Board jurisdiction over pre-1914 rights, and arguably, the very general language of these provisions fails to support the argument that they were intended to alter jurisdiction. Moreover, neither the *Light* court nor the *Imperial Irrigation* court presents a convincing legal argument for such a change, as sound as their policy rationales might be.[104] Of course, these decisions are binding and courts are unlikely to reverse them.

Despite their thin legal underpinning, the ultimate conclusion of these cases—that consistent and comprehensive regulation of water resources is most desirable regardless of a lack of legislative clarity on the issue—seems eminently sensible. Perhaps for this reason, if not for any other, Article X, Section 2 is increasingly invoked as a source of Board power, even over water rights to which

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97. *See* 226 Cal. App. 4th at 1481–82 (lacking other grounds to uphold the regulation, the court relied heavily on the expansive language of the constitutional provision and the fact that Board jurisdiction "has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters").

98. *Id.* at 1495.

99. *Id.* at 1487.

100. *Id.* at 1486.

101. CAL. WATER CODE § 174.

102. *Id.* § 186.

103. *See* Imperial Irrigation Dist. v. State Water Res. Control Bd., 186 Cal. App. 3d 1160, 1169–70 (1986) (citing to California Water Code Sections 275 and 1050 for the proposition that "the Board has the '*separate and additional power* to take whatever steps are necessary to prevent unreasonable use") (quoting United States v. State Water Res. Control Bd., 182 Cal. App. 3d 82, 142 (1986) (emphasis in original)).

104. *See, e.g.*, WATER § 100 (cited by the *Imperial Irrigation* court, and mandating a statewide water policy but not mentioning the constitutional provision).

it otherwise does not have jurisdiction.[105] In this regard, twenty-five years ago, one commentator characterized Article X, Section 2 as "something of a sleeping giant, which may be awakened in future years as water grows shorter in supply and the interest in water conservation increases."[106] After a century-long nap, the giant may finally be awake. In 2014, the legislature invoked Article X, Section 2 to confer substantial new powers on the Board in the groundbreaking Sustainable Groundwater Management Act.[107]

III. NEW GROUNDWATER LEGISLATION: INTRODUCING SUSTAINABLE STANDARDS

During their 2013–2014 legislative session, California lawmakers recognized several problems connected to the state's reliance on groundwater resources during dry years, including the ability of most groundwater users to pump at an unregulated rate.[108] In response to these problems, the legislature passed three bills related to sustainable local groundwater management that Governor Jerry Brown later signed into law; collectively, these three bills make up the Sustainable Groundwater Management Act.[109] SGMA is a groundbreaking effort to mandate sustainable groundwater use,[110] so as to avoid "over-drafting"[111] the state's already-depleted water supplies.[112]

The Act primarily focuses on the roles of local groundwater management entities and finds that "groundwater resources are most effectively managed at the local or regional level" and that "groundwater management will not be

105. *See, e.g.*, *Light*, 226 Cal. App. 4th at 1473 (citing to the constitutional provision to support regulation of unreasonable uses).

106. Gray, *supra* note 78, at 226.

107. SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014).

108. *See* SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (finding that "[e]xcessive groundwater pumping can cause overdraft, failed wells, deteriorated water quality, environmental damage, and irreversible land subsidence . . . .").

109. AB 1739, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1319, 2014 Leg., 2013–14 Sess. (Cal. 2014) (collectively referred to as the Sustainable Groundwater Management Act).

110. *See generally* EDMUND G. BROWN, GOVERNOR, STATE OF CALIFORNIA, CALIFORNIA WATER ACTION PLAN (2014) [hereinafter CALIFORNIA WATER ACTION PLAN] (advocating for sustainable water use and "serious groundwater management"); *see also* Lisa Lien-Mager, *Senate Committee Advances Groundwater Bill*, ASS'N OF CAL. WATER AGENCIES, April 22, 2014, http://www.acwa.com/news/groundwater/senate-committee-advances-groundwater-bill (on file with *The University of the Pacific Law Review*) (quoting Senator Fran Pavley, author of SB 1168 and SB 1319: "Everyone—literally everyone—seems to be working on groundwater this year").

111. *See* SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (stating that over-draft occurs when a given basin is pumped at a faster pace than the rate at which it recharges its groundwater supply).

112. *See, e.g.*, Sara Jerome, *Water Bills Advance in California Senate,* WATER ONLINE, May 14, 2014, http://www.wateronline.com/doc/water-bills-advance-in-california-senate-0001 (on file with *The University of the Pacific Law Review*) (stating that "California is pushing up against the limits of our finite water supply," and calling the current state of affairs a "water crisis"); *see also* Galloway, *supra* note 4 (noting that the groundwater aquifers in California have been over-pumped for years).

effective unless local actions to sustainably manage groundwater basins and subbasins are taken."[113] Consequently, groundwater management entities and rights holders must now create management plans that specify a "sustainable yield"[114] for the underground basins within their purview, and the basin must be managed to achieve that sustainable level by a deadline.[115] In order to enforce this mandate, the legislature amended the Water Code to grant new powers to the state through the Board.[116] It added two main functions to the state's responsibilities: prioritization[117] and enforcement.[118]

Pursuant to the new sustainable groundwater management provisions, the state now has the authority to prioritize groundwater basins by their depletion levels and risk of overdraft.[119] Management entities in charge of the highest priority basins will have to create plans more quickly than those that manage lower priority basins.[120] These plans must be designed in a way that achieves a satisfactory result within twenty years.[121]

In order to ensure that management entities actually develop these plans, the new legislation makes its most impactful change by allowing for Board enforcement. Upon noncompliance with the new planning requirements and a determination that a basin is probationary,[122] the Board may arrange for a qualified third party to develop a groundwater management plan for the basin.[123] The Board may adopt such a plan one year after designating a basin as probationary as long as the specific problems noted during designation have not been addressed and remedied.[124] Ultimately, the Board only has the authority to rescind its interim plans if it determines that the sustainability plan and the activities moving forward are "adequate."[125] This could mean indefinite control

113. SB 1168 § 1(a)(6)–(7), 2014 Leg., 2013–14 Sess. (Cal. 2014).

114. *See* CAL. WATER CODE § 10721(v) (enacted by Chapter 346) (defining "sustainable yield" as the "maximum quantity of water . . . that can be withdrawn annually . . . without causing an undesirable result").

115. *Id.* § 10727(a) (enacted by Chapter 346); CAL. WATER CODE § 10726.2(b) (enacted by Chapter 346).

116. *See generally* AB 1739, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014); SB 1319, 2014 Leg., 2013–14 Sess. (Cal. 2014) (known collectively as SGMA).

117. WATER § 10933(b) (enacted by Chapter 346).

118. *Id.* § 10735.4(c) (enacted by Chapter 347).

119. *Id.* § 10933(b) (enacted by Chapter 346).

120. *Compare id.*§ 10720.7(a)(1) (enacted by Chapter 346) *with id.*§ 10720.7(a)(2) (enacted by Chapter 346) (allowing low-priority basins two more years to adopt sustainability plans than basins of high- and medium-priority).

121. CAL. WATER CODE § 10727.2(b) (enacted by Chapter 346).

122. *See id.* § 10735.2 (enacted by Chapter 347) (stating that "the board may . . . designate a basin as a probationary basin if" any of the listed criteria are met, such as failure to form a management entity by 2017 or to create a management plan by 2020).

123. *Id.* § 10735.4(c) (enacted by Chapter 347).

124. *Id.* §§ 10735.6–8 (enacted by Chapter 347).

125. *Id.* § 10735.8(b)(2) (enacted by Chapter 347).

over the basins that continually fail to meet the Board's standards, regardless of the rights held by the entities that operate those basins.[126]

IV. ROUGH WATERS: DOES THE BOARD'S NEW ABILITY TO LIMIT PUMPING IMPLICATE A TAKINGS CLAIM?

Regulators disagree with users and appropriators about the practical implications of statewide monitoring, prioritization, and the possibility of intervention.[127] However, the focus of this Comment is not the pros and cons of the new legislation, but the way in which it expands Board jurisdiction, and whether such expansion creates a takings issue.[128] Therefore, the next section determines whether the legislature has expanded the Board's jurisdiction.[129] Upon concluding that the legislature has indeed increased the Board's jurisdictional scope, the sections thereafter discuss the nature of groundwater rights[130] and the viability of a takings claim.[131]

A. Does SGMA Expand Board Jurisdiction?

The question of whether SGMA expands the Board's authority in a manner relevant to a takings analysis depends on whether the Board had the authority to limit pumping of percolating groundwater rights prior to the enactment of SGMA. If the Board had that authority, then SGMA did not, as a practical matter, alter the Board's ability to regulate percolating groundwater rights—it merely changed the regulatory framework. From this perspective, Article X, Section 2 of the California Constitution provides the best support for the argument that SGMA does not expand the Board's jurisdiction.[132] The constitutional provision mandates reasonable and beneficial use of all of California's water resources, including groundwater.[133] Further, as explored above, at least one court has recognized the Board's regulatory authority concerning reasonable uses to be as broad and expansive as possible.[134] These authorities suggest that SGMA has not

126. *Id.*

127. For a review of those issues, see Micah Green, Article, *Chapters 346 and 347: Keeping California's Thirst for Groundwater in Check*, 46 MCGEORGE L. REV. 425 (2015) (discussing the practical consequences of the new groundwater legislation and outlining the arguments on both sides).

128. *See infra* Part IV.

129. *See infra* Part IV.A.

130. *See infra* Part IV.B.

131. *See infra* Parts IV.C.1–3.

132. CAL. CONST. art. X, § 2.

133. *Id.*

134. *See supra* Part II.B.4 (explaining the evolution of the notion that the Board has a regulatory authority comparable to the legislature when dealing with unreasonable uses).

expanded Board jurisdiction, because Article X, Section 2 already grants the Board the power to limit unreasonable pumping.[135]

An argument to the contrary might note that prior to SGMA, no court had addressed the scope of the Board's jurisdiction. The *Light* case explored this issue in more detail than any prior authority, and *Light* itself did not address percolating groundwater. Arguably, because no court has ever clearly held that the pre-SGMA Board had the authority to directly limit percolating groundwater pumping under Article X, Section 2, percolating groundwater rights holders would not have reasonably anticipated that Board authority was a limitation on their property rights. In other words, Board regulation would not have historically been part of the bundle of sticks that made up their groundwater rights.

The legislature's adoption of requirements for sustainable groundwater management and allocation has granted new powers to the Board to regulate percolating groundwater pumping that did not exist before.[136] Legislators working on the bills made a concerted effort to make the state stronger in its role as water manager.[137] Under SGMA, the Board may now limit pumping even though the authority to do so largely did not exist before the enactment of the new laws.[138]

Take, for example, the hypothetical case of an overlying landowner who extracts percolating groundwater from a basin underneath the property and uses it for farming. Assume further that this landowner is subject to the new sustainability requirements, but a groundwater sustainability plan has not been adopted for the basin. Under the law as it existed before SGMA, the Board would not be authorized to interfere with this landowner's use of percolating groundwater.[139] However, under the new legislation, the Board would be able to step in and deem the basin as probationary because no plan was created.[140] The Board would then be able to adopt its own plans and limit that landowner's pumping.[141]

Therefore, at least in this one scenario, it is likely that the legislature has indeed expanded the Board's jurisdiction This remains true even if one accepts

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135. CAL. WATER CODE § 1201.

136. *See supra* Part III (detailing the shift in authority).

137. *See* SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (stating in the legislative findings section that "[g]roundwater management will not be effective unless local actions to sustainably manage groundwater . . . are taken," and that in order to do so, "robust conjunctive management" and state "authority to develop and implement an interim plan" will be necessary).

138. *Compare* WATER § 1200 (stating that "whenever the [term] . . . water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such [term] refers only to surface water, and to subterranean streams flowing through known and definite channels."), *with* WATER §§ 10735.2–10735.8 (allowing for adoption of interim plans for "probationary" basins without any reference to whether percolating groundwater is exempt from coverage).

139. *See* CAL. WATER CODE § 1200 (impliedly exempting percolating groundwater from coverage under the Water Code).

140. *Id.* § 10735.2(a)(2) (enacted by Chapter 347).

141. *Id.* § 10735.4(c) (enacted by Chapter 347).

the argument that such action on the part of the landowner is unreasonable,[142] because as far as the State Board is concerned, landowners in California have historically been left alone to do what they wish with the percolating groundwater sitting underneath their properties.[143]

B. Water Rights are Property Rights in California

According to the California Supreme Court, "courts typically classify water rights in an underground basin as overlying, appropriative, or prescriptive."[144] Overlying rights are landowner rights to use groundwater on their own properties.[145] Appropriative rights depend on a surplus of water and these rights holders may only take that groundwater that is "not needed for the reasonable beneficial use of those having prior rights."[146] Prescriptive rights arise where wrongful appropriative pumping of non-surplus groundwater takes place openly and notoriously for a continuous period of time, much like adverse possession of real property.[147]

All of these groundwater rights are property rights.[148] Like all water rights in California, groundwater rights are usufructuary, which means that owners have a "legal right to use the water," but hold "no right of private ownership" in the corpus of the water itself.[149] However, the fact that a property right is a

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142. *See Imperial Irrigation*, 186 Cal. App. 3d at 1163 (stating that "the Board has adjudicatory power in the matter of unreasonable use of water."); *see also* Allen v. Cal. Water & Tel. Co., 29 Cal. 2d 466, 484 (noting that "[t]he amount of water required to irrigate . . . lands should . . . be determined by reference to the system used"); *see also* Light v. State Water Res. Control Bd., 226 Cal. App. 4th 1463, 1488 (2014) (holding that "[w]hat constitutes an unreasonable use of water changes with circumstances, including the passage of time.") These authorities, when put together, permit an argument that the overlying landowner in the above hypothetical is using an unreasonable amount of water under the circumstances.

143. CAL. WATER CODE § 1200; Cross v. Kitts, 69 Cal. 217, 222 (1886); *Light*, 226 Cal. App. 4th 1463.

144. City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 1240 (2000).

145. *Id.*

146. *Id.* at 1241.

147. *Id.*

148. *See* Lux v. Haggin, 69 Cal. 255, 392 (1886) (stating that overlying water rights are property rights); San Bernardino Valley Mun. Water Dist. v. Meeks & Daley Water Co., 226 Cal. App. 2d 216, 221 (1964) (noting that appropriative and prescriptive rights are property interests that begin to exist when certain conditions are met); Eddy v. Simpson, 3 Cal. 249, 252 (1853) (stating that "the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use") (emphasis deleted); N. Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 559 (Ct. App. 2007) (citing to Smith v. Hawkins, 110 Cal. 122, 126 (1895)) (recognizing that "water rights are a form of property and, as such, are subject to establishment and loss"); Fullerton v. State Water Res. Control Bd., 90 Cal. App. 3d 590, 598 (Ct. App. 1979) (standing for the proposition that, "[a]lthough there is no private property right in the corpus of the water while flowing in the stream, the right to its use is classified as real property"); Locke v. Yorba Irrigation Co., 35 Cal. 2d 205, 211 (1950) (stating that "[w]ater rights are a species of real property"); Adamson v. Black Rock Power & Irrigation Co., 12 F. 2d 437, 438 (9th Cir. 1926) (noting that the proposition "[t]hat a water right is real property is well settled").

149. *See* 62 CAL. JUR. 3D. *Water* § 373 (2015) (noting that "water rights holders have the right to take and use water, but they do not own the water and cannot waste it").

usufructuary right does not mean that it is outside the protection of the Fifth Amendment's "takings" clause.[150]

C. Applying the Doctrine of Regulatory Takings to Groundwater

This section details the law of regulatory takings and applies those principles to the groundwater context.[151] The United States Supreme Court has never ruled on a takings case concerning California groundwater, but its takings cases have established legal principles that guide application to groundwater.[152] This section examines cases that have addressed takings claims concerning California water rights.[153] Finally, this Comment concludes that SGMA itself does not result in a taking of property, nor will many (or even most) forms of regulation under SGMA, because a mere shift in regulatory jurisdiction from court-only to the Board cannot itself result in a taking.[154] Instead, a takings claim will only be cognizable when a water right holder suffers a specific harm, such as limited pumping, and that claim must specify a harm other than the Board's new assertion of jurisdiction, and the mere fact of some pumping limits would probably not support a claim.[155] There may be specific circumstances in which a pumping limit disproportionately forces a property owner to bear a burden that should be shared by the public, and in those circumstances, a takings claim could be successful.[156]

1. The Takings Jurisprudence of the United States Supreme Court

The United States Supreme Court has a longstanding takings doctrine under the Fifth and Fourteenth Amendments, in which the Court divides takings into categories of "physical" and "regulatory" takings.[157] Within these categories, the Court has developed a standard for two kinds of "categorical" or "per se" takings: one that applies "to physical invasions and direct appropriations of property and complete wipeouts in value, even if those wipeouts were caused solely by regulatory constraints,"[158] and another that applies when governmental action deprives an owner of "all economically beneficial or productive use."[159] If

150. *See* Schimmel v. Martin, 190 Cal. 429, 432 (characterizing the usufructuary right to use water as "a right in real property," as opposed to personal property).

151. *See infra* Parts IV.C.1–3.

152. *See infra* Part IV.C.1.

153. *See infra* Part IV.C.2.

154. *See infra* Part IV.C.3.

155. *See infra* Part IV.C.4.

156. *See id* (explaining the scenarios where a takings claim could be successful).

157. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

158. Dave Owen, *Taking Groundwater*, 91 WASH. U. L. REV. 253, 271–72 (2013).

159. Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1015 (1992).

a regulation comes within either narrow category, a court should automatically hold it to be a taking and award just compensation to the plaintiff.[160]

In contrast, the analysis for whether a taking occurred as a result of less extensive, albeit still significant, regulatory action is more complicated. In the landmark case *Penn Central Transportation Company v. City of New York*,[161] the Court outlined a case-by-case analysis that should apply to regulatory actions interfering with private property interests.[162] The Court's test has three factors, none of which is dispositive on its own.[163] Courts must decide a takings question based on: (1) the "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment-backed expectations" of the claimant, and (3) "the character of the governmental action."[164]

Competing purposes help characterize the Court's evolving doctrine.[165] On one hand, recognition of takings claims "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[166] On the other hand, the government must retain some ability to regulate, because "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[167]

In the context of groundwater law, these competing interests will heavily influence the discourse going forward because of the ongoing power struggle between regulators and users.[168] The state undoubtedly has an interest in regulating groundwater pumping due to the negative impacts of unregulated use.[169] At the same time, however, rights holders have an equally weighted interest in their historically-preserved rights,[170] and the agricultural industry will work to maximize profits by providing irrigation for as many crops as legally possible.[171]

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160. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

161. *Id.*

162. *Id.* at 124.

163. *Id.*

164. *Id.*

165. Owen, *supra* note 158, at 272.

166. Armstrong v. United States, 364 U.S. 40, 49 (1960).

167. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

168. *See infra* Part I (describing the conflict between those who pump and those who protect).

169. *See* SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (finding that "[e]xcessive groundwater pumping can cause overdraft, failed wells, deteriorated water quality, environmental damage, and irreversible land subsidence . . .").

170. *See* Cross v. Kitts, 69 Cal. 217, 222 (1886) (holding that "[w]ater percolating in the soil belongs to the owner of the freehold.").

171. *See* CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA AGRICULTURAL STATISTICS REVIEW, 2013–2014, at 5 (2014) (noting that California leads the nation in the production of over 70 crops, despite the current conditions of extreme drought and groundwater overdraft).

2. Water Rights Takings Cases from California

This section reviews California and federal takings law in the context of groundwater.[172] Two U.S. Federal Claims Court cases applying California water law help illustrate how a California state court could recognize compensation for interference with certain rights.[173] In the first case, *Tulare Lake Basin Water Storage District v. United States*, a group of plaintiffs claimed their right to use water had been taken from them when the federal government imposed water use restrictions under the Endangered Species Act.[174] The plaintiffs reasoned that the government had placed the costs of protecting local endangered species solely on their shoulders.[175] The Court of Federal Claims found in favor of the plaintiffs, recognizing that "a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water."[176]

In the second case, *Casitas Municipal Water District v. United States*, a different regulatory agency attempted to curtail rights holders' water use under the Endangered Species Act.[177] The rights holders brought suit alleging that their water rights had been taken in violation of the Fifth Amendment.[178] The government conceded that, under California water law, the plaintiff had a "valid property right in the water in question."[179] The court went on to state that an application of the doctrine of physical takings was appropriate and remanded to the lower court to determine whether a taking had actually occurred.[180] Thus, under California's current water rights' framework, courts would act well within the limits of the law by granting compensable takings awards in certain circumstances.

Contrary to this rationale, at least one California court has held that governmental regulation of groundwater in the permitting context does not come within either category of per se takings, nor does it constitute a taking under *Penn Central*.[181] In *Allegretti & Company v. County of Imperial*, a landowner alleged that the Board's requirement to obtain a permit for certain groundwater

172. *See infra* Part IV.C.2.

173. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001); Casitas Mun. Water Dist. v. U.S., 543 F. 3d 1276 (Fed. Cir. 2008).

174. *Tulare Lake Basin*, 49 Fed. Cl. at 314.

175. *Id.* at 316.

176. *Id.* at 319; *see also* Int'l Paper Co. v. United States, 282 U.S. 399, 407 (1931) (stating that "the petitioner's right was the use of water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by [the] government . . . it is hard to see what more the [g]overnment could do to take that use").

177. *Casitas Mun. Water Dist.*, 543 F.3d at 1282.

178. *Id.*

179. *Id.* at 1295.

180. *Id.* at 1296–97.

181. Allegretti & Co. v. Cnty. of Imperial, 138 Cal. App. 4th 1261, 1267 (2006).

drilling activities and comply with reporting standards amounted to a taking.[182] Despite recognizing that California's Constitution allows a taking when "land is taken . . . for public use" and that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property,"[183] the court held that "imposition of a . . . condition limiting the total quantity of groundwater available for . . . use" could not be a physical taking.[184] The court also held that state intervention with groundwater resources does not constitute a total "deprivation of economically beneficial or productive use" because owners may still use the overlying land for farming and other financially gainful purposes.[185]

Further, the *Allegretti* court did not see interference with groundwater rights as a taking under the ad hoc *Penn Central* test, because the economic impact was reasonable, and the landowner had no "distinct, as opposed to abstract, [investment-backed] expectations."[186] The court did not view the landowner's interest in the anticipated profits when buying the farm as compensable because it believed that a landowner's missed economic opportunity should not take away from the state's power to regulate under both the police power and of the court's understanding of Article X, Section 2.[187] The *Allegretti* case is the only California case to examine whether regulation of an overlying landowner is a taking.[188]

An older case suggests that the *Allegretti* court's reasoning was not entirely novel.[189] In *Joslin v. Marin Municipal Water District*, the California Supreme Court held that a compensable interest in water is rooted in reasonable use, and thus, regulation of unreasonable uses cannot constitute a taking.[190] Although not dealing directly with groundwater, the Court concluded that no takings claim arises when the state regulates an unreasonable use, because property owners are not entitled to use their water unreasonably.[191] Thus, although the *Allegretti* court did not need to cite to *Joslin* to reach its conclusion, the case law in California demonstrates a trend of opposition to recognizing takings claims for regulation of water resources.[192]

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182. *Id.*

183. *Id.* at 1269–70.

184. *Id.* at 1273.

185. *Id.* at 1276.

186. *Id.* at 1277.

187. *Id.* at 1279.

188. *Id.* at 1267.

189. Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132 (1967).

190. *Id.* at 144–46.

191. *Id.*

192. *See Allegretti & Co.*, 138 Cal. App. 4th 1261 (holding that property owners do not have a property right in groundwater resources and making no reference to *Joslin*); *see also Joslin*, 67 Cal. 2d (opposing a takings claim where regulation is to prohibit unreasonable uses).

3. Creation of New Jurisdiction Alone is Likely Insufficient to Support a Takings Claim

Generally, when a state decides to allocate private resources for public purposes, such action necessitates a discussion of takings and just compensation.[193] That principle begs the question of whether a shift in jurisdiction is equal to a state action for condemnation of private interests sufficient to create a facial takings claim.

Case law answers this question in the negative. For example, in *United States v. Riverside Bayview Homes*, the U.S. Supreme Court affirmed the principle that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking."[194] The plaintiffs alleged that the United States Army Corps of Engineers had effectuated a taking by extending its regulatory authority to previously unregulated property.[195] The Supreme Court confirmed that mere extension of regulatory authority does not, by itself, result in a compensable taking.[196]

In California, the road is even rockier for a facial claim because courts generally reason that the ability to regulate groundwater use for public benefit comes "within the sphere of the [state's] police power."[197] This notion could arguably take regulation of groundwater out of the takings conversation altogether.[198] In *People v. Murrison*, the Third District Court of Appeal applied this police power rationale to restrictions imposed on an alleged pre-1914 right holder who was diverting stream water for irrigation purposes.[199] In doing so, it noted that "[l]egislation with respect to water affects the public welfare and the right to legislate in regard to its use and conservation is referable to the police power of the state" and that "[w]ater rights have been the subject of pervasive regulation in California."[200] Ultimately, the *Murrison* court held that:

> where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly

193. 4 TIFFANY REAL PROPERTY § 1252 (3d ed. 1947).

194. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

195. *Id.* at 123.

196. *Id.* at 126.

197. State Water Res. Control Bd. v. Forni, 54 Cal. App. 3d 743 (1976).

198. *See id.* (stating that "it is established beyond dispute" that regulations based on the California Constitution are valid exercises of the police power, and citing to Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132 (1967) in support of the police power rationale).

199. People v. Murrison, 101 Cal. App. 4th 349, 354–55 (2002).

200. *Id.* at 360.

> singled out the property owner to bear a burden that should be borne by the public as a whole.[201]

One final consideration for regulatory takings is the question of whether "background principles" of state law limit a takings claim for pumping limits under SGMA.[202] In *Lucas v. South Carolina Costal Council*, the U.S. Supreme Court noted that the state does not owe compensation if the regulation simply reiterates the restrictions that the "background principles" of the state's property law already place upon ownership.[203] Because of this statement, the question becomes whether California's background principles of groundwater law already dictate that unsustainable use is unreasonable. On the one hand, the California courts have long recognized the Board's regulatory power to prescribe unreasonable uses,[204] and unsustainable pumping could fit within the meaning of "unreasonable." That would be a background principle likely to prevent compensation. Another, and perhaps more definitive question, is whether any entity had the authority to impose pumping cuts on percolating groundwater users prior to SGMA; if the users were subject to limits from another source prior to SGMA, then perhaps it doesn't matter that the Board has not historically had the power to issue those limits. In this regard, the courts have always had the power to limit pumping to prevent overdraft and to ensure that pumping is within the "safe yield" of a basin.[205] Because SGMA's definition of sustainable use essentially mirrors the common law "safe yield" definition,[206] the best conclusion seems to be that pumping limits to achieve a safe yield have always been part of a landowner's so-called bundle of sticks. In other words, the potential for such limits has always been inherent in the water right.

4. "As Applied" Takings

Although reduction of pumping under SGMA is unlikely to support a viable takings claim in many instances, there may be a few specific scenarios in which regulation raises the specter of takings. First, there should be a cognizable takings claim if SGMA results in limits on individual riparian or overlying rights holders who pump from isolated aquifers that do not contribute to the problems of unsustainable groundwater pumping and overdraft.

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201. *Id.* at 363.

202. Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1029 (1992).

203. *Id.*

204. *See supra* Part II.B.4 (outlining the cases demonstrating the regulatory authority of the Board when it comes to addressing unreasonable use).

205. *Safe Yield*, WATER EDUC. FOUND., http://www.watereducation.org/aquapedia/safe-yield (last visited September 7, 2015) (on file with *The University of the Pacific Law Review*).

206. *See* CAL. WATER CODE § 10721(v) (enacted by Chapter 346) (defining "sustainable yield" as the "maximum quantity of water . . . that can be withdrawn annually . . . without causing an undesirable result").

Second, a takings claim might succeed where SGMA limits deprive a water user of all economically beneficial use of their water rights. The *Lucas* court held that, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[207] Of course, this argument depends in part on what is required of the water user and how the right is defined—if the user is limited in critically dry years, but not every year, such regulation would likely withstand a takings claim.

V. CONCLUSION

Throughout California's storied history as a leading agricultural producer, each branch of the government has worked to keep the state's groundwater law current with evolving demands.[208] Now, as the legislature pushes for sustainability and confers new authority on the Board, it is important to keep the longstanding framework in mind. The Board now has a scope of authority that is larger than before.[209] Although such pumping limits are likely desirable from an environmental and policy perspective, this substantial legal change raises important questions about whether the government is overreaching in the scope of its impact on private property in the name of public benefit, at least without compensation. As described herein, this mere shift in jurisdiction is unlikely to support a viable takings claim; however, there may be some limited, specific circumstances in which state interference "goes too far" and results in a compensable taking.[210]

207. *Lucas*, 505 U.S. at 1019 (emphasis in original).

208. *See* CALIFORNIA WATER ACTION PLAN, *supra* note 110 (showing the executive's role in groundwater management); SB 1168, 2014 Leg., 2013–14 Sess. (Cal. 2014) (showing the legislature's role); Cross v. Kitts, 69 Cal. 217, 222 (1886) (showing the judiciary's role).

209. *See supra* Part III.

210. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

Foreclosing on a Crisis: How a Presumption of Public Use Could Help Courts Decide Whether Eminent Domain of Underwater Mortgages Is Beneficial

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I. INTRODUCTION

The three-bedroom, one-bath home that Robert and Patricia Castillo moved into in Richmond could use a fresh coat of paint on the outside and does not have grass on the front lawn.[1] The couple wanted to find a home so they could more easily care for their autistic son.[2] In 2005, just before the housing market crash, they purchased the home for $420,000, but following the market failure the value plummeted to $125,000.[3] Now, they are in a home that has lost most of its value, yet are struggling to make high mortgage payments while trying to recover from the financial crash.[4] The national mortgage crisis that started in 2007 led to significant losses on mortgage payments to many financial institutions,[5] and today many homeowners, like the Castillos, strain to make their payments.[6] Others risk foreclosure and walking away from the homes they purchased before the bubble burst, leaving behind a wake of unpaid loans.[7]

Cities like Richmond are now considering an innovative solution to the housing crisis still impacting residents in its communities, like the Castillos: a city will buy residential mortgage loans at fair market value and refinance the loan so a homeowner can make lower monthly payments and stay in his or her home.[8] The plan is set up to give cities and third-party investors the difference between the amount it would buy the loan for and the amount for which it would refinance the loan.[9]

Amidst the initial attempts of a few cities proposing to use eminent domain to take over underwater mortgages, opponents have quickly launched reactions to

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1. Shaila Dewan, *A City Invokes Seizure Laws to Save Homes*, N.Y. TIMES (July 29, 2013), http://www.nytimes.com/2013/07/30/business/in-a-shift-eminent-domain-saves-homes.html?pagewanted=all&_r=0 [hereinafter Dewan *Invokes*] (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 7 (2009).

6. Dewan *Invokes*, *supra* note 1.

7. Kimbriell Kelly, *Lenders Seek Court Actions Against Homeowners Years After Foreclosure*, WASH. POST (June 15, 2013), http://www.washingtonpost.com/investigations/lenders-seek-court-actions-against-homeowners-years-after-foreclosure/2013/06/15/3c6a04ce-96fc-11e2-b68f-dc5c4b47e519_story.html (on file with *The University of the Pacific Law Review*).

8. Dewan *Invokes*, *supra* note 1.

9. *Id.* Under the plan, "a home mortgaged for $400,000 is now worth $200,000. The city plans to buy the loan for $160,000 . . . . Then the city would write down the debt to $190,000 and allow the homeowner to refinance at the new amount . . . [t]he $30,000 difference goes to the city, the investors who put up the money to buy the loan, closing costs and M.R.P. The homeowner would go from owing twice what the home is worth to having $10,000 in equity." *Id.*

try to stop those proposals before they are adopted.[10] Some of opponents' attempts include staking out a spot near the entrance to a city council meeting to sell hotdogs to entice people to listen to their point of view.[11] Others include drawing hard lines by refusing to offer loans in communities that allow eminent domain of residential mortgages.[12] As discussions regarding using eminent domain on residential mortgages continue and attempts to stop it remain strong, the issue of whether the taking satisfies a public use will be at the heart of what to do with former homeowners who are struggling to keep their homes under difficult financial circumstances and the investors who want their investment back.[13] As a result, cities that want to use eminent domain of mortgages will face an obstacle of proving the act meets the "public use" requirement of the Fifth Amendment.[14]

Courts should presume a city meets the public use requirement of the Fifth Amendment when it takes a residential mortgage through eminent domain and gives the loan to a private, third-party lender.[15] But, lenders can rebut the presumption by proving that a homeowner does not qualify for that type of assistance, the profits to the city and a private third-party investor are high enough to raise suspicion that the taking benefits a private party over the public, and the lack of an overall economic development plan supports a claim that the taking is not for the public's benefit.[16]

Part II of this Comment provides an overview of the history of defining "public use" under the Fifth Amendment of the U.S. Constitution and how that definition has allowed government actors to take private property for the private use of another.[17] Part III discusses the public use element of city plans to use eminent domain to take residential mortgages.[18] Part IV supports a finding that a city asserting its eminent domain rights on residential mortgages is based on a valid public purpose.[19] Part V discusses the implications of a presumption of

10. Shaila Dewan, *Eminent Domain: A Long Shot Against Blight*, N.Y. TIMES (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/business/in-richmond-california-a-long-shot-against-blight.html?_r=0 [hereinafter Dewan *Eminent*] (on file with *The University of the Pacific Law Review*).

11. *Id.*

12. *Id.*

13. Dewan *Eminent*, *supra* note 10.

14. *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005) (stating that "a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking").

15. *Infra* Part VI.

16. *Infra* Part VI.

17. *Infra* Part II.

18. *Infra* Part III.

19. *Infra* Part IV.

public use on both cities and lenders.[20] Finally, Part VI discusses the use of a balancing test that allows lenders to rebut the presumption of a valid public use.[21]

II. LEGAL BACKGROUND

The Fifth Amendment of the U.S. Constitution allows local governments to seize private property as long as the government actors prove the seizure was for a public use.[22] Public use is broadly defined, and the Court expanded that definition even further when it allowed a city to force a woman out of her home for the sake of economic redevelopment.[23] Now, cities want to take that broad application of public use and apply it to their efforts to seize home mortgages, refinance those mortgages, and give them to private third-party investors.[24] This plan purports to keep residents in their homes.[25]

A. Midkiff and Broadening the Public Use Requirement

The government's ability to take private property is based on the Fifth Amendment to the Constitution, which states, "nor shall private property be taken for public use, without just compensation."[26] Whether the government's avowed purpose satisfies the definition of public use has been at issue in the past and is at issue for cities that want to take mortgages of residential homes.[27]

In the Supreme Court case *Hawaii Housing Authority v. Midkiff*, the Court expanded the definition of public use in response to state legislation.[28] In the 1960s, Hawaiian legislatures determined that a relatively few number of private owners controlled almost half of non-government owned land.[29] The Legislature believed that concentrated ownership resulted in a skewed housing market,

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20. *Infra* Part V.

21. *Infra* Part VI.

22. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984) (allowing Hawaii to essentially force land sales to break up on oligopoly thwarting the functioning of the residential land market).

23. Kelo v. City of New London, 545 U.S. 469, 473–75, 483–84 (2005).

24. Dewan *Invokes*, *supra* note 1 (explaining how the City of Richmond and third-party investors would split the difference between the amount of the loan and the refinance rate given to a homeowner).

25. Dewan *Eminent*, *supra* note 10.

26. U.S. CONST. amend. V.

27. *Compare* Berman v. Parker, 348 U.S. 26, 31 (1954) (determining whether allowing the taking of a department store to revitalize the area was for a public use), *with* Notice of Motion & Motion to Dismiss for Lack of Subject Matter Jurisdiction at 3, The Bank of New York Mellon v. City of Richmond, No. CV-13-3664-CRB (N.D. Cal. Nov. 1, 2013) [hereinafter Notice] (arguing that the city will need to "state the public purpose" to justify the taking).

28. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984) (using an earlier decision by the Court to declare that the Court "will not substitute its judgment for a legislature's judgment").

29. *Id.* at 232 (stating that forty-seven percent of Hawaii's land was owned by seventy-two private owners).

inflated home prices, and general damage to the public welfare.[30] As a result, it enacted legislation that essentially forced landowners to sell their property.[31] The landowners resisted and filed a lawsuit that alleged, among other claims, that the Hawaiian law was unconstitutional.[32] The Ninth Circuit agreed with the landowners because the law was not based on a valid public purpose.[33] The Supreme Court disagreed.[34] The Court held that public use is "coterminous with the scope of a sovereign's police power."[35] In further explaining its decision, the Court said it would not "substitute its judgment for a legislature's" in determining what acts "constitute a public use" unless there was no reasonable foundation for the use.[36] The Court added that taking private property from one owner and transferring it to a different private owner "does not condemn that taking as having only a private purpose."[37] Instead, the Court said, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[38]

Applying that reasoning to the facts of *Midkiff*, the Court held that the state's law served a legitimate public purpose because it was trying to restore normalcy to the market of buying, selling, and owning land in Hawaii.[39] In addition to supporting the legislature's ability to determine a valid public use, the *Midkiff* Court added that a taking could still have a public purpose even if it benefited a private person.[40] As a result, the focus remains on the purpose of the taking and whether it is "rationally related to a conceivable public purpose,"[41] rather than who uses the seized property.[42] In its conclusion, the *Midkiff* Court noted that it was important that the legislation was enacted "not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose."[43]

30. *Id.*

31. *See id.* at 233–34 (detailing how the Hawaiian Legislature condemned property to provide a tax benefit to the landowners being forced to sell their land).

32. *Id.* at 235.

33. *Id.*

34. *Id.* at 236 (reversing the Ninth Circuit's holding).

35. *Id.* at 240.

36. *Id.* at 241.

37. *Id.* at 243–44.

38. *Id.* at 244.

39. *Id.* at 242.

40. *Id.* at 243–44.

41. *Id.* at 241.

42. *Id.* at 244.

43. *Id.* at 245.

B. *History and Background of* Kelo[44]

The Supreme Court established the government's right to take public property for economic purposes in the landmark case *Kelo v. City of New London*.[45] In 1998, the City of New London faced blight.[46] Acting with the city's authorization, and to counter the city's apparent decline, the city, the state, a private pharmaceutical company, and a non-profit mobilized to inject money into a large-scale economic development plan that would reinvigorate the city's economy and population.[47] The plan called for $315 million of investments[48] and was going to transform ninety acres into a thriving community of residences, businesses, and recreational activities that would create jobs and a lifestyle that would draw people to the area and reinvigorate the city's tax revenue.[49] However, the multi-stage plan ran into problems when the city wanted to take the property of homeowners who did not want to move.[50]

Suzette Kelo and her fellow petitioners filed a lawsuit when the City of New London, through the New London Development Corporation, stated it would take the property of Kelo and others via eminent domain.[51] When the case reached the Supreme Court, Kelo argued against eminent domain for the purposes of economic redevelopment.[52] The Court, in a 5–4 decision,[53] upheld the use of eminent domain for an economic purpose because it "unquestionably serve[d] a public purpose."[54] The Court reviewed its past jurisprudence to find that the general public does not have to use the land to constitute a public purpose.[55] Public use has a broad definition that allows a court to evaluate the entirety of a project's purpose rather than evaluate it on a "piecemeal basis,"[56] and even if property is transferred to a private individual, it is the purpose behind the transfer

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44. Kelo v. City of New London, 545 U.S. 469 (2005).

45. *Id.*

46. *See id.* at 473 (stating the City was designated a "distressed municipality" and its unemployment rate was almost twice the rate of the state and it recorded its lowest population since 1920).

47. *Id.*

48. *Id.* The state issued two bonds—a $5 million bond for planning purposes and a $10 million bond to create a state park—as part of the plan, and pharmaceutical company Pfizer announced plans to build a $300 million research plant next to the area targeted for revitalization. *Id.*

49. *Id.* at 474–75.

50. *Id.* at 475.

51. *Id.*

52. *Id.* at 484 (claiming that economic development was not a public use that would satisfy the Takings Clause of the Fifth Amendment). Kelo and her fellow petitioners also highlighted and the court acknowledged that their homes were not "blighted" and only subject to eminent domain because their residences were located in the area of the economic development plan. *Id.* at 475.

53. *Id.* at 479.

54. *Id.* at 484.

55. *Id.* at 479–80.

56. *Id.* at 481 (quoting Berman v. Parker, 348 U.S. 26, 35 (1954)).

and not the result that matters.[57] Relying on this broad definition of public purpose, the *Kelo* plurality determined that the City of New London's project was for a public purpose because the city wanted to increase tax revenue and create jobs, the entirety of the project was designed to fulfill that goal, and the Court's prior case law limited its ability to review the city's purpose.[58]

The *Kelo* plurality's broad interpretation of public use and the dissent's rigid construction of the term[59] were offset by Justice Kennedy's concurrence, which struck a balance between the plurality's deference to legislatures and the dissent's need for judicial review of a taking's purpose.[60] Justice Kennedy said it was important to scrutinize whether a taking is for a public purpose or if the public benefit is only incidental to the benefit given to a private party.[61] He agreed with the plurality that a bright-line rule that a taking was presumptively invalid because it was part of an economic development plan was inappropriate in a takings analysis.[62] He explained that a bright-line rule would "prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large."[63] However, Justice Kennedy's concurrence considered the possibility of a heightened standard of review in takings cases in which private parties benefitted from the government action.[64] He reasoned that there may be cases when "the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted."[65] He did not elaborate as to when a higher standard would apply and did not believe it necessary to consider in *Kelo* because the City of New London acted based on a public purpose.[66] In concluding, Kennedy stated that there was no improper purpose in the case of *Kelo* even though "there may be categories of cases in which the transfers are so suspicious, the procedures employed so prone to abuse, or the purported benefits

57. *Id.* at 482. ("[I]t is only the taking's purpose, and not its mechanics" used to determine whether there is a public use). Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

58. *Kelo*, 545 U.S. at 483–84.

59. *See id.* at 497 (O'Connor, J., dissenting) (stating that the public use requirement allows a taking for a public use and not for a private individual's benefit).

60. *See* Marla E. Mansfield, *Takings and Threes: The Supreme Court's 2004-2005 Term*, 41 TULSA L. REV. 243, 288 (2005) ("Justice Kennedy twice reminded his colleagues of the availability of some substantive due process requirements for legislation.").

61. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

62. *Id.* at 492–93.

63. *Id.* at 492.

64. *Id.* at 493.

65. *Id.*

66. *Id.* Justice Kennedy agreed that the City of New London had a proper public purpose because the taking was part of an overall plan to convey a significant benefit to the local economy and there was a sufficient review process that supported the city's claim that it did not enact the plan to favor one private party over another. *Id.*

are so trivial or implausible that courts should presume an impermissible private purpose."[67]

The Court's decision in *Kelo* sparked outcry among the public and government officials.[68] However, despite some states taking a statutory stance against the *Kelo* plurality and Justice Kennedy's reasoning,[69] the case remains the judicial definition of a public purpose under the Takings Clause of the Fifth Amendment.[70]

III. CITIES CLAIM PUBLIC USE SATISFIED IN USING EMINENT DOMAIN ON MORTGAGES

Cities like Richmond that propose to use eminent domain on foreclosures face heavy resistance from mortgage companies both in court and in the legislature.[71] The proposal to use eminent domain on residential mortgages could serve a public purpose because it allows a city to take over an underwater mortgage at market price and refinance at a new rate, thus lowering mortgage payments for homeowners and keeping residents in their homes.[72] Potential legal battles facing Richmond and cities that attempt similar takings likely begin with the disagreements between trustees and investors over what a different private lender is allowed to do with a bad loan a city is trying to take over.[73] At least one company stated it would consider taking legal action if a plan like Richmond's

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67. *Id.*

68. Adam Liptak, *THE NATION; Case Won on Appeal (To Public)*, N.Y. TIMES (July 30, 2006), http://query.nytimes.com/gst/fullpage.html?res=9807E2DE133FF933A05754C0A9609C8B63&n=Top/Reference/Times%20Topics/Subjects/P/Public%20Opinion (on file with *The University of the Pacific Law Review*) (describing that the public reaction included state legislatures passing bills to counter *Kelo's* holding and an attempt to take one Supreme Court Justice's home via eminent domain); *see also* John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES (Feb. 21, 2006), http://www.nytimes.com/2006/02/21/national/21domain.html?pagewanted=all&_r=0 (on file with *The University of the Pacific Law Review*) (reporting that three states passed bills limiting the state's ability to use eminent domain and dozens of others proposed similar legislation in reaction to *Kelo*).

69. *See* Planned Indus. Expansion Auth. of Kansas City v. Ivanhoe Neighborhood Council, 316 S.W.3d 418, 426 (Mo. Ct. App. 2010) (explaining that the legislature enacted a statute providing landowners with sufficient appraisals as a reaction to the Supreme Court's ruling in Kelo v. City of New London).

70. *See* Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1, 30 (2011) (describing the Second Circuit's post-Kelo takings analysis as "extremely deferential").

71. Dewan *Eminent*, *supra* note 10; *see also* James Queally, *ACLU, NJ Join Fight to Protect Cities Using Eminent Domain to Fight Foreclosure Crisis*, THE STAR-LEDGER (Apr. 7, 2014), http://www.nj.com/essex/index.ssf/2014/04/aclu_nj_leaders_join_fight_to_protect_cities_using_eminent_domain_to_fight_foreclosure_crisis.html (on file with *The University of the Pacific Law Review*) (reporting that city officials in Irvington, New Jersey want to use eminent domain on foreclosed mortgages and identified 199 that are eligible).

72. Alexandra M. Perry, *Eminent Domain: A Solution to the Mortgage Crisis?*, 86 TEMP. L. REV. 181, 191–92 (2013).

73. Dewan *Invokes*, *supra* note 1 (explaining that in Richmond, investors requested their trustees to sue the city to stop their plan).

was implemented with federal support.[74] If that were to happen, it would not be the first attempt to take the city to court over its plan.[75] In 2013, Wells Fargo requested a preliminary injunction in federal court to stop Richmond's plan.[76] The bank and its co-plaintiffs challenged the "public use" purpose of the city's plan because it financially benefits a private investor and targets individual homeowners who are making their mortgage payments.[77] As a result, restructuring a loan leaves a homeowner with a "windfall" while the initial loan backers lose money.[78] The judge dismissed the motion because Richmond's proposed plan was not final and as such, the validity of the challenge remains unanswered.[79]

Cities also face opposition from mortgage groups that lobby Congress to stop efforts to take mortgages by eminent domain.[80] The House of Representatives introduced a bill in 2013 to prevent Fannie Mae from issuing mortgages in counties that use or have used eminent domain to take home mortgages.[81] The same bill also seeks to prohibit the Federal Housing Administration (FHA) from securing mortgages under the National Housing Act or an FHA program in a county that uses eminent domain on residential mortgages.[82] Other efforts to stop the use of eminent domain on mortgages have significantly diminished the intended effects of at least one state law seeking to protect homeowners.[83] These legislative efforts may undermine the argument that using eminent domain on

74. Nick Timiraos, *Freddie Mac Considers Legal Action to Block Eminent Domain Plan*, WALL ST. J. (Aug. 7, 2013, 1:44 PM), http://blogs.wsj.com/developments/2013/08/07/freddie-mac-considers-legal-action-to-block-eminent-domain-plan/ (on file with *The University of the Pacific Law Review*) (quoting William McDavid, general counsel for Freddie Mac, as saying the mortgage company "would consider taking legal action" if Richmond took loans using eminent domain).

75. Complaint for Declaratory and Injunctive Relief, Wells Fargo Bank v. City of Richmond, No. 3:13-CV-03663 (N.D. Cal. Aug. 7, 2013) [hereinafter Complaint].

76. Motion for Preliminary Injunction, Wells Fargo Bank v. City of Richmond, No. 3:13-CV-03663 (N.D. Cal. Aug. 8, 2013) [hereinafter *Wells Fargo Bank*]

77. *Id.* at 9.

78. *Id.* at 9–10.

79. Order Granting Defendants' Motion to Dismiss and Denying Plaintiffs' Motion for a Preliminary Judgment, Wells Fargo Bank v. City of Richmond, No. 3:13-CV-03663 (N.D. Cal. Sept. 16, 2013) [hereinafter Order] (stating the claim was not yet ripe).

80. Dewan *Eminent*, *supra* note 10 (reporting that one asset management group supported a bill proposed by a Texas legislator that prohibited federal backing of loans vulnerable to eminent domain).

81. H.R. 2767, 113th Cong. § 108 (2013). Author's note: This bill was pending as of Jan. 4, 2014.

82. H.R. 2767. Author's note: This bill was pending as of Oct. 5, 2015. The bill's most recent activity shows that additional sponsors joined it in 2014, but there has been no other action. 160 Cong. Rec. 6399-02 (July 17, 2014).

83. Dewan *Eminent*, *supra* note 10 (explaining that the Georgia Legislature passed a law guarding against predatory loans only for the law to be "gutted" a year later after some lenders stopped providing loans in the state).

mortgages serves a public purpose because history shows that the public supports limiting the government's ability to seize private property.[84]

Cities and a citizens' rights group are fighting back.[85] In New Jersey, city leaders in Irvington and Newark sent a joint letter with the American Civil Liberties Union state chapter to ask the U.S. Attorney General and the FHA to adopt an explicitly neutral policy regarding municipal use of eminent domain on mortgages.[86] Richmond's mayor has publicly stated on more than one occasion she will not stop efforts to promote the proposal despite heavy resistance.[87]

But without public support, cities that are considering using eminent domain to take over mortgages can find it difficult to fight for public use, especially when facing intense resistance from mortgage companies.[88] By a 6–1 vote, the Irvington, New Jersey City Council approved a measure allowing its mayor to draft a redevelopment ordinance that permitted the use of eminent domain of mortgages.[89] However, that was before the May elections.[90] After a key councilman retired and with the newly elected mayor opposing the use of eminent domain on underwater mortgages, the council voted 4–2 to hold off on the plan.[91] That has not stopped the neighboring city of Newark from continuing with an aggressive plan to rehabilitate the housing market in its city by using eminent domain on mortgages if necessary.[92]

IV. SEIZING A MORTGAGE SATISFIES THE PUBLIC USE REQUIREMENT

Cities may successfully argue that their seizure of underwater mortgages satisfies the public use requirement given the Court's broad interpretation of the

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84. *See* Liptak, *supra* note 68 (describing that the public reaction included state legislatures passing bills to counter *Kelo's* holding and an attempt to take one Supreme Court Justice's home via eminent domain); *see also* Broder, *supra* note 68 (reporting that three states passed bills limiting the state's ability to use eminent domain and dozens of others proposed similar legislation in reaction to *Kelo*).

85. Queally, *supra* note 71.

86. *Id.*

87. *See* Dewan *Invokes*, *supra* note 1 (quoting the mayor as saying, "[t]hey can put forward as much pressure as they would like but I'm very committed to this program and I'm very committed to the well-being of our neighborhoods."); Dewan *Eminent*, *supra* note 10 (quoting the mayor as saying, "I'm not trying to minimize what we're dealing with; it's just like, if you're willing to buck up against an unjust set of circumstances, you're going to have those attacks coming at you. And in some sense that says you're doing your job.").

88. Joe Tyrrell, *Tale of Two Towns: Newark, Irvington Mayors Tackle Housing Issues*, NJ SPOTLIGHT (Sept. 25, 2014), http://www.njspotlight.com/stories/14/09/24/tale-of-two-towns-newark-irvington-mayors-tackle-housing-issues/ (on file with *The University of the Pacific Law Review*); Dewan *Invokes*, *supra* note 1 (reporting that San Bernardino dropped its plan to use eminent domain on foreclosed mortgages).

89. Tyrrell, *supra* note 88.

90. *Id.*

91. *Id.*

92. *Id.*

requirement.[93] But is that broad interpretation enough to support a city's claim when there is no economic plan to revive an area like in *Kelo* and *Midkiff*?[94] At least one commentator contends that there are or should be special protections provided for the residential home.[95] However, the Court has not recognized a special protection for the home in takings cases.[96] Instead, a closer look at the jurisprudence may show that cities with plans that only benefit the individual homeowner, and do not economically benefit the community, may fail to convince a court to approve of their taking of a residential mortgage. [97] Applying the findings Justice Kennedy reviewed in his concurring opinion in *Kelo* provides guidance to courts evaluating a city's plans to seize mortgages.[98]

A. Applying Kelo[99] *to Eminent Domain of Residential Mortgages*

If a private lending company challenged a city's seizure of underwater mortgages, a federal court would rely on the *Kelo* holding.[100] The Court supported its holding by stating that its past decisions gave deference to local government bodies in deciding what kinds of public use support a taking.[101] In *Kelo*, the city of New London wanted to take private property to revive the area's overall economy.[102] Today, a town with many foreclosed homes could similarly argue that communities with foreclosed homes suffer[103] and using eminent domain to

93. *See* Kelo v. City of New London, 545 U.S. 469, 479–80 (2005) (upholding the Court's prior rejections of narrow test defining public use).

94. *See id.* at 474 (describing the City of New London's development plan); Midkiff, 467 U.S. at 233 (explaining the Land Reform Act and the process instituted for the Legislature to determine if a public purpose is served).

95. *See* Thomas G. Sprankling, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112, 142 (2012) (arguing that the protection of the home provided for in the Third Amendment should be read into the Takings Clause).

96. *Infra* note 97.

97. *See* Berman v. Parker, 348 U.S. 26, 35–36 (1954) (stating that when there is a public purpose, the government can take a private business to carry out a redevelopment plan); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (holding that legislation forcing the sale of private homes to another private individual satisfied the public use requirement when doing so did not benefit a particular class of individuals but "attacked certain perceived evils of concentrated property ownership"); *Kelo*, 545 U.S. at 490 (holding that the City's plans to condemn residential homes for economic development plan was a valid public use).

98. *Kelo*, 545 U.S. at 491–92 (Kennedy, J., concurring).

99. *Id.* at 469.

100. *Id.* at 484 (holding that the government entity could take private property for economic development because the taking was for a public purpose).

101. *Id.* at 483; *see also Midkiff,* 467 U.S. at 241 (stating the Court will defer to the legislature's decision as to what is considered a public use).

102. *Kelo*, 545 U.S. at 483–84 (stating the City wanted to implement its plan to increase tax revenue and create new jobs).

103. G. THOMAS KINGSLEY ET AL., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES 18 (The Urban Institute 2009), *available at* http://www.urban.org/uploadedpdf/411909_impact_of_forclosures.pdf

restructure a mortgage would serve the public purpose of keeping people in their homes and maintaining communities.[104] As a result, a city could use the loose standards of defining what constitutes a public use[105] to justify taking residential mortgages to protect individual homeowners.[106] However, the public use element is challenged on grounds that it favors different, private, third-party investors and targets specific individual homeowners who can pay their mortgage bills.[107] A court can also turn to the Court's analysis in *Midkiff*.[108] There, the Court determined that the taking of land from one private owner to force a sale to another private owner was a public purpose, and part of the Court's reasoning was that the law enforcing the sale was enacted before any individual beneficiaries of it were identified.[109] The City of Richmond reportedly targets both performing and non-performing loans.[110] Whether that constitutes targeting an individual before a plan is enacted is undecided and is an open question for a court to answer.[111]

A closer examination of Justice Kennedy's concurrence in *Kelo* could support a city's taking of residential mortgages.[112] In approving the Court's decision in *Kelo*, Justice Kennedy relied on several trial court factual findings that justified the conclusion that the City of New London had a valid public purpose in condemning Ms. Kelo's home.[113] Those findings included testimony from City of New London officials about the purpose and evidence of blight in the city.[114] Leaders of communities with large numbers of homeowners saddled

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(on file with *The University of the Pacific Law Review*) (describing how foreclosures lower property values which in turn results in less tax revenue to local governments).

104. Dewan *Eminent*, *supra* note 10 (reporting that the City of Richmond's purpose in using eminent domain on foreclosed mortgages was to "prevent foreclosures and the blight of vacant properties."); *see also* Perry, *supra* note 72, at 204–05 (analyzing that a court would likely find that transferring mortgages by using eminent domain would fulfill the public purpose of preventing blight).

105. *See* David Schultz, *Economic Development and Eminent Domain After Kelo: Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41, 46 (2006) (stating that there is a broad definition of public use that includes an acquisition that "serves a public purpose, confers a benefit on the public, furthers the state's police powers, or otherwise is within a state's legitimate governmental authority").

106. *See* Dewan *Eminent*, *supra* note 10 (reporting that the City of Richmond's purpose in using eminent domain on foreclosed mortgages was to "prevent foreclosures and the blight of vacant properties."); *see also* Queally, *supra* note 71 (explaining that one New Jersey city mayor wanted to use eminent domain on foreclosed mortgages to help homeowners afford their monthly payments).

107. *See* Complaint, *supra* note 75, at 10 (claiming there is no "legitimate 'public use'" for the city program to seize residential mortgages).

108. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984).

109. *Id.* at 245.

110. Dewan *Invokes*, *supra* note 1.

111. *See* Order, *supra* note 79 (dismissing a claim against the City of Richmond because its city council had not yet approved use of eminent domain on underwater mortgages).

112. Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

113. *Id.* at 491–92.

114. *Id.* at 491.

with underwater mortgages have publically supported the use of eminent domain on those mortgages because it is for the benefit of their blighted community.[115] These communities can also point to statistics showing the number of underwater mortgages and foreclosed homes in their area are significant enough to make a negative impact, which further justifies taking this kind of governmental action.[116] Therefore, a city arguing in federal court for the use of eminent domain of a mortgage may stand up to a closer evaluation of their purpose under the Justice Kennedy concurrence.[117]

B. Protecting the Individual Homeowner is a Valid Public Use

When cities want to use eminent domain on mortgages, Justice Kennedy's *Kelo* concurrence may provide guidance and support for a court to hold that the taking serves a valid public purpose.[118] Justice Kennedy stated that if a litigant objects to a taking on the grounds that it "impermissib[ly]" favors private parties, a federal court should treat this objection seriously with the presumption, however, that the government action aims to serve a public purpose.[119] Opponents of the City of Richmond's plan contend that the taking of residential mortgages unjustly favors different, private, third-party investors.[120] But, the city can rely on the presumption that the government action aims to serve a public purpose and support that presumption by arguing that courts should provide individual homeowners a special protection given the benefits of homeownership to the individual and the community in which they reside.[121]

Homeownership can provide many financial and personal benefits to the individual homeowner.[122] It also provides benefits to the greater community in

115. *See* Tyrrell, *supra* note 88 (reporting that Newark mayor Ras Baraka wants to use eminent domain on mortgages to slow foreclosures and address vacant buildings "plaguing the city."); Dewan *Invokes*, *supra* note 1 (describing how the city of Richmond wants to use eminent domain to address "fraying neighborhoods and a depleted middle class").

116. *See* Dewan *Eminent*, *supra* note 10 (reporting that post-recession homes in Richmond lost sixty-six percent of their value, and sixteen percent of homeowners lost their homes in foreclosure).

117. *See Kelo*, 545 U.S. at 493 (explaining that a stricter review may be necessary when a taking poses a risk of invalid favoritism to a private party).

118. *Id.* at 491.

119. *Id.*

120. Complaint, *supra* note 75, at 10.

121. *See* William M. Rohe, Shannon Van Zandt & George McCarthy, *The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research*, *in* JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, LOW-INCOME HOMEOWNERSHIP WORKING PAPER SERIES 1, 3 (2001) (describing studies that found a correlation between personal satisfaction and homeownership); *see also* Selma Hepp, *Social Benefits of Homeownership and Stable Housing*, NATIONAL ASSOCIATION OF REALTORS (Mar. 27, 2012), http://economist soutlook.blogs.realtor.org/2012/03/27/social-benefits-of-homeownership-and-stable-housing/ (on file with *The University of the Pacific Law Review*) (describing benefits such as better self-esteem, healthier living, and financial wealth).

122. *See* Hepp, *supra* note 121 (extolling the virtues of homeownership).

which it is established.[123] One commentator argues that there should be special protections for the home because, in part, the Third Amendment's history of protecting the home suggests that the Framers "may have intended for the Takings Clause to provide greater protection to homes than to other types of property."[124] Further, the political process supports an argument that the home is provided special protection because in response to *Kelo*,[125] many states enacted laws that offered greater protection to homeowners from government takings.[126] Here, cities like Richmond and Newark want to help their citizens stay in their homes so their communities remain vibrant and productive.[127]

Using Justice Kennedy's analysis of the facts in *Kelo*, a city that wants to use eminent domain on mortgages can point to the fact that many of the residents who would benefit from the program are not known when the city considers or would approve a plan to use eminent domain of residential mortgages.[128] Thus, by cities showing that promoting individual homeownership is not "impermissib[ly]" favoring a private party[129] and providing evidence that there should be an additional protection to individual homeowners, a court may find that a government taking of a residential mortgage fulfills a public purpose.[130]

C. Risk of Favoritism Invites Closer Scrutiny

Critics of residential mortgage takings contend there are other considerations that invite closer scrutiny of the public use requirement.[131] Justice Kennedy's *Kelo* concurrence opens the door for this argument by suggesting there may be takings cases that warrant a "more stringent standard of review."[132]

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123. *See* Rohe, Van Zandt & McCarthy, *supra* note 121, at 12 (explaining that homeowners stay in their neighborhood longer than renters and the longevity leads to increased property values in the neighborhood).

124. *See* Sprankling, *supra* note 95, at 142 (arguing that the protection of the home provided for in the Third Amendment should be read into the Takings Clause).

125. Kelo v. City of New London, 545 U.S. 469, 469 (2005).

126. *See* Christopher W. Smart, *Legislative and Judicial Reactions to Kelo: Eminent Domain's Continuing Role in Redevelopment*, 22 PROB. & PROP. 60, 61 (2008) (reporting that "since 2005, some 42 states have adopted some form of anti-*Kelo* legislation").

127. *See* The Associated Press, *Eminent Domain to Fight Foreclosures is Divisive*, NJ.COM (Nov. 23, 2013, 1:54 P.M.), http://www.nj.com/essex/index.ssf/2013/11/eminent_domain_to_fight_foreclosures_is_divisive.html [hereinafter *Eminent Domain*] (on file with *The University of the Pacific Law Review*) (reporting that the mayor wants to help his struggling town); Dewan *Invokes*, *supra* note 1 (reporting that Richmond wants to use eminent domain to boost its "depleted middle class").

128. *See Kelo*, 545 U.S. at 492 (stating that city planners' lack of knowledge of other private beneficiaries of its redevelopment plan was evidence that the taking was for a public purpose).

129. *See id.* at 491 (explaining that favoring a private party could be impermissible in the context of a taking).

130. *See id.* (stating that evidence of government's reason for taking fulfilled the public use requirement).

131. *See* Complaint, *supra* note 75, at 19 (arguing the eminent domain proposal transfers wealth from one private party to another).

132. *Kelo*, 545 U.S. at 493.

In supporting the Court's conclusion that the City of New London's economic redevelopment plan was a permissible public purpose, Justice Kennedy relied on the factual findings and evidence presented to the trial court justifying that purpose.[133] Those findings included evidence that the city invested money in its plan before a majority of the private beneficiaries were known, that the city chose developers and a plan from a group of applicants, and that other, private beneficiaries were still unknown after the city approved the plan.[134] Mortgage companies fighting a city's use of eminent domain to take foreclosed mortgages could use this analysis to argue that there should be a higher standard of review in these cases because private investors in one mortgage company are being favored over the private investors who originally funded the mortgage.[135] Thus, because the transfer is from one private investor to another, mortgage companies may argue that the transfer of private property does not involve an economic development plan aimed toward bettering the public good.[136] To support this claim, the companies, at least in the case of Richmond, could state that the private beneficiary of the plan is already known before the city council approves the plan, and there was no selection from a group of applicants.[137] Therefore, a claim that reducing mortgage rates via eminent domain serves a public purpose of keeping people in their homes is potentially subject to a stricter standard of review because there could be strong evidence that the taking favors a private party more than creating a public benefit.[138] However, given that the *Kelo* plurality acknowledged the importance of deference to the legislature, it appears a mortgage company may struggle to overcome broad definitions of public use despite hints of favoritism.[139]

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133. *Id.* at 491–92.

134. *Id.*

135. *See* Brian Elzweig & Valrie Chambers, *Legal and Practical Implications of the Eminent Domain of Mortgages*, 33 BANKING & FIN. SERVICES POL'Y REP. 1 (2014) (describing how investors part of Mortgage Resolution Partners would fund city plans to lower mortgages and then receive payment).

136. *See* Dewan *Eminent*, *supra* note 10 (reporting that Richmond City Council took a vote on a proposal to use eminent domain but did not state it was part of an overall economic development plan); Elzweig & Chambers, *supra* note 135, at 4 (arguing that the real beneficiary of a city's use of eminent domain on mortgages are private investors who make the funding to do so possible); *see also Eminent Domain*, *supra* note 127 (quoting a New Jersey town's mayor as saying eminent domain of foreclosures would not be a "panacea"); *see*

137. *See* Notice *supra* note 27, at 1 (naming Mortgage Resolution Partners as co-defendants with the City of Richmond). *See also* Dewan *Eminent*, *supra* note 10 (reporting that the mayor of Richmond heard about the eminent domain plan from Mortgage Resolution Partners).

138. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (stating a higher standard may be allowed when there is a possibility of giving an advantage to private parties); Dewan *Eminent*, *supra* note 10 (reporting that the City of Richmond's purpose in using eminent domain on foreclosed mortgages was to "prevent foreclosures and the blight of vacant properties.").

139. *See id.* at 480 (acknowledging the Court's "longstanding policy of deference to legislative judgments" in takings cases).

Justice Kennedy did not support a higher review standard in cases of economic redevelopment takings.[140] Yet, he left open the possibility of a higher standard for different types of takings cases.[141] Opponents of a city's plan to seize a residential mortgage would use the same fact that plans to keep individual homeowners in their homes are done on a case-by-case basis[142] as evidence that the takings are not part of an overall economic redevelopment plan that is detailed in the same way as the plan the *Kelo* court approved.[143] This evidence might raise the risk of "impermissible favoritism of private parties" that supports a presumption that the taking is for an invalid public purpose because opponents allege specific mortgages are targeted before approving the plan.[144] Further, in the case of Richmond, there is already an identified beneficiary that the city did not select from a group of applicants, which was an important piece of evidence to Justice Kennedy in *Kelo*.[145]

Additionally, there are no special legal considerations for individual homeowners. Supreme Court jurisprudence and a plain reading of the Constitution appear to provide support for the claim that the takings clause applies to all property.[146] Also, in determining the just compensation prong of the Takings Clause, the Court does not award compensation for the intangible aspects of homeownership.[147] Thus, there is a foundation for imposing a higher standard of review in cases using eminent domain on mortgages because homeowners do not receive special protections and some cities lack an overall economic development plan.[148]

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140. *Id.* at 493.

141. *Id.*

142. *See* Complaint, *supra* note 75, at 19 (contending that the eminent domain plan "cherry-pick[s]" specific loans with the best chance of repayment).

143. *See Kelo*, 545 U.S. at 491–92 (explaining how the city's lack of knowledge regarding many of the beneficiaries and selection of the primary developer from a group was evidence of a valid public purpose).

144. *See* Complaint, *supra* note 75, at 19 (contending that the eminent domain plan "cherry-pick[s]" specific loans with the best chance of repayment).

145. *See* Dewan *Eminent*, *supra* note 10 (reporting that Richmond mayor embraced eminent domain of mortgages after meeting with Mortgage Resolution Partners, which would be the investment company assisting the city in restricting the mortgages).

146. *See* Sprankling, *supra* note 95, at 120 (arguing that the language of the Takings Clause "treat[s] all 'private property' as equally subject to government seizure").

147. *See* U.S. v. 564.54 Acres of Land, 441 U.S. 506, 514 (1979) (determining that there is no compensation for the intangible value of property).

148. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (stating there is a possibility for a higher standard of review in takings cases).

D. Presumption of a Public Purpose Will Likely Prevail

Cities wanting to use eminent domain can establish the act fulfills a valid public use whether or not they have a comprehensive redevelopment plan.[149] While there is legal support to not provide special protections to individual homeowners,[150] it is likely not enough to warrant a higher standard of review when a city is challenged over its use of eminent domain on a residential mortgage.[151] Justice Kennedy stated only a "narrowly drawn category of takings" would justify a presumption of invalidity, but a higher standard is not warranted if the purpose is economic development.[152] A city that does not include the taking of a residential mortgage as a part of an overall economic development plan is not foreclosed from taking the mortgage because Justice Kennedy did not state what other purposes may or may not warrant a stricter standard of review.[153] While the cities may not yet have detailed plans as in *Kelo*, the Court does not require that level of specificity.[154] Further, the cities seek a broader purpose of maintaining their communities and keeping residents in their homes, and this has benefits that extend beyond the individual homeowner.[155] Additionally, the plan the Court approved in *Midkiff* was not as detailed as the redevelopment plan in *Kelo*, nor did it have the same pieces of evidence Justice Kennedy weighed in his concurring opinion.[156] Instead, the *Midkiff* court focused on a broad definition of public use that deferred to the local legislature.[157] Given the Court's history of broadly defining public use and its deference to local governments, a federal

149. *See* Dewan *Eminent*, *supra* note 10 (describing that the Richmond mayor wants to use eminent domain to keep residents in their home but does not state it's part of an overall redevelopment plan).

150. *See 564.54 Acres of Land*, 441 U.S. at 514 (determining that there is no compensation for the intangible value of property).

151. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (determining that a higher standard of review is not required just because there is an economic purpose to a taking).

152. *Id.*

153. *Id.*

154. *See id.* at 492 (Kennedy, J., concurring) (rejecting a broad, "*per se*," invalid presumption of takings for an economic purpose).

155. *See* Rohe, Van Zandt & McCarthy, *supra* note 121, at 4 (describing studies that found a correlation between personal satisfaction and homeownership); *see also* Hepp, *supra* note 121 (describing benefits such as better self-esteem, healthier living, and financial wealth).

156. *Compare* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 233–34 (1984) (describing the Act that forced the sale of private property to tenants on the land), *with Kelo*, 545 U.S. at 491–92 (Kennedy, J., concurring) (weighing trial court testimony, documents exchanged between the parties, apparent economic distress of the city, significant contribution of public funds before private beneficiaries selected, unknown private beneficiaries still outstanding, and selection of a developer from a group).

157. *See Midkiff*, 467 U.S. at 241 (determining that the Court will not use its judgment in place of the legislature's).

court is more likely to reject a higher standard of review for a case of a city using eminent domain on mortgages.[158]

V. IMPLICATIONS OF A PRESUMPTION FOR CITIES, HOMEOWNERS, AND LENDERS

Applying a presumption that a public purpose exists when cities elect to use eminent domain on residential mortgages raises important questions as to whether the courts have a role in this debate[159] and whether this might have a negative impact on the housing market.[160]

A. States Should Determine a Proper Public Use

Cities seeking to use eminent domain on mortgages can claim the court's role is very limited to determine a proper public use.[161] These cities could use court decisions that defer to legislative authority to bolster the argument that legislatures, not the courts, should decide the limits of a city's use of eminent domain.[162] Further, following the Court's decision in *Kelo*, more than forty states undermined the case's holding by passing laws that gave added protections to homeowners.[163] Thus, a city that plans to use eminent domain on mortgages may argue in court that the opponent must comply with state law, and the court must defer to its prior precedents.[164] As a result, a presumption that a plan of seizing a residential mortgage fulfills a public purpose would favor cities.[165]

158. *See id.* (determining that the Court will not use its judgment in place of the legislature's); Berman v. Parker, 348 U.S. 26, 33 (1954) (stating that Congress determines how to carry out powers that are within its authority).

159. *See Berman*, 348 U.S. at 33 (declaring that once a public purpose of a project is established only Congress can determine the means to execute it).

160. *See* Complaint, *supra* note 75, at 10, (claiming that allowing cities to use eminent domain on foreclosed mortgages would "severely disrupt the United States mortgage industry").

161. *See Berman*, 348 U.S. at 33 (stating that only Congress can determine the means of executing a project that serves a public purpose); *Midkiff*, 467 U.S. at 241 (declaring that a court will not substitute "its judgment for the legislature's judgment"); *Kelo*, 545 U.S. at 489–90 (noting that the Court only has authority to determine whether an act constitutes a public use under the Fifth Amendment).

162. *See Berman*, 348 U.S. at 33 (stating that Congress is the only one to implement a project once it has an established public purpose).

163. *See* Smart, *supra* note 126, at 60–61 (reporting that "since 2005, some 42 states have adopted some form of anti-*Kelo* legislation.").

164. *See Kelo*, 545 U.S. at 489–90 (stating that the Court's role is limited to determining a valid public use based on centuries of case law).

165. *Infra* Part VI.

B. Taking Mortgages Could Harm the Housing Market

A presumption of validity for taking underwater mortgages does not account for the loss to investors and will wreak havoc on the housing market.[166] Opponents also contend that allowing cities to seize mortgages will negatively impact pension plans[167] and make borrowing more costly for other homebuyers and owners.[168] In response, several lenders threatened to stop providing loans to communities that approve of using eminent domain to take mortgages.[169] Thus, a presumption of public use could ignite backlash against communities that are looking for ways to help their residents.[170] However, the ability to rebut the presumption allows lenders to appropriately challenge a city's plan to seize residential mortgages, and prior attempts indicate that these lenders are prepared with evidence to potentially successfully rebut the presumption.[171]

VI. THE CASE FOR A REBUTTABLE PRESUMPTION

A court can strike a compromise of sorts between the two sides by applying a presumption that a taking of a residential mortgage fulfills a public use,[172] which can be rebutted with evidence why it should or should not determine the outcome of a case.[173] The presumption would assume that a local government is taking a residential mortgage for a public use. However, balancing factors tied to the public use requirement for lenders and investors against factors for a municipality seeking to use eminent domain on mortgages to decide for the party who has the most factors weighing in their favor could rebut the presumption.[174]

A. Factors to Consider for Lenders and Investors

The factors a court should consider when determining whether the balance weighs for or against a lender are: (1) the financial status of the debtor at the time the loan was initially issued; (2) the terms of the loan; (3) the value of a home

166. *See* Complaint, *supra* note 75, at 10 (asserting that the national mortgage industry will be "severely disrupted" if cities can take mortgages using eminent domain).

167. Dewan *Eminent*, *supra* note 10.

168. Dewan *Invokes*, *supra* note 1.

169. Dewan *Eminent*, *supra* note 10.

170. *See id.* (reporting that some lenders stopped issuing loans in Georgia because of tough lending laws the state passed in 2012 and the laws have since been changed).

171. *Infra* Part VI.

172. *Infra* Part VI.

173. *Infra* Part IV.

174. *See* Part IV.A–B.

nearing foreclosure; and (4) the difference the lender could receive in a deficiency judgment whether or not one is possible in the jurisdiction.[175]

In many cases of loans issued to homeowners in the time period before the housing crash, individuals who could not afford the homes they purchased still received loans.[176] In some instances, homeowners were told they did not need to meet other qualifying conditions such as making a down payment.[177] Not surprisingly, those loans did not meet prior industry standards.[178] If a lender issued a loan under these conditions, factors one and two would cut against them. A city claiming it is using eminent domain on a mortgage near foreclosure can bolster its public purpose argument because it is helping vulnerable residents who signed up for loans under false conditions and on bad terms.[179] These were likely working residents contributing to the local economy, and now they face leaving the community because they could be losing their homes.[180] Therefore, when a court is evaluating the lender's argument that the taking is not for a public purpose, it can determine that a city is taking the mortgage for a public purpose if the lender issued a non-conforming loan to a vulnerable borrower, and the city is responding by helping its community recover.[181] If the lender issued a conforming loan[182] to a borrower in good standing, then this factor would support the lender's argument that the taking of a mortgage nearing foreclosure is not for a public purpose because it supports the lender's claim that the city is purposefully targeting performing loans to gain a profit for an independent third-party.[183]

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175. *See infra* text accompanying notes 179–81, 189–85, and 191–92.

176. Loans given to individuals with bad or questionable credit history or significant loans given to people who did have good credit history were called subprime loans. Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373 (2008).

177. Kelly, *supra* note 7.

178. Subprime loans are considered "very high risk" because the borrowers clearly show they cannot repay the loan in a timely manner. Office of the Comptroller of Currency, Bd. of Governors for the Fed. Reserve Sys., *Subprime Lending: Expanded Guidance for Subprime Lending Programs*, 1, 9–10 (2001), *available at* http://www.occ.gov/news-issuances/bulletins/2001/bulletin-2001-6a.pdf (on file with *The University of the Pacific Law Review*).

179. *See* Kelly, *supra* note 7 (reporting that one man was told he didn't have to put down a down payment for a condo purchase).

180. *See id.* (reporting local man who worked in community and enrolled his son in one of its schools had to move after his home was foreclosed on); Dewan *Invokes*, *supra* note 1 (stating that one couple "watched as their daughter's playmates on the block have, one by one, lost their homes.").

181. *See* Dewan *Invokes*, *supra* note 1 (discussing that communities like Richmond were targets of predatory loan tactics and now city officials want to help by using eminent domain).

182. Conforming loans are those that meet a loan limit set annually by the federal government that is the maximum amount at which a lender can purchase a single-family home mortgage. Fed. Hous. Fin. Agency, *Conforming Loan Limits*, http://www.fhfa.gov/DataTools/Downloads/Pages/Conforming-Loan-Limits.aspx (on file with *The University of the Pacific Law Review*) (last visited Jan. 3, 2015).

183. *See* Complaint *supra* note 75, at 10 (claiming there is no public use to the city's "profit-driven" plan).

Factors three and four examine what the city and third-party investor stand to gain to either support or negate a lender's argument that there is no valid public purpose for taking a mortgage. If the value of the home nearing foreclosure and the difference the lender could receive in a deficiency judgment is a minimal amount in comparison to the value of the home, then there is less risk of impermissible favoritism and more support toward a program that is helping residents and the community.[184] However, these factors would weigh in favor of the lender if there were a large gain to be made because a large gain supports a lender's claim that the taking is for profit and not a public purpose.[185] A city using this program would base its taking on the home's fair market value.[186]

Fair market value is also a factor used to determine whether a lender has set a valid price for a home when it will be up for bid at a foreclosure auction.[187] Fair market value usually considers such factors as a property's potential uses, zoning attachments, the cash value of the home, and the possibility for development.[188] Therefore, the fair market value and how cities calculate it can either bolster or diminish a lender's argument that a city seizing mortgages at "steeply discounted prices" to gain a profit would not support a public purpose.[189] Or, if it is the same price a lender is required to set, then that factor supports the implication that the city is using valid means to determine the value of the home to help its residents.[190]

The final factor courts should consider is the difference in value between the sale price at foreclosure and the remaining loan amount, which lenders usually try to retrieve by filing for a deficiency judgment against the borrower.[191] A court should weigh this factor against a lender if the value of the deficiency judgment plus the amount of interest charged is disproportionate to the current value of the

184. *See* Dewan *Invokes*, *supra* note 1 (stating that the plan for taking underwater mortgages includes "both current and delinquent loans" and doesn't target homes with second mortgages).

185. *See* Complaint, *supra* note 75, at 9 (describing how the takings plan proposed by the City of Richmond and a third-party investor would yield a twenty percent profit).

186. *See* Dewan *Invokes*, *supra* note 1 (reporting that the City of Richmond is "offering to buy the loans at what it considers the fair market value.").

187. *See* Citicorp Real Estate Inc. v. Smith, 155 F.3d 1097, 1107 (9th Cir. 1998) (outlining factors to be considered in whether a property price was set at fair market value).

188. *Id.*

189. Complaint, *supra* note 75, at 9.

190. *See* CAL. CIV. PROC. CODE § 580(a) (West 2014) (requiring that a home's auction price be set at fair market value).

191. A deficiency judgment is defined as "[a] judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due." BLACK'S LAW DICTIONARY (9th ed. 2009).

home at the time the eminent domain action is filed because it underscores the lender's claims that the city's goal is to make a profit.[192]

B. Factors to Consider for the Borrower/Debtor and City

Courts should consider whether the borrower was knowledgeable as to the terms of the loan in determining whether a borrower/debtor receives the benefit of a government taking that restructures his or her mortgage payment.[193] Other factors courts should consider include: the percentage of homes underwater in the city seeking to use eminent domain on foreclosed mortgages;[194] whether the taking is part of an overall economic development plan or addresses a crisis in the community;[195] and the impact of the percentage of underwater homes on the municipality's tax revenue for services.[196]

Additional factors a court should consider when determining whether the borrower was knowledgeable about the terms of their loan include a borrower's ability to secure a loan through multiple lenders and his or her income level.[197] These factors work in favor of borrowers because—with some assistance from the government—lenders made it easy for many borrowers to enter into unsound loan agreements in the first place.[198] Therefore, if a city can prove this element, it would support a city's claim that it is helping vulnerable residents stay in their homes.[199]

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192. *Compare* Kelly, *supra* note 7 (reporting that one former homeowner owed $21,000 in interest in addition to $95,500 for the unpaid portion of his loan), *with* Complaint, *supra* note 75, at 9 (claiming that third-party investors would gain a twenty percent profit through an allegedly impermissible program).

193. Many subprime loans were usually given to low-income homebuyers and monitories who had limited access to larger commercial financial institutions to secure a loan. Solomon Maman, *New Tools for Combating Unfair, Deceptive and Abusive Mortgage Practices: New Amendments to Regulation Z*, 21 LOY. CONSUMER L. REV. 194, 199 (2008); *see also* Kelly, *supra* note 7 (reporting that one man was shown homes he thought he could not afford but was then told he did not have to pay a down payment).

194. One extreme example occurred in San Bernardino County where after 2006, fifty-seven percent of residential mortgages in the county were underwater. Tad Friend, *Home Economics: Can an Entrepreneur's Audacious Plan Fix the Mortgage Mess?*, THE NEW YORKER (Feb. 4, 2013), *available at* http://www.newyorker.com/magazine/2013/02/04/home-economics-2 (on file with *The University of the Pacific Law Review*).

195. *See* Kelo v. City of New London, 545 U.S. 469, 484 (2005) (holding an economic development plan was a valid public purpose).

196. Kingsley, *supra* note 103, at 18 (describing how foreclosure lowers property values which in turn results in less tax revenue to local governments).

197. Many lenders administered subprime loans to low-income homebuyers and minorities. Maman, *supra* note 193, at 199.

198. Steven L. Schwarcz, Keynote Address, Understanding the Subprime Financial Crisis (Oct. 24, 2008) *in* 20 S.C. L. REV. 549, 550 (2009).

199. *See also* Dewan *Invokes*, *supra* note 1 (quoting Richmond Mayor Gayle McLaughlin as saying she is "committed to the well-being of [Richmond's] neighborhoods.").

Next, the court should look at factors that weigh for or against the city. For instance, a city may not have an economic development plan to revive the local economy through eminent domain of foreclosures; however, balancing the other factors may allow a court to find in favor of a city if its goal is to maintain its community by keeping residents in their homes.[200] This goal satisfies a public use because keeping homeowners in their homes benefits the community.[201] In considering the various factors supporting or denying a city's attempt to use eminent domain on a foreclosed mortgage, the court should evaluate each factor separately with an understanding that one factor can outweigh another.

C. Applying the Presumption

While the court dismissed a lawsuit filed against the City of Richmond for its proposal to use eminent domain on foreclosures,[202] the city's efforts, along with the efforts of many others, warrant an analysis of the proposed presumption's applicability to a case challenging a city's use of eminent domain of underwater mortgages.[203] The court's initial steps require it to balance factors in favor of or against the lenders.[204] First, the lender needs to supply the terms of the loans for the mortgages in question.[205] In Richmond, this factor likely weighs in favor of lenders who can argue the loan terms are fair and that the debtors are capable of paying the loans even if they are underwater; this is based on the lender's claim that the City of Richmond and its third-party investor, Mortgage Resolution Partners, only target performing loans not loans in default or in danger of default.[206]

Next, a court would look at the financial status of the debtor at the time the loan was issued.[207] This factor likely weighs against the lender because in Richmond's case, many lenders likely issued loans to low-income homeowners.[208] Then, the court would evaluate the fair market value of a home

200. Dewan *Eminent*, *supra* note 10 (reporting that the City of Richmond sought to prevent foreclosures and the damages those foreclosures cause).

201. *See* Dewan *Invokes*, *supra* note 1 (reporting that married homeowners refused to "walk away from [their] house in part for the sake of their son.").

202. Order, *supra* note 79.

203. Timiraos, *supra* note 74 (quoting William McDavid, general counsel for Freddie Mac, as saying the mortgage company "would consider taking legal action" if Richmond took loans using eminent domain).

204. *Supra* Part VI.A.

205. *Supra* Part VI.A.

206. Complaint, *supra* note 75, at 10–11.

207. *Supra* Part VI.A.

208. The median household income in Richmond between 2009 and 2013 was $54,589, which was lower than the $61,094 median household income statewide during the same time period. Further, Richmond had 18.5 percent of its population living below the poverty line during that same period while the state averaged 15.9 percent living below the poverty line. *U.S. Census Bureau, Richmond (city), California*, U.S. DEP'T OF

nearing foreclosure.[209] This factor could potentially cut both ways depending on if the city is using the fair market value standards required by law[210] or if they are setting a price that yields a large profit for them and a separate third-party investor.[211]

Finally, the court considers the amount of the deficiency judgment and interest charged to the debtor in comparison to the current value of the home.[212] In Richmond's case, homes bought before the housing crash in 2006 lost sixty-six percent of their value.[213] Today, the median home value in Richmond is about $270,200.[214] Therefore, this factor would likely weigh against a lender seeking to recover a large deficiency and high interest rate accrual[215] against a city that wants to pay fair market value for the loan because the factor supports the city's argument that it wants to keep residents in their homes to help the community.[216]

In weighing factors for and against the individual borrowers and the city, the court considers first the individual borrower's knowledge.[217] This factor falls either for or against the individual depending on whether the lender can show the borrower had sufficient options and knowledge at the time the loan was issued.[218] In Richmond, it is questionable if the lender can show this given that much of the city's population was "steered into predatory loans."[219] However, the blanket statement that the population was prey to bad lending practices would be refuted by evidence that performing loans are targeted.[220] Thus, if a city is helping homeowners who actually understand the terms of their loan and payment requirements, the city's purpose seems less likely for a public use because it is missing the element of addressing a community need during tough economic

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COMMERCE, http://quickfacts.census.gov/ qfd/states/06/0660620.html [hereinafter Census] (on file with *The University of the Pacific Law Review*) (last revised Dec. 4, 2014).

209. *Supra* Part VI.A.

210. *See* CAL. CIV. PROC. CODE § 580a (West 1988) (requiring that a home's auction price be set at fair market value).

211. *See* Complaint, *supra* note 75, at 9 (stating that MRP and its investors would receive a profit up to twenty percent).

212. *See supra* Part VI.A.

213. Dewan *Invokes*, *supra* note 1.

214. Census, *supra* note 208.

215. *See* Kelly, *supra* note 7 (reporting that one former homeowner owed $21,000 in interest in addition to $95,500 for the unpaid portion of his loan).

216. *See* Dewan *Invokes*, *supra* note 1 (discussing the reasons for Richmond seeking to use eminent domain to stop foreclosures).

217. *Supra* Part VI.B.

218. *See* Kelly, *supra* note 7 (discussing how one man was not required to make a down payment when purchasing a condo).

219. Dewan *Invokes*, *supra* note 1.

220. *See* Complaint *supra* note 75, at 10 (calling the City of Richmond's plan a "façade" because it targets loans of homeowners who pay on a monthly basis and have a good credit).

times and leans more toward benefiting "a particular class of identifiable individuals."[221]

Next, the court would consider the actions of the city attempting to use eminent domain on foreclosures.[222] One factor is the percentage of homes underwater in the community, which works with another factor of determining if the community is in crisis.[223] In Richmond, about twenty-eight percent of homes were underwater, which is almost double the nineteen percent national average.[224] This evidence weighs in favor of allowing the city to use eminent domain on foreclosures because a plan to address a significant problem in a community is a viable public purpose to justify a taking of the private property of one and giving it to another.[225] Finally, a court considers the impact of the percentage of underwater homes on the city's tax revenue.[226] In Richmond, this factor weighs in favor of the city taking the mortgage for the public use of benefitting the community because the municipality reported that it faces "financial stress" from increased expenses and decreased revenue from property taxes and assessments.[227]

By balancing the factors and analyzing prior Supreme Court case law, it appears that the City of Richmond may have enough support to win a lawsuit against banks challenging a seizure of a private, residential, underwater mortgage. However, that could change if lenders provide enough evidence to show there is a risk of "impermissible favoritism"[228] to a private third-party investor and to individual homeowners who can pay their loans.[229] Therefore, as cities consider a proposal of taking a mortgage via eminent domain, it will have to be mindful of the evidence it needs to support its claim so when a court does

221. Kelo v. City of New London, 545 U.S. 469, 478 (2005).

222. *Supra* Part VI.B

223. *Supra* Part VI.B.

224. Dewan *Eminent*, *supra* note 10.

225. *See* Schultz, *supra* note 105, at 46 (stating that there is a broad definition of public use that includes if the use "serves a public purpose, confers a benefit on the public, furthers the state's police powers, or otherwise is within a state's legitimate governmental authority"); *see also* Perry, *supra* note 72, at 204–05 (analyzing that a court would likely find that transferring mortgages by using eminent domain would fulfill a public purpose of preventing blight).

226. *See supra* Part VI.B.

227. City of Richmond, Cal., 2012-13 Tax & Revenue Anticipation Notes, Series A, 1, 20 (2012), *available at* http://www.ci.richmond.ca.us/DocumentCenter/Home/View/9391 (on file with *The University of the Pacific Law Review*).

228. *See* Kelo v. City of New London, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (believing a court should seriously consider an objection that there is "impermissible favoritism to private parties").

229. *See* Complaint, *supra* note 75, at 9–10, (claiming third-party investors will make a twenty percent profit and cities target performing loans).

determine that a complaint can proceed, there will be a full discussion on whether the public use requirement is satisfied.[230]

VII. CONCLUSION

The housing crash caused a financial crisis that still heavily impacts communities across the country.[231] Individual families like the Castillos, who want to stay in their homes and communities, face high payments in low-value homes while recovering from a tough economic collapse.[232] Leaders in some of those cities want to find a way to help their residents and using eminent domain to take over underwater mortgages may just be the solution that can effectively help residents and communities—who have watched as neighbors are forced to abandon their homes and their children lose more playmates—remain whole.[233] Lender expectations and the need to recover their lost money is also a crucial factor that helps maintain the housing market.[234] Thus, a court faced with deciding which side to support can be greatly aided by presuming there is a public purpose in the taking and balancing the evidence to support that purpose using the conditions that led to the current status of the city, homeowner, and lender to determine the best solution in that case to the crisis facing both sides.[235] Under this analysis, there may be a way to keep the Castillos and their neighbors together so they can continue to be a community.[236]

230. *See* Order, *supra* note 79 (dismissing a case against Richmond's attempt to use eminent domain because the city's plan was not yet fully developed).

231. Dewan *Invokes, supra* note 1.

232. *Id.*

233. *Id.*; Queally, *supra* note 71.

234. *See also* Complaint, *supra* note 75, at 14–15 (arguing that the use of eminent domain on underwater mortgages would have negative effects on the housing market).

235. *Compare* Kelo v. City of New London, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (stating that presumption of invalidity is not warranted unless the risk of "impermissible favoritism is so acute" that the presumption is not warranted), *with* Complaint *supra* note 75 (arguing that is it unconstitutional for a city to use eminent domain on foreclosures).

236. Dewan *Invokes*, *supra* note 1.

The 1875 General Railway Right of Way Act and *Marvin M. Brandt Revocable Trust v. United States*: Is This the End of the Line?

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Photo by Karly McCrory

I. INTRODUCTION

At one point in time, railroad corporations were collectively the largest private landholder in the country, holding the rights to nearly ten percent of the land comprising the continental United States as a result of a series of congressional acts meant to encourage westward expansion.[1] The acts achieved their goals and resulted in many positives: railroads encouraged settlement, fostered economic growth, and created a reliable method of transport for people and freight.[2] However, the acts also had their downsides. Railroad corporations acquired excessive amounts of land, frustrating the public and leading to the construction of an overabundance of railroad corridors.[3] Over the years, railroads

1. William S. Greever, *A Comparison of Railroad Land-Grant Policies*, 25 AGRIC. HISTORY 83, 83 (1951); *see infra* Part II (discussing the various grants and the westward expansion).

2. *See generally* Rick Ewig, *The Railroad and the Frontier West,* 3 OAH MAGAZINE OF HISTORY, Spring 1988, at 9–10 (discussing the goals of the country, and noting that "[i]n only a generation, the country had experienced tremendous growth and the western railroad played a leading role").

3. *See* Greever, *supra* note 1, at 84 (noting that more than 180 million acres of land were granted to the railroads by 1871); *See* David Maldwyn Ellis, *The Forfeiture of Railroad Land Grants, 1867–1894*, 33 THE

have abandoned massive numbers of corridors[4]—usually because the lines became unprofitable or unneeded as a result of railroad acquisitions and mergers.[5] Nevertheless, rail transport remains strong today and is on an upward trend: Class I Freight Railroads added nearly 1,500 miles of track to the network between 2009 and 2011.[6]

But a potential problem looms on the horizon: despite a strong national policy in favor of preserving abandoned railroad rights-of-way for future reinstatement,[7] a recent Supreme Court decision puts the thousands of miles of rights-of-way granted under the General Railway Right of Way Act of 1875[8] at risk for complete dissolution should the railroad cease operations on them.[9] Despite the unique qualities of railroads,[10] the Court held that rights-of-way under the 1875 Act are mere easements.[11] As courts continue to interpret the property rights of railroad rights-of-way within a common law framework,[12] our need to instill a way to prevent the abandonment and subsequent extinguishment of those same rights-of-way becomes more apparent, so that we can protect the full capacity of railroads for future generations.

Part II of this Comment will look briefly at the history of congressional railroad land grants and the shift in the public and the Supreme Court's attitudes

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MISS. VALLEY HIST. REV. 27, 38 (1946) ("The opponents of land grants found it necessary throughout the decade of the seventies to prevent further raids on the public domain and the Treasury by the railroads."); BUREAU OF TRANSP. STAT., NATIONAL TRANSPORTATION STATISTICS § 1–1 (2014) [hereinafter NATIONAL TRANSPORTATION STATISTICS]. In 1960, Class I railroads—a classification based on revenue—had 207,334 miles of track, not including side track, yard trackage, or parallel tracks. This figure also does not include miles of track held by numerous smaller non-Class I railroads. *Id.*

4. NATIONAL TRANSPORTATION STATISTICS, *supra* note 3, at § 1–1. Class I railroad track mileage decreased by fifty-four percent over fifty years. By 2011, Class I railroads had 95,387 miles of track. *Id.*

5. BUREAU OF TRANSP. STAT., TRANSPORTATION STATISTICS ANNUAL REPORT 2012, at 14 (2013); *see also* NATIONAL TRANSPORTATION STATISTICS, *supra* note 3, at § 1–2. In 1960, there were 106 Class I Railroads; today there are seven. *Id.*

6. NATIONAL TRANSPORTATION STATISTICS, *supra* note 3, at § 1–1. Railroads are classified according to amount of annual operating revenue. Class I Railroads have the highest annual operating revenue of all classes of railroads. 49 C.F.R. § 1201.1–1 (1978); ASS'N OF AMERICAN RAILROADS, CLASS I RAILROAD STATISTICS 1 (July 15, 2014).

7. *See* 16 U.S.C. § 1247(d) (2012) (confirming the Legislature's recognition of a "national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use").

8. 43 U.S.C. §§ 934–940 (2012). The General Railway Right of Way Act will hereinafter be referred to within the text as the 1875 Act. No one knows exactly how many miles of right-of-way exist under the 1875 Act. The Bureau of Land Management, the federal governmental agency in charge of managing public land, estimates that "[t]housands of miles of 1875 Act ROWs . . . exist on public land in the western United States." *BLM Issues Guidance on Uses of Railroad Rights-of-Way Land*, BUREAU OF LAND MGMT. (Aug. 12, 2014), *available at* http://www.blm.gov/wo/st/en/info/newsroom/2014/august/nr_08_12_2014.html (on file with *The University of the Pacific Law Review*).

9. *Infra* Part III.

10. *See infra* Part III.C (comparing the common law property framework with the rights granted to railroads).

11. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

12. *Infra* Part III.

toward them.[13] Part III of this Comment will delve into the recent U.S. Supreme Court decision *Marvin M. Brandt Revocable Trust v. United States*, its negative effects on railroad right-of-way abandonment, and the possibility of reinstatement.[14] Part IV of this Comment proposes a broader interpretation of the "railroad purposes" doctrine in order to prevent permanent extinguishment of the 1875 Act's rights-of-way.[15] Congress should enact law expanding the scope of activities that qualify as "railroad purposes" to include leases made by the railroad to third parties for activities undertaken on the right-of-way that serve a clear public utility purpose and generate revenue for the railroad.[16] Such a law would protect the railroad easement from dissolution, allowing railroads to reinitiate operations as needed.[17]

II. THE TRACK OF RAILROAD LAND GRANTS: A HISTORICAL AND LEGAL OVERVIEW

Over the span of the nineteenth century, the United States tripled the size of its land surface area.[18] Due to the vastness of the new American frontier, westward travel was treacherous.[19] In order to satisfy the national hunger for expansion, the federal government needed to determine not only how to use all of this new land, but also how to access it—that is where railroads and congressional land grants came into the picture.[20]

This Part first gives a brief overview of the history of congressional railroad land grants,[21] before turning to the early Supreme Court interpretations of the property rights these grants conveyed to the railroad.[22]

A. Railroads on the Rise: Early Land Grants

Intent on creating a reliable national transportation system to aid the growth of the country and the economy,[23] Congress began granting federally held public

13. *Infra* Part II.

14. *Brandt*, 134 S. Ct. 1257 (2014); *infra* Part III.

15. *Infra* Part IV.

16. *See infra* Part IV (providing support for such an interpretation).

17. *Infra* Part IV.

18. Guillaume Vandenbroucke, *The U.S. Westward Expansion*, 49 INT'L ECON. REV. 81, 81 (2008); *see also* Greever, *supra* note 1, at 83 (noting the "eagerness . . . to see the West developed as rapidly as possible.").

19. James E. Vance, Jr., *The Oregon Trail and Union Pacific Railroad: A Contrast in Purpose*, 51 ANNALS OF THE ASS'N. OF AM. GEOGRAPHERS 357, 358 (1961) (noting that the Oregon Trail served "as a migration way for a population estimated at above 300,000, of whom over a tenth died").

20. *See generally* Greever, *supra* note 1, at 90 (finding that "the role . . . land-grant railroads played as landsellers or colonizers in developing the West was a vital and creditable one.").

21. *Infra* Part II.A–B.

22. *Infra* Part II.B–C.

23. *See* Vandenbroucke, *supra* note 18, at 81 (discussing the rapid growth of the United States).

lands to the states in order to subsidize rail corridor development and construction.[24] In turn, the states handed the land over to private railroad corporations as an incentive for the construction of railroads between cities around the country.[25]

By the 1860s, the push for a transcontinental railroad reached its height: "[t]o the public . . . federal loans and land grants to the pioneer Pacific railroads represented aid necessary to secure an economically and politically desirable technological feat."[26] Caught in the midst of the Civil War, the northern states saw how desperately they needed "the construction of said railroad . . . to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores thereon."[27] Once the Southern states seceded, Congress had the opportunity to set the transcontinental railroad route across the Northern states without any pushback from the Southern Congress members.[28] To fast-track the process, Congress decided to cut out the state middle-men and began making grants directly to the private railroad corporations.[29]

The first major land grant was the Pacific Railroad Act of 1862.[30] This Act followed the general framework of earlier state grants.[31] In exchange for the construction of a railroad, the railroad corporations earned alternating plots of land adjacent to the right-of-way for every mile of railway constructed, in addition to the tract for the right-of-way itself.[32] The Pacific Railroad Act of 1862 conveyed "the *right and title* to said lands to said [railroad] company" for each forty miles of railway completed, with the exception of mineral lands.[33]

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24. *See, e.g.*, 9 STAT 466–67 (granting land to Illinois, Mississippi and Alabama); *see also* 10 STAT 8–10 (granting lands to Missouri in 1852); 10 STAT 155 (Arkansas and Missouri in 1853); 11 STAT 9 (Iowa in 1856); 11 STAT 21 (Michigan in 1856).

25. Maldwyn Ellis, *supra* note 3, at 28; *see* Greever, *supra* note 1, at 83 (arguing that "capitalists refused to finance railroads built in advance of traffic but probably would invest if the companies had the right to considerable land as an additional asset").

26. Heywood Fleisig, *The Central Pacific Railroad and the Railroad Land Grant Controversy,* 35 THE J. OF ECON. HISTORY 552, 552 (1975).

27. 12 STAT. 492.

28. Ewig, *supra* note 2*,* at 9; Dr. James McPherson, *A Brief Overview of the American Civil War: A Defining Time on Our Nation's History*, CIVIL WAR TRUST (Jan. 1, 2015), *available at* http://www.civilwar.org/education/history/civil-war-overview/overview.html (on file with *The University of the Pacific Law Review*). Eleven Southern States seceded and formed the Confederate in between 1860–61. *Id.; see also* Greever, *supra* note 1, at 83 (noting that the South's "obstructionism was, obviously, removed by the Civil War").

29. Maldwyn Ellis, *supra* note 3, at 28–29.

30. 12 STAT. 489.

31. *See, e.g.*, 10 STAT 8; 10 STAT 155; 11 STAT 9; 11 STAT 21 (each laying out similar grants of the land adjacent to the right-of-way).

32. 12 STAT. 489. The grants of alternating sections of land along the right-of-way are commonly referred to as "checkerboard grants," which the railroad often sold in order to fund construction of the right-of-way. Greever, *supra* note 1, at 84–85.

33. 12 STAT. 492 (emphasis added).

Congress amended, expanded, and otherwise altered the Pacific Railroad Act several times over the next few years.[34] By 1871, the federal government had granted more than 175 million acres of land to the railroads, and the states had granted nearly another 50 million acres.[35] All in all, the railroads held some form of property rights to nearly ten percent of the total land area of the continental United States.[36]

B. The End of Lavish Land Grants and Introduction of the 1875 Act

At the turn of the 1870s, the public's one-time support for the construction of the transcontinental railroad transformed into mounting contempt toward the massive land grants made to the private railroad corporations.[37] The public realized how much developable land had been granted and how much was still waiting to be put to use by dozens of different railroad companies.[38] As a result, others could not settle the land until the railroads had either claimed their rights through construction or forfeited the reserved land.[39] In response to the public outcry, the House of Representatives unanimously adopted a resolution that discontinued the policy of granting land subsidies to railroads.[40]

Notwithstanding the shifting public sentiment towards the "lavish" land grants, the need for railroad expansion continued—in 1875, Congress enacted the General Railway Right of Way Act.[41] The Act ended checkerboard land grants and placed a one-year limit on the railroads to file profiles of the planned right-of-way and a five-year limit on construction, thus addressing the public concern earlier grants caused.[42] Failure to meet these deadlines resulted in land grant forfeiture and released the land back into the public domain.[43]

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34. *See* 12 STAT. 807 (Pacific Railroad Act of 1863); 13 STAT. 356 (Pacific Railroad Act of 1864); 13 STAT. 504 (Pacific Railroad Act of 1865); 14 STAT. 66 (Pacific Railroad Act of 1866).

35. Greever, *supra* note 1, at 84.

36. *Id.*

37. *See* Maldwyn Ellis, *supra* note 3, at 38 ("The opponents of land grants found it necessary throughout the decade of the seventies to prevent further raids on the public domain and the Treasury by the railroads.").

38. *See* Greever, *supra* note 1, at 84 (stating that the "Department of the Interior then withdrew the [land] . . . from public entry in the government land offices until the railroad's rights were satisfied").

39. Maldwyn Ellis, *supra* note 3, at 30.

40. *Id.* at 38 (noting that "[f]arm groups, labor organizations, land reformers, and politicians were bringing pressure on Congress" to reform the land grants); CONG. GLOBE, 42D CONG., 2D SESS. 1585 (1872) ("stating that "the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers"). William S. Holman of Indiana set forth the resolution. *Id.*

41. 43 U.S.C. §§ 934–940 (2012).

42. *Id.* at §§ 934, 937 (limiting grants to "the extent of one hundred feet on each side of the central line of said road" and lands adjacent to the right-of-way for railroad buildings and stations "not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road").

43. *Id.*

Beyond these changes, the 1862 and 1875 Acts are not that different from one another on their face.[44] In 1903, the Court in *Northern Pacific Railway Company v. Townsend* determined that the pre-1871 acts granted the railroads a "limited fee, made on an implied condition of reversion [to the federal government] in the event that the company ceased to use or retain the land for the purpose for which it was granted."[45] Twelve years later in *Rio Grande Western Railway Company v. Stringham*, the Supreme Court handed down the first major decision regarding the scope of railroad rights under the 1875 Act.[46] The Court recognized the similarities between the 1875 Act and its predecessors,[47] and followed the earlier *Townsend* ruling[48] holding that:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.[49]

Rather than categorizing the pre-1871 and the 1875 acts as different types of property interests, the *Stringham* Court found that all congressional railroad land grants conveyed the same interest—a limited fee.[50]

*C. The Not-So-*Great Northern *Change of 1942*

Lower courts typically followed the *Townsend-Stringham* limited-fee view of railroad property rights when resolving land disputes under the Acts until 1941.[51] However, in 1942, the Supreme Court derailed the consistency that the *Stringham* decision brought to the railroad's property interests.[52] The Court granted certiorari in *Great Northern Railroad Co. v. United States* in order to determine whether the railroads or the United States government held the title to

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44. *Compare* 12 STAT. 489, *with* 43 U.S.C. §§ 934–940 (2012); *see generally* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 U. COLO. L. REV. 85, 92 (2011) (noting that courts later misinterpreted the 1875 Act because "they confused the more well-known railroad land subsidy grants, which did end in 1871**,** with the more obscure right-of-way grant policy, which had a distinct history before, during, and after the land grants").

45. 190 U.S. 267, 271 (1903).

46. 239 U.S. 44 (1915).

47. *Supra* Part II (discussing the various land grants).

48. *See Townsend*, 190 U.S. at 271 (classifying pre-1871 grants as "limited fee, made on an implied condition of reverter").

49. *Stringham,* 239 U.S. at 47.

50. *Id.*

51. *See* MacDonald v. United States, 119 F.2d 821, 824 (9th Cir. 1941) (holding that "as a general rule a railroad company is recognized as having something of greater dignity than the easement known at common law").

52. Great N. R.R. Co. v. United States*,* 315 U.S. 262 (1942).

the right-of-way subsurface lands.[53] The Roosevelt Administration argued that the railroad did not have the right to drill oil and gas deposits on a right-of-way granted under the 1875 Act.[54] The Supreme Court agreed, and went one step further, finding that the Act granted only easements to the railroads.[55]

Justice Murphy, writing for the Court, made the sweeping generalization that "[s]ince [the 1875 Act] was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches."[56] And with that simple statement, nearly thirty years after it was decided, the Supreme Court all but overruled *Stringham*—1875 Act rights-of-way were no longer considered to be limited fees.[57]

Since its inception, scholars have criticized *Great Northern*.[58] Some believe that the *Great Northern* interpretation of the 1875 Act was plainly wrong: the decision was inapposite to the historical context, legislative intent at the time of enactment, and language of the Act itself.[59] Unlike earlier grants, which expressly reserved the rights to mineral lands to the government, the 1875 Act was completely silent on the matter.[60] Notwithstanding, the *Great Northern* Court held that if the language of the Act did not specifically grant something, then the railroad had no right to it.[61] The fact that such rights were not specifically excluded, as they had previously been, was of no matter to the Court.[62]

Other *Great Northern* critics have suggested that courts ought to narrowly interpret the decision and apply it solely to issues regarding the railroad's subsurface rights as against the government.[63] A narrow application might have

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53. *Id.* at 270.

54. Noah Feldman, *Supreme Court Wakes Up in 1875*, BLOOMBERG VIEW (Mar. 10, 2014, 12:21 PM), *available at* http://www.bloombergview.com/articles/2014-03-10/supreme-court-wakes-up-in-1875 (on file with *The University of the Pacific Law Review*).

55. *Great Northern,* 315 U.S. at 277.

56. *Id.* at 275.

57. *Id.*

58. *See, e.g.*, Roberts, *supra* note 44, at 86 (arguing that "the entire notion of an '1871 shift' in federal railroad right-of-way law is a fallacy, derived from the Supreme Court's 1942 adoption of a faulty historical analysis advanced by the Solicitor General.").

59. *See supra* note 58 and accompanying text.

60. *Compare* 12 STAT. 489 (providing that "all mineral lands shall be excepted from the operation of this act") *with* 43 U.S.C. §§ 934–940 (2012) (failing to include a specific exception of mineral lands, as in past Acts).

61. *Great Northern,* 315 U.S. at 272.

62. *Id.*

63. Norman A. Dupont, *The Supreme Court Decides Rails to Trails Case: A New Governmental Attorney Estoppel Doctrine or a Case of Revisionist History?*, ABA TRENDS, July/Aug. 2014, at 9–13; *see also* Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to Rail-Trail Conversions*, 38 ENV'T. L. 711, 729 (2008). Ms. Wright gives a thorough explanation of the perceived problems with the *Great Northern* decision:

> There are numerous problems with the *Great Northern* decision, not least of which is its failure to acknowledge the fact that all federal railroad grants of right-of-way across the public lands had used

eased some of the confusion and uncertainty of the interests granted by pre- and post-1872 Acts.[64] However, the modern day Supreme Court had different plans for the 1875 Act.[65]

III. THE *BRANDT* EFFECT: COMMON LAW ABANDONMENT ISSUES

One hundred and forty years after Congress enacted the 1875 Act, and seventy years post-*Great Northern*, remaining questions regarding the property rights held by the railroads, the federal government, and private owners of land adjacent to the 1875 Act right-of-way resulted in a deep circuit split.[66] Shockingly, a dispute over a paltry ten acres became the tie-breaker and forever changed the course of the 1875 Act rights-of-way.[67]

This Part will first look at *Marvin M. Brandt Revocable Trust v. United States*' path through the lower courts and will then discuss the Supreme Court's majority and dissenting opinions.[68] Next, this Part will explain the effects of *Brandt*'s ruling on the Rails-to-Trails Program, a program aimed at preserving abandoned rights-of-way for future railroad use.[69] Lastly, this Part will explore a few less-than-satisfactory solutions to minimize or resolve *Brandt*'s effects on the 1875 Act rights-of-ways.[70]

> the same term-a—"right-of-way"—and so it made little sense to identify some as fee simple absolute, some as fee simple determinable, and others as easements. To justify a finding that different property rights were intended despite use of the same property terminology, the Court had to rely on changing legislative attitudes that somehow could be characterized as evidencing intent to create three distinct property interests. But of course, there is no such legislative history, and the fact that Congress discontinued the checkerboard grants does not mean it intended to give a different property right to the railroads in their corridor grants, especially since Congress did know how to limit corridor grants to easements, which it routinely did in legislation pertaining to railroad access across Indian lands.

Id.

64. Dupont, *supra* note 63, at 9–13.

65. *Infra* Part III.

66. *See, e.g.*, Hash v. United States, 403 F.3d 1308, 1317 (Fed. Cir. 2005) (holding that "[t]he text of the 1875 Act, and the omission of any reservation or retention or reversion of the fee by the United States, negate the now-asserted intention on the part of the United States to retain ownership of the lands underlying railway easements when the public lands were disposed of"); *see also,* Samuel C. Johnson 1988 Trust v. Bayfield Cnty, 649 F.3d 799, 806 (7th Cir. 2011) (holding that abandoned right of ways reverted to private landowner rather than federal government). *But see* Marshall v. Chi. & Nw. Transp. Co., 31 F.3d 1028, 1032 (10th Cir. 1994) (finding that in enacting 42 U.S.C. § 912, "Congress clearly believed that it had authority over 1875 Act railroad rights-of-way").

67. *Brandt*, 134 S. Ct. 1257. A full discussion of the facts of the *Brandt* dispute is beyond the scope of this Comment. For a more complete background of the case, see Justin G. Cook, Comment, *How the Supreme Court Jeopardized Thousands of Miles of Abandoned Railroad Tracts with a Single Opinion [Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014)]*, 54 WASHBURN L. J. 227 (2014).

68. *Infra* Parts III.A–C.

69. *Infra* Part III.D; 16 U.S.C. §§ 1241–1251 (2012).

70. *Infra* Part III.E.

A. Brandt*'s Track through the Lower Courts*

The federal government initiated a quiet title action against landowners adjacent to a non-operative right-of-way where a small, local railroad company abandoned its line after it became unprofitable.[71] The Wyoming District Court and the Tenth Circuit both held that the federal government retained a reversionary interest in abandoned 1875 Act rights-of-way.[72] While recognizing *Great Northern*'s determination that the 1875 Act granted easements, the Tenth Circuit applied two laws that both provide that all abandoned congressional act rights-of-way revert to the federal government.[73] This decision further deepened the circuit split regarding the 1875 Act property rights, and, as a result, the Supreme Court granted certiorari in an action disputing just ten acres of land.[74]

B. Brandt *and the Supreme Court: (Almost) All Aboard!*

With an eight-justice majority, Chief Justice Roberts wrote the *Brandt* opinion, reversing the lower courts, affirming *Great Northern*, and holding that all 1875 Act rights-of-way are nothing more than "simple easements."[75] Unlike *Great Northern*, the *Brandt* decision is not only concerned with a limited portion of the land rights.[76] Under *Brandt*, any time a railroad abandons an 1875 Act

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71. *See* Lyle Denniston, *Argument Preview: Rights to Old Rights-of-way*, SCOTUSBLOG (Jan. 13, 2014 12:06 AM), *available at* http://www.scotusblog.com/2014/01/argument-preview-rights-to-old-rights-of-way/ (on file with *The University of the Pacific Law Review*) (noting that "[e]veryone except [the Brandt] trust either settled with the government or did not appear to contest the federal claim").

72. United States v. Marvin M. Brandt Revocable Trust, No. 06–CV–184–J, 2008 WL 7185272, at *2 (D. Wyo. Apr. 8, 2008), *aff'd in part, rev'd in part;* United States v. Brandt, No. 09–8047, 496 F. App'x 822, 825 (10th Cir. 2012), *rev'd sub nom*. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

73. *Brandt*, 496 F. App'x at 825. The court applied 43 U.S.C. § 940 and 16 U.S.C § 1248(c). In 1906, Congress enacted 43 U.S.C. § 940, which termed the federal grants as easements, but provided that "the United States resumes the full title to the lands covered thereby free and discharged from such easement[s]." This right allowed the federal government to take possession of the lands in the event the railroad ceases operations—similar to the limited fee reversionary interests in the 1862 Act land grants. 43 U.S.C. § 940 (2012). The latter, enacted in 1988, provides that "any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof." 16 U.S.C § 1248(c) (2012).

74. Lyle Denniston, *Argument Recap: Oh, Give Me Land, Lots of Land . . . ,* SCOTUSBLOG (Jan. 14, 2014 4:10 PM), *available at* http://www.scotusblog.com/2014/01/argument-recap-oh-give-me-land-lots-of-land/ (on file with *The University of the Pacific Law Review*); *see Brandt*, 134 S. Ct. at 1257, 1262.

75. *Brandt*, 134 S. Ct. at 1259, 1268. Justice Sotomayor was the single dissenter among her fellow Justices. Many of her arguments against the majority decision were similar to those of the *Great Northern* critics. *Id.* At 1269–72.

76. *Compare id.*, *with* Great N. R.R. Co. v. United States, 315 U.S. 262 (1942). The *Great Northern* decision was primarily focused on subsurface rights, while the *Brandt* decision affects the entire right-of-way, including both the subsurface and surface.

right-of-way, the underlying land reverts back to the adjacent landowner rather than the federal government.[77]

The Court heavily based its decision upon the arguments made by the federal government seventy years earlier in *Great Northern*:

> The Government . . . maintains that the 1875 Act granted the railroads something more than an easement, reserving an implied reversionary interest in that something more to the United States. The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, in the case of *Great Northern Railway Co. v. United States*.[78]

The decision has a tone akin to a mother scolding her child—the Court punished the federal government representatives for rejecting the arguments made by their predecessors.[79] The Court supported its reprimand of the government with a nod towards "the special need for certainty and predictability where land titles are concerned."[80] Ironically, the precedent the Court relied upon was responsible for disaffirming the most predictable, consistent, and certain view we had of congressional land grants since their enactment.[81]

C. Brandt*'s Lone Dissenter: Common Law Principles Put Us on the Wrong Track*

What began as a dispute over ten acres will have a variety of consequences for cases involving 1875 Act rights-of-way.[82] As adjacent landowners become aware of their new rights under *Brandt*, a rise in railroad abandonment litigation is almost certainly coming down the tracks.[83] Even if narrowly applied, the *Brandt* decision will have a profound effect on any action regarding

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77. *Brandt*, 134 S. Ct. at 1257. Railroad rights-of-way are usually abandoned for economic purposes, such as when a line becomes unprofitable. *See generally*, Steven R. Wild, *A History of Railroad Abandonments*, 23 TRANSP. L.J. 1 (1995-96) (discussing the evolution of laws and regulations affecting railroad abandonments).

78. *Brandt*, 134 S. Ct. at 1264.

79. *See* Dupont, *supra* note 63, at 10 (noting that "[d]uring oral argument, other members of the Court chastised the Assistant Solicitor General . . .").

80. *Brandt*, 134 S. Ct. at 1268 (quoting Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979)).

81. Great N. R.R. Co. v. United States, 315 U.S. 262 (1942); N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 271 (1903). The *Townsend* decision provided consistency by finding that all federal land grants, including the 1875 Act, had granted limited fee titles with reversionary interests held by the federal government. *Townsend*, 190 U.S. at 271.

82. *Infra* Part III.C.

83. *See* Richard Wolf, *Court Ruling in Land Dispute Could Threaten Bike Trails*, USA TODAY (Mar. 10, 2014 7:22 PM), *available at* http://www.usa today.com/story/news/nation/2014/03/10/supreme-court-railroad-land-dispute/6252835/ (on file with *The University of the Pacific Law Review*) ("Brandt's victory has implications for about 80 other cases involving about 8,000 claimants.").

abandonment of an 1875 Act right-of-way.[84] Justice Sotomayor recognized the high potential for negative effects and stood alone as the only dissenter of the Court.[85]

Rather than reading *Great Northern* to hold that 1875 Act grants were "easements,"[86] Justice Sotomayor embraced a narrow application of *Great Northern* to subsurface rights alone and found that it did not overrule the existence of the federal reversionary interests recognized by the prior decisions.[87] She also acknowledged the unique properties of the railroad right-of-way, finding it to be a "*sui generis*" property right that the majority forced into a poorly fitting framework of common law principles.[88]

At common law, easements give the holder the right to enter another's land.[89] However, this right is non-possessory, and it does not confer any estate in the land to the holder.[90] Most importantly, for the purposes of this Comment, easement holders can only use the land for purposes that are reasonably related to the scope of the easement,[91] and such uses cannot unreasonably increase the burden on the possessory owners' estate.[92] When the holder of a common law easement ceases to use it for its intended purpose, the easement "may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude."[93]

Justice Sotomayor recognized some of the negative implications that the Court's decisions could have on 1875 Act rights-of-way:

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84. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

85. *Id.* at 1269.

86. Great N. R.R. Co. v. United States, 315 U.S. 262 (1942).

87. *See Brandt*, 134 S. Ct. at 1270 (Sotomayor, J., dissenting). Justice Sotomayor stated:

> "This case [] turns on whether, as the majority asserts, *Great Northern* "disavowed" *Townsend* and *Stringham* as to the question whether the United States retained a reversionary interest in the right of way. *Great Northern* did no such thing. Nor could it have, for the Court did not have occasion to consider that question . . . . All that *Great Northern* held . . . was that the right of way did not confer one particular attribute of fee title. Specifically . . . the right of way did not confer the right to exploit subterranean resources").

Id.

88. *Id.* at 1271. ("[The majority] concludes that we are bound by the common-law definitions that apply to more typical property. In doing so, it ignores the *sui generis* nature of railroad rights of way.").

89. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (AM. LAW INST. 2000).

90. *Id.*; 6 MILLER & STARR, CAL. REAL EST. § 15:4 (3d ed. 2006). ("An easement merely creates an *interest* in real property that is not an estate.")

91. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. d (2000).

92. Atchison, Topeka & Santa Fe Ry. Co. v. Abar, 275 Cal. App. 2d 456, 464 (Ct. App. 1969).

> "The grant of an unrestricted easement, not specifically defined as to the burden imposed upon the servient land, entitles the easement holder to a use limited by the requirement that it be reasonably necessary and consistent with the purpose for which the easement was granted. This permits a use consistent with 'normal future development [w]ithin the scope of the basic purpose, but not an abnormal development, one which actually increases the burden upon the servient tenement."

Id.

93. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. d (2000).

> By changing course today, the Court undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation. And lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars.[94]

However, the effect of the *Brandt* decision is not limited to the public and its recreational activities; the decision will affect the railroad and its ability to reinstate operations any time an 1875 Act right-of-way is abandoned.[95]

D. Uncoupled by Brandt*: the Rails-to-Trails Program and Protection of the 1875 Act Right-of-Way*

In 1983, Congress enacted the Rails-to-Trails Act.[96] The federal program sought to allow interim uses on abandoned rights-of-way, while simultaneously preserving the rights-of-way for reinstatement of railroad operations—a process known as "rail-banking."[97] The rail-banking clause provides that:

> [I]n furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.[98]

The statutory scheme incentivizes the railroad to preserve its right-of-way by making it able to do so in a cost-efficient manner,[99] while preventing dissolution

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94. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1272 (2014) (Sotomayor, J., dissenting).

95. *Infra* Section IV.

96. 16 U.S.C. §§ 1241–1251 (2012).

97. *Id.* § 1248(d). *See Railbanking*, RAILS-TO-TRAILS CONSERVANCY, *available at* http://www.railstotrails.org/build-trails/trail-building-toolbox/railbanking/ (last visited Jan. 1, 2015) (on file with *The University of the Pacific Law Review*) (rail-banking is a "[c]ondition allowing a railroad to 'bank' a corridor for future rail use if necessary. During the interim, alternative trail use is a viable option").

98. 16 U.S.C. § 1248(d).

99. *See* Charles H. Montange, *Conserving Rail Corridors*, 10 TEMP. ENVTL. L. & TECH. J. 139, 154 (1991) ("[T]he statute permits a carrier not only to relieve itself of any costs or risks associated with preserving a line, but also to realize more value for a line than would be possible from a simple discontinuance . . . The cost of corridor preservation for possible rail re-use is borne by trail users, in return for use of the corridor in the interim as recreational or commuting trails.").

of easement land into the underlying servient estate.[100] As of July 2009, more than 5,000 miles of abandoned rail corridor had been rail-banked under the Rails-to-Trails Act.[101]

However, *Brandt* has potentially rendered the Rails-to-Trails program inoperative with regard to abandoned 1875 Act rights-of-way[102] by holding that the government has no reversionary interest to lands it patented to private individuals subject to an 1875 Act right-of-way.[103] The federal government will be subject to Fifth Amendment takings liability[104] for all currently rail-banked 1875 Act rights-of-way for which it does not hold the underlying estate[105] and for any rights-of-way granted under the Act that the government attempts to rail-bank in the future.[106] This risk of "opening the federal treasury to hundreds of millions of dollars in potential takings liability" could result in the government's unwillingness to rail-bank abandoned 1875 Act rights-of-way.[107] More importantly, it places railroads at risk for complete extinguishment of their opportunity to reinitiate operations.[108]

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100. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1265 (2014) ("[I]f the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.").

101. Marianne Fowler, *Review of Federal Railbanking: Successes, Statistics, and Landowner Impacts*, AMERICAN TRAILS (July 8, 2009), *available at* http://www.americantrails.org/resources/railtrails/fowler-railbanking-testimony-STB-July-2009.pdf (on file with *The University of the Pacific Law Review*).

102. *Brandt*, 134 S. Ct. at 1268 ("[I]f there is no 'right, title, interest, [or] estate of the United States' in the right of way, then the statutes simply do not apply.").

103. *Id.* at 1264.

104. U.S. CONST. amend. V (" . . . nor shall private property be taken for public use, without just compensation."). *See also* Danaya C. Wright, *A New Era of Lavish Land Grants: Taking Public Property for Private Use and Brandt Revocable Trust v. United States*, 28 PROB. & PROP. 30 (Sept./Oct. 2014) (noting that the Court did not "even [acknowledge] the potential takings liability that the government may have to pay when it seeks to preserve these lands, once granted for public transportation purposes and now reused for a different public transportation purpose . . .").

105. *See supra* Part III.C for a discussion of basic easement property principles.

106. *See* Brief for the United States at 19–20, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (No. 12–1173), 2 ("Actions involving 1875 Act rights-of-way are often brought against the United States by landowners seeking just compensation for actions taken to preserve railroad rights-of-way for future rail use under the National Trails System Act Amendments of 1983 . . . To date, thousands of claims pertaining to 1875 Act rights-of-way have been filed."); *see also* Wolf, *supra* note 83 ("Brandt's victory has implications for about 80 other cases involving about 8,000 claimants.").

107. Wright, *supra* note 104. *See* ENV'T. & NATURAL RES. DIV., U.S. DEP'T. OF JUSTICE, ENRD ACCOMPLISHMENTS REPORT FISCAL YEAR 2013, at 100 (2013) (noting that by the close of 2013, "[t]he Division continue[d] to defend nearly 10,000 claims brought under the Fifth Amendment deriving from the implementation of the National Trails System Act").

108. *See* 25 AM. JUR. 2D *Easements and Licenses* § 95 (1962) (noting that "[g]enerally, once an easement is extinguished, it is gone forever").

E. Trying to Get Back on Track after Brandt*: The Search for a Solution*

The simplest solution to avoid the myriad of problems resulting from *Brandt* is also the least achievable. If the Supreme Court overruled its decision, the easement abandonment problem would disappear—but, with an eight to one majority, it is unlikely that the Court will overrule itself in the near future.[109] Consequently, other solutions must be explored.

1. Using Eminent Domain to Recover Extinguished Easements

Without rail-banking, the path to reinstitution of railroad operations on the abandoned rights-of-way would become a long litigation-filled process for the railroad.[110] Recognizing the importance of railroad transport, the federal government and many states have given private railroad corporations eminent domain powers to construct and operate a railroad right-of-way.[111] While condemnation may seem like an ideal solution to the *Brandt* right-of-way abandonment issue,[112] it can be a costly and time-consuming process.[113] Forcing the railroad to initiate proceedings against several landowners to reinstate operations along one abandoned corridor will be burdensome, and as one scholar has noted, it will give the newfound *Brandt* landowners "compensation for *not* receiving land they never bought, expected, or received a deed for."[114] Although many condemnation proceedings typically settle out of court,[115] just one or two

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109. *See generally* James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. OF POL. 1091, 1095, 1097 (2011) (noting that rulings based on statutory, as opposed to constitutional, interpretation, and rulings with strong majorities are less likely to be overruled).

110. *Infra* Part III.E.2.

111. *See, e.g.*, CAL. PUB. UTIL. CODE § 611 (West 1976); MO. ANN. STAT. § 523.010 (Vernon 2012); VA. CODE ANN. § 56-347 (West); MINN. STAT. § 222.27 (West) (all granting railroad power to condemn land necessary for its operations); Robert Meltz, *CRS Report for Congress: Delegation of the Federal Power of Eminent Domain to Nonfederal Entities*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS (May 20, 2008) (discussing several congressional acts that gave condemning powers to the railroad, including early land grant acts).

112. *Supra* Part III.C–D.

113. *See generally* David Berger, *Current Problems Affecting Costs of Condemnation*, 26 LAW & CONTEMP. PROBS. 85 (1961) (discussing the high costs of condemnation for the condemner in addition to paying for the value of the condemned land, such as the costs of litigation and paying attorney fees for the condemned party where required).

114. Wright, *supra* note 104, at 30.

115. EVALUATION OF STATE CONDEMNATION PROCESS, FEDERAL HIGHWAY ADMINISTRATION, http://www.fhwa.dot.gov/real_estate/uniform_act/acquistion/cndmst.cfm (last visited Sept. 5, 2014) (on file with *The University of the Pacific Law Review*). Eighty percent of right-of-way acquisition proceedings generally end in settlement, however that number is lower in states that require the condemning authority to pay the condemnee's attorney costs. While this report is based on acquisitions by the States for highway and street rights-of-way, the statistics would likely be similar for railroad right-of-way condemnations. *Id.*

non-settling landowners can increase costs substantially with litigation and appeals.[116]

California's high speed rail project serves as a prime example of the cost and time required to acquire land for rail construction through eminent domain: the California High Speed Rail Authority needs approximately 1,100 parcels, at an expected cost of $776 million, for a 130-mile segment of its project.[117] After two years of efforts, it has only acquired 106—less than ten percent—of the needed parcels.[118] Considering the economic, environmental, and safety benefits the railroad provides the nation as a whole, the costs of eminent domain are simply unacceptable—we must consider other options to aid in railroad operation reinstatement.[119]

2. *Narrow Application of* Brandt *and Changing the Language of Future Conveyances*

One scholar, Justin G. Cook, proposes that a narrow application of *Brandt* would lessen its negative effects on the thousands of miles of 1875 Act rights-of-way.[120] The federal government's deed to the Brandt family contained a provision that the conveyance was made "subject to those rights for railroad purposes."[121] Mr. Cook proposes applying the *Brandt* decision only to cases in which the adjacent landowners' deed contains the "subject to" language.[122] However, "subject to" clauses are commonplace in deeds conveying land encumbered by easements.[123] Consequently, applying *Brandt* in such a fashion is unlikely to limit its effects in most cases. Mr. Cook further suggests that "the United States Government should be careful to expressly reserve an interest in all 1875 Act rights of way that traverse federal lands."[124] While this suggestion would successfully carve out the reversionary interest that the *Brandt* Court refused to

116. Berger, *supra* note 113, at 99–103 (discussing the high costs of condemnation for the condemner in addition to paying for the value of the condemned land, such as the costs of litigation and paying attorney fees for the condemned party where required).

117. Allen Young, *High-Speed Rail Authority Has 30 Eminent-Domain Cases Pending . . . And It's Just Getting Started*, SACRAMENTO BUS. JOURNAL (Nov. 7, 2014, 7:27 A.M.), *available at* http://www.bizjournals.com/sacramento/news/2014/11/07/high-speed-rail-authority-has-30-eminent-domain.html?page=all (on file with *The University of the Pacific Law Review*).

118. *Id.*

119. *See generally* OVERVIEW OF AMERICAN FREIGHT RAILROADS, ASS'N OF AMERICAN RAILROADS (Apr. 2014) (discussing the wide range of benefits that freight railroads offer, including economic growth, job creation, and environmental benefits).

120. Cook, *supra* note 67, at 251.

121. Brief of Petitioners at 12, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (No. 12-1173).

122. Cook, *supra* note 67, at 251.

123. Robert Kratovil, *Easement Draftsmanship and Conveyancing*, 38 CALIF. L. REV. 426, 431 (1950).

124. Cook, *supra* note 67, at 252.

recognize,[125] it would only apply to future grants incorporating such advice. These proffered "narrow application" and "future conveyance language" solutions do very little, if anything, to protect the thousands of miles of rights-of-way that Brandt placed at risk. A proper solution will apply retroactively to protect currently existing 1875 Act rights-of-way, in addition to any such rights-of-way created in the future.

IV. EXPANDING THE "RAILROAD PURPOSES" DOCTRINE TO PREVENT ABANDONMENT AND KEEP RIGHTS-OF-WAY ON TRACK

If 1875 Act rights-of-way must be labeled as "easements," perhaps the best solution lies in common law property principles. As previously noted, easement holders can only use the land for purposes that are reasonably related to the scope of the easement and such uses cannot unreasonably increase the burden on the possessory owners' estate.[126] Consequently, a broader interpretation of "railroad purposes" would prevent permanent extinguishment of 1875 Act rights-of-way and allow railroads to reinitiate operations as needed.

This Part will first look at the basic concepts of railroad abandonment and the "railroad purposes" doctrine.[127] Then, this Part will focus on a plausible solution to the problems presented by *Brandt*: the expansion of the "railroad purposes" doctrine to include leases to third parties performing activities with a clear public utility purpose on the rights-of-way.[128] Finally, this Part will argue that Congress is best suited to adopt this expanded view and will set forth the ideal statutory language to accomplish this task.[129]

A. Abandonment and Railroad Purposes

The law regarding abandonment of railroad rights-of-way is unclear. Because of the wide variety of railroad property rights in existence, there is no single correct method of analysis when such issues arise.[130] Abandonment analyses require a fact-based inquiry.[131] The Third Restatement of Property notes that

125. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1268 (2014).

126. *See supra* notes 89–93 and accompanying text.

127. *Infra* Part IV.A.

128. *Infra* Part IV.B.

129. *Infra* Part IV.C.

130. *See* Wendy Lathrop, *Sharing the Railroad Corridors: A Question of Ownership*, RIGHT OF WAY, Jan./Feb. 2010, at 32, 33, *available at* https://www.irwaonline.org/eweb/upload/Web_ RailroadCorridors.pdf (on file with *The University of the Pacific Law Review*) (recognizing the inconsistency of land rights along any particular corridor: "[T]hree tracts in a row might be owned in fee by the railroad, then one or two tracts only allow easement rights, and then back to fee ownership. There may even be a few leases thrown in for good measure, just to confuse the matter.").

131. *See* J. A. Connelly, Annotation, *What Constitutes Abandonment of a Railroad Right of* Way, 95 A.L.R. 2d 468 § 2 (1964) ("Abandonment of a railroad right of way has been said to be a matter of intent . . .

"[r]esolution of the controversies varies widely depending on the language of the instrument granting rights to the railroad, the actions of the parties, and . . . the actions of various governmental bodies."[132]

In the case of federally granted right-of-ways, the Abandoned Railway Right of Way Act (ARRWA) is the sensible starting point for analysis.[133] ARRWA provides that the government will consider such right-of-ways abandoned or forfeited when they cease to be used for the purpose granted.[134] However, when looking to the language of the grants themselves, the pre-1871 grant language was clear on the purposes of the grant, whereas the 1875 Act was much less specific.[135] Consequently, there are an abundance of cases and administrative orders purporting that the grants were made for "railroad purposes."[136] A broad interpretation of what right-of-way activities qualify as "railroad purposes" could be instrumental in preventing the extinction of railroad easements where the railroad stops operating trains on the right-of-way.[137]

1. What Qualifies as a Railroad Purpose?

Because of the very nature of the railroad and it operations, its activities necessarily consist of far more than just operating trains—but how much more? As with other areas of railroad law, courts have debated the exact scope of railroad purposes.[138] A recent California Court of Appeals decision found that "[f]or something to be a railroad purpose, it must be used to construct and

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the issue in most cases is reduced to the question of what factors or circumstances are sufficient to justify an inference that there existed an intent to abandon.").

132. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4, cmt. f (2000).

133. 43 U.S.C. § 912 (2012); *See* Marshall v. Chi. & Nw. Transp. Co., 31 F.3d 1028, 1032 (holding that § 912 applies to 1875 Act rights-of-way).

134. 43 U.S.C. § 912 (2012). The statute reads:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress.

Id.

135. *Compare* 12 STAT. 489, *with* 43 U.S.C. §§ 934–940 (2012). The Pacific Railroad Act of 1862's title alone conveys much more about the purpose of the Act than the 1875 Act as a whole.

136. *See, e.g.*, The Ellamae Phillips Co. v. United States, 99 Fed. Cl. 483, 486 (2011) (noting that the "legislative history of the 1875 Act indicates that the easement was limited to railroad purposes only."); *see also* Use of Railroad Right of Way for Extracting Oil, 56 Interior Dec. 206 (1937) ("A right of way through the public domain granted to a railroad by Congress [under the 1875 Act] may be used only and exclusively for railroad purposes.").

137. *Infra* Part IV.

138. *See, e.g.*, Cash v. S. Pac. R.R. Co., 123 Cal. App. 3d 974, 979 (1981) (holding that a lease by railroad to third party for a team track was a railroad purpose because it attracted more customers to the line and the revenue generated helped "[defray] the [railroad's] costs in operating and maintaining the railroad"). *But see* Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc., 231 Cal. App. 4th 134, 180 (2014) (holding that lease to pipeline company was not a railroad purpose, although the railroad used the fuel transported by the line).

operate a railroad and to use the land for such other purposes as are necessary and incident to railroad construction, maintenance and operation."[139]

Under this definition, several activities are within the scope of "railroad purposes" under the 1875 Act: making substantial changes to the land in order to construct and maintain its right-of-way;[140] gathering the "material, earth, stone, and timber necessary for . . . construction" from adjacent public lands;[141] maintaining "station-buildings, machine shops, side-tracks, turn-outs, and water-stations" along the right-of-way;[142] and for storage.[143]

Courts have considered other activities to be for railroad purposes if the activities are incidental to the construction or operation of the railroad.[144] Incidental activities are those that "derive from or further a railroad purpose."[145] Historically, courts have deemed a wide variety of commercial activities to be within the scope of the incidental purpose doctrine.[146] And it is these incidental purposes, if given a broad reading, which may protect the railroad right-of-way from dissolving under the *Brandt* ruling.[147]

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139. *Union Pacific*, 231 Cal. App. 4th at 180 (quoting Cash v. Southern Pacific R. Co., 123 Cal. App. 3d 974, 977 (1981)) (internal quotations omitted).

140. Kan. City S. Ry. Co. v. Ark. La. Gas Co., 476 F.2d 829, 834–35 (10th Cir. 1973)

> [The railroad] acquires the right to excavate drainage ditches; to construct beneath the surface supports for bridges and other structures; to erect and maintain telegraph lines and supporting poles with part of the poles beneath the surface; to construct passenger and freight depots, using portions of the land below them for foundations; to construct signals; to make fills and cuts to decrease the grades of their rail lines, and to use material from the land covered by the right of way to make such fills; and to construct a roadbed and lay its ties and rails thereon.

Id.

141. 18 STAT 482 § 2.

142. 18 STAT 482 § 2.

143. State v. Or. Short Line R.R. Co., 617 F. Supp. 213 (D. Idaho 1985).

144. Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1024 (S.D. Ind. 2005).

145. Memorandum from the Office of the Solicitor to Assistant Secretary for Land and Minerals Management, Assistant Secretary for Water and Science, and Director of the Bureau of Land Management (Nov. 4, 2011), *available at* http://www.doi.gov/solicitor/opinions/M-37025.pdf [hereinafter Solicitor's Opinion M-37035] (on file with *The University of the Pacific Law Review*). It is difficult to get past the circular nature of the scope of railroad purposes—an activity is for railroad purposes if it is incidental and its incidental if it derives from or furthers a railroad purpose.

146. Grand Trunk R.R. Co. v. Richardson, 91 U.S. 454, 468 (1875) ("erection of buildings . . . by other parties, for convenience in delivering and receiving freight"); *Home on the Range*, 386 F. Supp. 2d at 1021 ("installation . . . of telegraph or other communications technology for the purpose of facilitating the operation of the railroad"); Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226, 231 (W.D. Tex. 1990) (installation of fiber optic cables).

147. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

2. The Incidental Purpose Doctrine: Saving the Railroad's Caboose?

The same case Chief Justice Roberts cited to support his decision in *Brandt—Leo Sheep Co. v. United States*—also supports a broad reading of the scope of railroad activities allowed under the 1875 Act.[148] *Leo Sheep* states:

> When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.[149]

Under this reasoning, courts and administrative agencies should find that railroad rights-of-way are being used for "railroad purposes" even when the railroad is non-operational in a traditional sense.[150]

Other case law also supports such a finding. The language of the *Stringham* decision recognized the permanency of the railroad right-of-way by implying that the railroad's property interest would not revert back to the federal government so long as the railroad held on to the land for railroad purposes, even if it failed to use the land for such purposes.[151] If Congress defined "railroad purposes" in a liberal manner, it would keep rights-of-way from being deemed abandoned.[152]

3. How Expansive Should a Broad Interpretation Be?

The broadest interpretation that the court could adopt would find any type of revenue-generating activity to be within the scope of the incidental railroad

148. Leo Sheep Co. v. United States, 440 U.S. 668 (1979). *See* Richard Pildes, *Commentary: John Roberts's Quiet Homage to William Rehnquist*, SCOTUSBLOG (Mar. 12, 2014, 2:31 PM), *available at* http://www.scotusblog. com/2014/03/commentary-john-robertss-quiet-homage-to-william-rehnquist/ (on file with *The University of the Pacific Law Review*) (noting the prevalence of the *Leo Sheep Co v. United States* opinion penned by Rehnquist, for whom Justice Roberts served as a law clerk beginning in 1980).

149. *Leo Sheep Co*., 440 U.S. at 683 (quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)).

150. By "non-operational in the traditional sense," the author means operating trains on the tracks.

151. Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44, 47 (1915). (The language, "in the event that the company ceases to use *or retain* the land for the purposes for which it is granted," suggests that the railroad can prevent reversion by retaining the land) (emphasis added).

152. The Abandoned Railway Right of Way Act provides that right-of ways will be considered abandoned or forfeited when they cease to be used for the *purposes* granted. 43 U.S.C. § 912 (2012). If railroad purposes continue on the right-of-way, it is not abandoned.

purpose doctrine.[153] Undoubtedly, money is required to construct, operate, and maintain a railroad;[154] therefore, one could easily argue that activities which generate revenue are well within the incidental purpose doctrine because they further railroad purposes by generating the income needed to continue investing into the railroad's operations.[155] Further, the Department of the Interior has held that "[a] railroad's right to undertake activities within an 1875 Act Right of Way includes the right to authorize other parties to undertake those same activities."[156]

Of course, this is a drastic interpretation: the railroad could cease operations, lease its right-of-way for organizations to use be used as a zoo, and still be within the scope of "incidental railroad purposes," because the rent received from the lease to the zoo generates revenue.[157] Scenarios such as this are indicative of why courts will never adopt such a broad interpretation of "railroad purposes." However, a more limited approach to the revenue-generation concept may be suitable to carry out the "intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable" when enacting the 1875 Act.[158]

To find success in the incidental purposes doctrine, landowner and railroad interests must be balanced in order to determine the ideal definition of "railroad purposes." A United States Bureau of Land Management memorandum issued just five months after the Supreme Court decided *Brandt* offers some guidance.[159] The Memo outlines processes and guidelines for determining whether 1875 Act right-of-way activities serve a "railroad purpose."[160] These guidelines suggest

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153. *See* Union Pac, R.R. Co. v. Santa Fe Pac. Pipelines, Inc., 231 Cal. App. 4th 134, 180 Cal. Rptr. 3d 173, 199 (2014) (quoting Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1021 fn. 10 (S.D. Ind. 2005)) ("If 'railroad purpose' were defined so broadly as to encompass anything that generates revenue for the railroad, it would be 'hard to imagine anything the railroads would be unauthorized to do within the right of way.'").

154. For example, Union Pacific Railroad Company's total operating expenses (including wages, fuel, equipment, rents, etc.) topped fourteen billion dollars in 2013. UNION PAC. CORP., UNION PACIFIC CORPORATION 2013 INVESTOR FACT BOOK 39 (2013), *available at* http://www.up.com/investors/attachments/factbooks/2013/fact_book.pdf (on file with *The University of the Pacific Law Review*).

155. Incidental activities are those activities that "derive from or further . . . railroad purpose[s]." Solicitor's Opinion M-37025, *supra* note 145.

156. *Id.* "The Department of the Interior manages public lands and minerals, national parks, and wildlife refuges and upholds Federal trust responsibilities to Indian tribes and Native Alaskans." The Department is also responsible for oversight of the Bureau of Land Management. *Department of the Interior (DOI)*, USA.GOV, http://www.usa.gov/directory/federal/department-of-the-interior.shtml (page last reviewed or updated Nov. 14, 2014) (on file with *The University of the Pacific Law Review*).

157. *See supra* note 153.

158. Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979) (quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)).

159. BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2014-122, EVALUATION OF ACTIVITIES WITHIN RAILROAD RIGHTS-OF-WAY GRANTED UNDER THE GENERAL RAILROAD RIGHT-OF-WAY ACT OF MARCH 3, 1875, DEPT. OF THE INTERIOR (Aug. 11, 2014), *available at* (on file with the *The University of the Pacific Law Review*).

160. *Id.*; BUREAU OF LAND MGMT., PROCESS FOR EVALUATION OF AN ACTIVITY LOCATED WITHIN A RIGHT-OF-WAY GRANTED UNDER THE GENERAL RAILROAD RIGHT-OF-WAY ACT OF MARCH 3, 1875, *available*

looking at the right-of-way activity with "specific consideration given to . . . how [the activity] promotes [railroad purposes] and any inconsistency it may have with railroad operations."[161] Following this framework, a valid railroad purpose must promote railroad operations and cannot interfere with those operations.[162] Furthermore, the activity must not be so inconsistent with the right-of-way's scope of purposes that it results in the takings liability that this very solution seeks to prevent.[163]

Clearly, the zoo scenario would not qualify under this framework.[164] While leasing land to the zoo would generate revenue for the railroad, it would make it extremely difficult to reinstate operations simply because the railroad could not operate safely in tandem with a zoo located on its right-of-way.[165] In addition, while zoos serve a public purpose by providing public education and entertainment,[166] this purpose is too far attenuated from the transportation and public utility purposes that a railroad provides.[167] Further, it would be difficult to find a judge who would find that a zoo's interim use of the right-of-way did not further burden the subservient easement.[168] It is clear that if courts broaden the scope of railroad purposes, they still must sufficiently limit the definition to workable interpretation.[169]

B. Striking a Balance: Third-Party Activities Serving a Clear Public Utility Purpose

This Comment proposes that the ideal interpretation of "railroad purposes" would encompass railroad revenue-generating activities performed by third

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at http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2014.Par.37040.File.dat/IM2014-122_att1.pdf (on file with the *The University of the Pacific Law Review*).

161. BUREAU OF LAND MGMT., PROCESS FOR EVALUATION OF AN ACTIVITY LOCATED WITHIN A RIGHT-OF-WAY GRANTED UNDER THE GENERAL RAILROAD RIGHT-OF-WAY ACT OF MARCH 3, 1875, *available at* http://www.blm.gov/style/ medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2014.Par.37040.File.dat/IM2014-122_att1.pdf (on file with the *The University of the Pacific Law Review*).

162. *Id.*

163. *See, e.g.*, Preseault v. I.C.C., 494 U.S. 1, 110 S. Ct. 914 (1990) (holding that Rails-to-Trails subjected federal government to takings liability because recreational trails were outside the scope of the purposes for which a private easement was granted to the railroad).

164. *Supra* Part IV.A.3.

165. *See* 18 STAT 482. The 1875 Act granted 200-foot wide rights-of-way. One might imagine that a zoo located on the right-of-way would present clearance and environmental safety issues, among a host of other problems for an operational railroad.

166. *See* JOHN H. FALK ET AL., WHY ZOOS & AQUARIUMS MATTER: ASSESSING THE IMPACT OF A VISIT 3, ASS'N OF ZOOS & AQUARIUMS (2007), *available at* https://www.aza.org/uploadedFiles/Education/why_zoos_matter.pdf (on file with *The University of the Pacific Law Review*) (discussing the benefits of zoos and aquariums to public visitors).

167. *See, e.g.*, 12 STAT. 489 (The Pacific Railroad Act of 1862 was subtitled: *"An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean . . .*").

168. *See supra* note 92.

169. *See infra* Part IV.B (discussing an ideal proposed balance).

parties that serve a *clear public utility purpose*. Such an interpretation would protect the 1875 Act easements from extinguishment, while also eliminating the possibility of the zoo scenario occurring.[170]

1. Clear Public Utility Purpose Defined

To create a useful bright-line rule, the meaning of "clear public utility purpose" must be plainly delineated. Black's Law Dictionary offers a good starting point: it defines a "public utility" as "[a] business enterprise that performs an essential public service and that is subject to governmental regulation . . . such as telephone lines and service, electricity, and water."[171] Statutory and judicial interpretations in several jurisdictions have similarly defined "public utilities" as business organizations that indiscriminately provide necessary services to the public within their service area.[172] These concepts provide the basis for determining whether a railroad's lease to a third-party activity on the right-of-way would qualify as a "railroad purpose" and still prevent takings liability.

2. Precedential Support for the Clear Public Utility Purpose Doctrine

The adoption of a clear public utility purpose doctrine is supported by precedent that has allowed third-party activities on 1875 Act railroad rights-of-way[173] and deemed both public utility activities and revenue-generating activities to be "railroad purposes."[174] Furthermore, there is strong public policy support in favor of maintaining railroad rights-of-way for continuation and future reinstatement of railroad transport.[175]

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170. *Supra* Part IV.C; *See* 43 U.S.C. § 912 (2012) (providing that rights-of-way are abandoned when they cease to be used for railroad purposes).

171. BLACK'S LAW DICTIONARY (10th ed. 2009).

172. *See, e.g.*, CAL. PUB. UTIL. CODE § 216 (West 2012) ("'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof."); S. Ohio Power Co. v. Pub. Utilities Comm'n of Ohio, 143 N.E. 700, 700 (1924) ("To constitute a 'public utility,' the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.").

173. Solicitor's Opinion M-37025, *supra* note 145 ("A railroad's right to undertake activities within an 1875 Act ROW includes the right to authorize other parties to undertake those same activities.").

174. *See supra* note 138; *see also, e.g.*, *Home on the Range*, 386 F. Supp. 2d at 1021 (permitting "installation . . . of telegraph or other communications technology for the purpose of facilitating the operation of the railroad").

175. *See* Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979) (quoting United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14 (1893)) (finding that the 1875 Act "manifest[ed] clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable" by granting land to private corporations); *see also,* 16 U.S.C. § 1248(d) (2012) (recognizing the

The presence of third-party activities on the 1875 Act rights-of-way is clearly within the scope of the incidental purpose doctrine.[176] It was foreseeable that railroads would work in tandem with other utilities from the very beginning of the federal right-of-way grants.[177] The pairing makes sense: because of the exclusivity required to operate a railroad, the railroad's right-of-way is an ideal place for other utilities to run their own cables and pipelines because they won't be subject to open access by the public.[178] Other utility companies often need to cross or run parallel to railroad right-of-ways, and they seek easements and licenses to do so.[179] In turn, the railroad grants these licenses and easements across their right-of-way to generate revenue for itself.[180]

Some courts have found that revenue generation does in fact serve a railroad purpose.[181] In *Cash v. Southern Pacific*, an adjacent landowner challenged the railroad's use of a portion of its right-of-way for a leased team track.[182] The disputed team track portion of the right-of-way had no active trains operating on it, but was adjacent to an active track.[183] The court found that the third party lease served a railroad purpose because the team track attracted more customers to the line, and the revenue gained from the lease "defray[ed] the [railroad's] costs in operating and maintaining the railroad."[184]

While the *Cash* scenario is admittedly different than a situation where the right-of-way has no train operations, policy supports a broad interpretation of the scope of railroad purposes under the 1875 Act.[185] Our nation has long recognized

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existence of a "national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use"); 49 U.S.C § 10101(4) (2012) ("[I]t is the policy of the United States Government to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public and the national defense.").

176. *See supra* Part IV.A.1 (discussing various third-party activities deemed as railroad purposes, including warehouse leases, communication utilities, etc.).

177. *See* 12 STAT. 489 (The Pacific Railroad Act of 1862 was subtitled: "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean").

178. *See, e.g.*, Puett v. W. Pac. R.R. Co., 752 P.2d 213, 218 (Nev. 1988) ("In granting railroads a right of way pursuant to the 1875 Act, Congress intended such railroads to have exclusive use and possession of the surface thereof.").

179. Jeffrey M. Heftman, *Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 U. ILL. L. REV. 1401, 1410 (2002). *See infra* Part IV.B.4 (discussing the co-existence of railroads and other public utilities).

180. *See, e.g.*, Cash v. S. Pac. R.R. Co., 123 Cal. App. 3d 974 (1981) (holding that a lease by railroad to third party for a team track was a railroad purpose, because it attracted more customers to the line and the revenue generated helped "[defray] the [railroad's] costs in operating and maintaining the railroad.").

181. *Id.*

182. *Id.* at 977. A "team track" is a "[s]ide track [next to the main track] on which cars are placed for the use of the public in loading or unloading of freight." BURLINGTON NORTHERN SANTA FE, GLOSSARY OF RAILROAD TERMINOLOGY & JARGON 20, *available at* http://www.bnsf.com/customers/pdf/glossary.pdf (last visited Mar. 4, 2015) (on file with *The University of the Pacific Law Review*).

183. *Cash*, 123 Cal. App. 3d. at 977.

184. *Id.* at 979.

185. *Supra* note 149 and accompanying text.

the benefits the railroad offers—those same benefits spurred the construction of the railroad in the first place.[186] Adoption of the clear public utility purpose doctrine will preserve our rights-of-way for the benefit of future generations.

3. The Shifting Public Use Doctrine: Avoiding Takings Liability

The shifting public use doctrine prevents takings liability by "reject[ing] the position that permitted uses of an easement are only those contemplated at the time of its granting. Rather, it posits that if a purpose were contemplated, the specific means of execution can develop as technology allows and society demands."[187] Various jurisdictions have recognized and accepted this doctrine.[188]

Many statutory definitions of "public utility" support shifting the public use doctrine and expanding the scope of "railroad purposes" to include third-party activities that serve a clear public utility purpose. Such definitions typically include common carriers and railroads among their list of services that qualify as public utilities, which suggests that railroads and other utilities are coterminous with one another.[189] If an alternative utility use falls within the shifting public use doctrine, it does not impose a greater burden upon the subservient tenement.[190] Therefore, the alternative use precludes easement extinguishment and takings liability.[191]

The similarities between railroads and other public utilities place them well within the scope of the shifting public use doctrine.[192] Consider, for example, railroads and electricity providers. Railroads provide a method of transport for necessary goods to the general public.[193] Electric companies, on the other hand, use their rights-of-way to transport electricity, a necessary "good," to the general public.[194] Natural gas providers similarly transport their goods to the public,[195] and

186. *Supra* Part II.A. *See supra* note 175 (citing case law and statutory support for the nation's recognition of benefits of the railroad).

187. Heftman, *supra* note 179, at 1418.

188. *See, e.g.*, W. v. Bancroft, 32 Vt. 367 (1859) (allowing the use of a highway for construction of a water reservoir, the court found that: "Besides the use of highways for the sole purpose of travel, the public may use them for many other objects necessary for the public convenience and health, such as laying water pipes and constructing drains, sewers and reservoirs"). *But see* Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (holding that use of easement for recreational purposes was outside the scope of the original easement for transportation purposes).

189. *See, e.g.*, CAL. PUB. UTIL. CODE § 211 (1996) (defining "common carrier" as used in the Code as including "[e]very railroad corporation"); OHIO REV. CODE ANN § 4905.03(J)–(L) (2012) (specifically delineating railroad and railway companies providing freight and passenger services as public utilities).

190. Heftman, *supra* note 179, at 1420.

191. *Id.* at 1418.

192. *Id.*

193. OVERVIEW OF AMERICAN FREIGHT RAILROADS, *supra* note 119.

194. ELECTRICITY REGULATION IN THE U.S.: A GUIDE, at 3, THE REGULATORY ASSISTANCE PROJECT (Mar. 2011), *available at* www.raponline.org/docs/ RAP_Lazar_ElectricityRegulationInTheUS_Guide_2011 _03.pdf (on file with *The University of the Pacific Law Review*).

sewer treatment utilities carry waste away from the public through pipeline rights-of-way.[196] The railroad could lease their right-of-way to these third-party utility companies for activities that serve a clear public utility purpose in a transportation-like fashion, thereby satisfying similar purposes to those which the railroad typically serves, albeit in a different manner.[197]

4. Team Tracking: Peaceful Co-Existence of Railroads and Public Utilities on the Right-of-Way

In addition to providing essential public services, a third-party activity must be able to work in tandem with the railroad when it reinstates operations to qualify as a clear public utility purpose within the scope of "railroad purposes."[198] Railroad rights-of-way are composed of, in property terms, a unique bundle of sticks.[199] Any activity performed on the railroad right-of-way must not interfere with those rights or with the safety of railroad operations.[200] However, many public utilities already operate along or across railroad rights-of-way, including gas pipelines,[201] telephone lines,[202] and fiber optic cables.[203] The co-existence of

195. ABOUT U.S. NATURAL GAS PIPELINES–TRANSPORTING NATURAL GAS 1, ENERGY INFORMATION ADMINISTRATION (June 2007), *available at* http://www.eia.gov/pub/oil_gas/natural_gas/analysis_ publications/ ngpipeline/fullversion.pdf (on file with *The University of the Pacific Law Review*).

196. ACCESS WATER KNOWLEDGE: SANITARY SEWERS 1, WATER ENV'T FEDERATION (May 2011), *available at* http://www.wef.org/workarea/download asset.aspx?id=6442451434 (on file with *The University of the Pacific Law Review*).

197. *See supra* Part II (discussing the original purposes for which the 1875 Act land grants were made to serve).

198. *See supra* Part IV.A (discussing a variety of activities considered to be well-within the scope of "railroad purposes").

199. United States v. Craft, 535 U.S. 274, 278, 122 S. Ct. 1414, 1420 (2002) (stating "[a] common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."). *See* Territory of N.M. v. U.S. Trust Co. of N.Y., 172 U.S. 171, 183 (1898) (describing railroad rights of way: "if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted,—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."); *see also* W. Union Tel. Co. v. Pa. R.R. Co., 195 U.S. 540, 570 (1904) (stating "[a] railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement.").

200. The railroad land grants bestowed a great number of rights upon the railroads that are not held by common law easement owners. The right of exclusive use and possession is a prime example, especially in light of the fact that easements are typically non-possessory interests. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (2000). *See, e.g.*, Puett v. W. Pac. R.R. Co., 752 P.2d 213, 218 (Nev. 1988) ("In granting railroads a right of way pursuant to the 1875 Act, Congress intended such railroads to have exclusive use and possession of the surface thereof."). In addition, the law fully protects congressionally granted railroad rights-of-way from claims of adverse possession. N. Pac. Ry. Co. v. Ely, 25 S. Ct. 302 (1904).

201. *See* Union Pacific R.R. Co. v. Santa Fe Pac. Pipelines, Inc., 180 Cal. Rptr. 3d 173, 199 (2014) (relating to a gas pipeline operating in the subsurface along more than one thousand miles of railroad right-of-way).

202. *See* Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1021 (S.D. Ind. 2005) (permitting "installation . . . of telegraph or other communications technology for the purpose of facilitating the operation of the railroad").

railroad rights-of-way and other public utilities is so common that many states have clear guidelines regulating their mutual accommodations.[204] Considering that other public utility providers already operate on many railroad rights-of-way, allowing third-party activities serving a clear public utility purpose to operate on the railroad right-of-way presents no interference issues—the railroad and public utility can co-exist on the right-of-way prior to the railroad ceasing operations and after reinstatement.[205] Finally, the fact that the two already co-exist on many railroad rights-of-way further supports a finding that broadening the scope of "railroad purposes" to include these third-party activities would not place further burden on the subservient tenement owner's rights.[206]

C. Expanding the Scope: Who Can Get the Job Done?

The right to determine the scope of railroad property rights under congressional land grants falls squarely in the federal government's lap: the Supreme Court has been creating federal common law on the topic for more than a century,[207] and Congress clearly has jurisdiction over the railroad as an instrumentality of interstate commerce under the Commerce Clause.[208] This jurisdiction extends over all aspects of the railroad, including "transportation by rail carriers, and . . . the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State."[209] Because both the Court and Congress have the jurisdiction to bring change in the scope of railroad property rights, the only question is, which one is better suited for the job?

The answer is simple: for the Supreme Court to reinterpret the scope of railroad purposes, it first must grant certiorari in a case whose facts allow such an

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203. *See* Mellon v. S. Pac. Transp. Co., 750 F. Supp. 226, 231 (W.D. Tex. 1990) (allowing installation of fiber optic cables along the railroad right-of-way).

204. *See, e.g.*, UTILITY ACCOMMODATION MANUAL 1, NEW HAMPSHIRE DEPT. OF TRANS. (Feb. 2010), *available at* https://www.nh.gov/dot/ org/projectdevelopment/highwaydesign/documents/UAM_complete.pdf (on file with *The University of the Pacific Law Review*) (enumerating regulations for co-existence and noting that "[u]tilization of such rights-of-way [by other public utilities] is recognized as being in the public interest provided that such occupancy does not adversely affect highway or railroad safety, operation, and maintenance or otherwise impair the highway or railroad or its aesthetic quality."); UTILITY ACCOMMODATION ON GDOT OWNED RAILROAD RIGHT OF WAY, GEORGIA DEPT. OF TRANS. (revised Nov. 20, 2008), *available at* http://www.dot.ga.gov/doingbusiness/utilities/Documents/Utility_Accommodation_on_DOT_Owned_Railroad_RW.pdf (on file with *The University of the Pacific Law Review*) ("prescrib[ing] policies and standards for the accommodation of utilities and . . . for coordinating the use of GDOT owned railroad right of way").

205. *See supra* note 202–04 and accompanying text.

206. *See supra* Part IV.C (discussing burden on the subservient tenement).

207. *See, e.g.*, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014); Great N. R.R. Co. v. United States, 315 U.S. 262 (1942). N. Pac. Ry. Co. v. Townsend, 190 U.S. 267, 271 (1903) (all decisions determining the scope of railroad property rights under Congressional land grants).

208. U.S. CONST. art. I, § 8, cl. 3; 49 U.S.C. § 10501 (2012).

209. 49 U.S.C. § 10501(b) (2012).

outcome.[210] The odds of the Court granting a writ of certiorari are extremely low: during the October 2013 Term, the Court granted certiorari in seventy-six actions, a mere one percent, of the 7,586 petitions it considered.[211] The odds of the Supreme Court ever hearing a case with the correct facts are too low to make it a viable option for the adoption of a new scope of "railroad purposes" any time soon.[212]

Adoption of the expanded scope through congressional action presents its own unique hurdles, but it is likely the best option for the timely adoption of a broader interpretation of "railroad purposes."[213] The language of the Rails-to-Trails "Rail-banking" Clause serves as the perfect guide for the language of the proposed legislation.[214] The ideal Act of Congress is as follows:

> (1) In furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to transfer, lease, or sale to a third-party public utility entity serving a clear public utility purpose, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.
>
> (2) As used in this chapter, a "clear public utility purpose" is one which utilizes the railroad right-of-way to provide, through transport or transmission, necessary services to the general public, including, but not limited to, natural gas, electricity, communications technology, water, and sewer treatment services.
>
> (3) To qualify as a railroad purpose under this chapter:
>
> > (a) The sale, lease, or transfer of the right-of-way to the third-party must generate revenue for the railroad corporation.

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210. *See* SUPREME COURT PROCEDURES, U.S. COURTS (last visited Feb. 9, 2015), http://www.uscourts.gov/educational-resources/get-informed/supreme-court/supreme-court-procedures.aspx (on file with *The University of the Pacific Law Review*) (noting that "[t]he Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value").

211. *The Supreme Court—The Statistics*, 128 HARV. L. REV. 401, 410 (2014).

212. If the odds of the Court granting certiorari in any case are one percent, the odds of the Court granting certiorari in a perfect case for the adoption of the suggested "clear public utility purpose" doctrine proposed in this Comment are incalculable.

213. Generally, anywhere from one to seven percent of bills introduced in Congress are actually enacted into law. *Historical Statistics about Legislation in the U.S. Congress*, GOVTRACK.US, https://www.govtrack.us/congress/bills/statistics (last visited Oct. 6, 2015) (on file with *The University of the Pacific Law Review*).

214. *See supra* note 98 and accompanying text.

> (b) The activities of the third-party public utility must not interfere with the subsequent reinstatement of railroad operations on the right-of-way.

This proposed language would keep 1875 Act railroad rights-of-way active even if the railroad temporarily ceases operations, thereby preserving these rights-of-way for future reinstatement so that future generations may reap the benefits of rail transport.[215] At the same time, the language sufficiently limits qualifying third-party activities to those that provide a clear benefit to the public similar to those benefits provided by the railroad: transport or transmission of public necessities and revenue generation for the railroad.[216]

V. CONCLUSION

Railroads affect our daily lives whether we realize it or not: They transport the ingredients in the food we eat and components of items we use every day.[217] They cut down on traffic and emissions, helping to protect our environment.[218] They may provide a job and income to one of our loved ones or acquaintances.[219] The list goes on. Something that is so beneficial to our country's continued livelihood and that is such a crucial component of our national heritage is worthy of protection.

The key to ensuring the continuance of rail transport in the future lies in protecting the existence of its rights-of-way today. If our courts continue to label 1875 Act railroad rights-of-way as easements, our lawmakers must adopt a broader interpretation of "railroad purposes"—one which recognizes third-party activities which serve clear public utility purposes—to protect those easements from being unnecessarily extinguished and to protect our rights-of-way for future railroad operations. This can be accomplished without requiring the Court to overrule *Brandt*, because such an interpretation is in complete alignment with the Court's determination that 1875 Act rights-of-way are easements.[220]

If Congress enacts legislation expanding the scope of "railroad purposes," a railroad would be able to lease or license its right-of-way to third parties for

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215. *See infra* Part V (discussing briefly the many benefits of rail transport).

216. *Supra* Part IV.

217. *See* AM. ASS'N. OF RAILROADS, OVERVIEW OF AMERICA'S FREIGHT RAILROADS 1 (Apr. 2014) (stating "[a]s an indispensable part of America's transportation system, freight railroads serve nearly every industrial, wholesale, retail, and resource-based sector of our economy . . . From the food on our tables to the cars we drive to the shoes on our children's feet, freight railroads carry the things America depends on").

218. *Id.*

219. *See id.* ("The more than 180,000 freight railroad employees are among America's most highly paid workers."); *see also* NATIONAL TRANSPORTATION STATISTICS, *supra* note 3, at §§ 3–25 (Of the reported modes of transport—including air, water, and truck—average fulltime railroad employee wages in 2012 were second only to pipeline wages.).

220. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

activities that derive from or further railroad purposes, and the right-of-way would be maintained so long as the third-parties continue their clear public utility purpose activities,[221] even if the railroad ceases operations on the track. The third-party activities would still be serving a public purpose and the policy reasons behind the Act of 1875 would remain fulfilled, all while protecting the national interest in preserving our railroad rights-of-way for future reinstatement.[222]

221. *See* 43 U.S.C. § 912 (2012) (noting that abandonment or forfeiture occurs when "use and occupancy of said lands for such purposes has ceased or shall hereafter cease").

222. *See supra* note 175.

Accountability Matters: An Examination of Municipal Liability in § 1983 Actions

*Amit Singh**

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I. INTRODUCTION

The deaths of Michael Brown, Eric Garner, and Tamir Rice took the nation by storm and sparked an examination of incidents involving police brutality and the use of excessive force.[1] Beyond the protests, public outrage, and media backlash, emerging investigative reports have revealed police officers disproportionately using excessive force against persons of color.[2] However, in the vast majority of American cities, those responsible for hiring and training the officers behind the acts of excessive force face a disturbing lack of accountability.[3]

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1. *See* Kimberly Kindy & Carol D. Leonnig, *At Least 5 Ferguson Officers Apart from Brown Shooter have been Named in Lawsuits,* WASH. POST (Dec. 18, 2014), *available at* http://www.washingtonpost.com/politics/at-least-6-ferguson-officers-apart-from-brown-shooter-have-been-named-in-lawsuits/2014/08/30/535f7142-2c96-11e4-bb9b997ae96fad33_story.html (on file with *The University of the Pacific Law Review*) (detailing some of the examination into patterns of excessive force).

2. *See* U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (March 4, 2015) [hereinafter DOJ INVESTIGATION OF FERGUSON], *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf (on file with *The University of the Pacific Law Review*) (detailing findings of the investigation into the Ferguson Police Department's policies and practices); U.S. DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (December 4, 2014) [hereinafter INVESTIGATION OF CDP] (on file with *The University of the Pacific Law Review*) (concluding that the CPD engages in a pattern or practice of the excessive use of force in violation of the Fourth Amendment); *see also* Jeff K. Lowenstein, *Killed by the Cops*, COLORLINES, (Nov. 4, 2007), *available at* http://www.colorlines.com/archives/2007/11/killed_by_the_cops.html (on file with *The University of the Pacific Law Review*) (observing the racial disparity towards blacks in police shootings); Ryan Gabrielson, et al., *Deadly Force, in Black and White: A ProPublica Analysis of Killings by Police Shows Outside Risk for Young Black Males* (Oct. 10, 2014, 10:07 AM), http://www.propublica.org/article/deadly-force-in-black-and-white (on file with *The University of the Pacific Law Review*) (detailing the over-representation of the African American community among victims of police shootings).

3. *See* Lowenstein, *supra* note 2, at 2 (describing the racial disparity in police shootings).

Officer Darren Wilson shot and killed Michael Brown on August 9, 2014.[4] The transcripts from the grand jury proceedings provide widely conflicting accounts of the circumstances surrounding Mr. Brown's death.[5] We know for certain there was a scuffle between Officer Wilson and Mr. Brown at the window of the officer's vehicle, after which, Mr. Brown turned and ran away.[6] We also know Officer Wilson repeatedly shot Mr. Brown, firing numerous times as Mr. Brown fell to the ground, presumably subdued by previous shots to his body.[7] Unfortunately, 2014 made many realize that situations similar to Mr. Brown's death—an African American killed during an interaction with police—are neither isolated, nor atypical, occurrences.[8]

On July 17, 2014, Officer Daniel Pantaleo killed Eric Garner by applying a chokehold.[9] The officer accosted Mr. Garner, and subsequently killed him for selling untaxed, loose cigarettes.[10] Video evidence clearly shows five other officers surrounding Mr. Garner as Officer Pantaleo placed him in a chokehold and audio includes Mr. Garner's pleas of, "I Can't Breathe, I Can't Breathe."[11] Mr. Garner's last words have become a rallying cry for protestors and advocates

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4. Transcript of Grand Jury Proceedings, Vol. 5 at 229, State v. Wilson (Sept. 16, 2014), *available at* http://apps.washingtonpost.com/g/page/national/read-darren-wilsons-full-grand-jury-testimony/1472/ (on file with *The University of the Pacific Law Review*). Grand Jury documents are not ordinarily released to the public. However, given the widely conflicting reports about the circumstances surrounding Michael Brown's death and the controversial debate on racial relations it sparked, the prosecutor made the rare decision to release the documents to the public. *Id.*

5. *See, e.g.*, *id.* at 166, 226 (conflicting testimony of Mr. Brown's location when Wilson fired shots); *see also* Transcript of Grand Jury Proceedings, Vol. 6 at 242–43, 255–59, State v. Wilson, (Sept. 23, 2014) *available at* http://apps.washingtonpost.com/g/page/national/read-darren-wilsons-full-grand-jurytestimony/1472/ (on file with *The University of the Pacific Law Review*) (providing different accounts of the events as perceived by different witnesses).

6. *See* Transcript of Grand Jury Proceedings, Vol. 5, *supra* note 4, at 224, 226 (providing an account of the tussle and Mr. Brown running away); *see also* Paul Caussell, *The Physical Evidence in the Michael Brown Case Supported the Officer*, WASH. POST (Nov. 28, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/ 28/the-physical-evidence-in-the-michael-brown-case-supported-the-officer/ (on file with *The University of the Pacific Law Review*) (explaining that the scuffle indisputably happened).

7. *See* Transcript of Grand Jury Proceedings, Vol. 5, *supra* note 4, at 229; *see also* Transcript of Grand Jury Proceedings Vol. 6, *supra* note 5, at 248 (describing the shots fired at Mr. Brown).

8. Grace Ji-Sun Kim, *'I Can't Breathe': Eric Garner's Last Words Symbolize Our Predicament*, HUFFINGTON POST (Dec. 18, 2014, 6:18 PM), http://www.huffingtonpost.com/grace-jisun-kim/i-cant-breathe-eric-garne_b_6341634.html (on file with *The University of the Pacific Law Review*) (arguing that the death of Mr. Eric Garner represents a broader issue in race relations).

9. *See* J. David Goodman & Michael Wilson, *Officer Told Jury He Meant No Harm*, N.Y TIMES (Dec. 3, 2014), *available at* http://www.nytimes.com/2014/12/04/nyregion/officer-told-grand-jury-he-meant-no-harm-to-eric-garner. html (on file with *The University of the Pacific Law Review*) (outlining the facts surrounding Mr. Garner's death).

10. *Id.*

11. Video, *'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer—Video*, THE GUARDIAN (Dec. 4, 2014), http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video (on file with *The University of the Pacific Law Review*).

hoping to bring an end to the unjustified use of excessive force by police officers.[12]

Officer Timothy Loehmann shot and killed Tamir Rice on November 22, 2014.[13] Officers Loehmann and Frank Garmback responded to a call indicating a person, "probably a juvenile," was wielding a gun that was "probably fake" in the gazebo area of a neighborhood playground.[14] Officer Loehmann fired his weapon twice within two seconds of approaching Mr. Rice, fatally injuring the young boy.[15] Mr. Rice was pronounced dead the next day, at the age of twelve.[16]

These three deaths represent a deeper issue that has been bubbling beneath the surface for some time now.[17] Police departments place too many officers on the streets without the proper training to handle foreseeable and reoccurring situations.[18] Surely, each officer can be blamed for taking the final act of aggression, but plucking one bad apple will not fix a rotten tree.[19] The problem becomes institutional when police departments continually allow officers to use excessive force against one segment of society.[20]

No officer has faced criminal accountability in the highly publicized cases mentioned above, resulting in further aggravation of the public's lack of trust in the police's use of force against colored men.[21] Grand juries in Ferguson,

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12. *See* Ji-Sun Kim, *supra* note 8 (explaining the symbolism of Mr. Garner's words).

13. *See* Complaint at 3, Rice v. City of Cleveland, 2014 WL 6844524 (Dec. 5, 2014) (No. 1:14-cv-02670-SO) (detailing the facts surrounding Mr. Rice's death).

14. *Id.*

15. *Id.*; *see also* Video, *Tamir Rice: Police Release Video of 12-year-old's Fatal Shooting—Video*, THE GUARDIAN (Nov. 26, 2014) http://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police (on file with *The University of the Pacific Law Review*).

16. Complaint, Rice v. City of Cleveland, *supra* note 13, at 3.

17. *See* MICHELLE ALEXANDER, THE NEW JIM CROW 1–11 (2010) (arguing the criminal justice system functions largely along color lines).

18. *See e.g.*, INVESTIGATION OF CDP, *supra* note 2 (concluding that the CPD engages in a pattern or practice of the excessive use of force in violation of the Fourth Amendment); *see also* Sari Horwitz et al., *Justice Dept. to Probe Ferguson Police Force,* WASH. POST (Dec. 22, 2014), *available at* http://www.washingtonpost.com/world/national-security/justice-dept-to-probe-ferguson-police-force/2014/09/03/737dd928-33bc-11e4-a723-fa3895a25d02_story.html (on file with *The University of the Pacific Law Review*) (describing some of the 30 recent investigations into police departments across the nation for civil rights violations).

19. *See* ALEXANDER, *supra* note 17, at 11 (providing numerous examples of police discrimination).

20. *See* INVESTIGATION OF CDP, *supra* note 2 (outlining the CDP's practice of the excessive use of force); Eric Holder, U.S. Attorney General, Remarks at Press Conference Announcing Pattern or Practice Investigation into Ferguson Police Department (Sept. 4, 2014) *available at* http://www.justice.gov/opa/speech/ attorney-general-holder-delivers-remarks-press-conference-announcing-pattern-or-practice [hereinafter Attorney General Remarks] (on file with *The University of the Pacific Law Review*) (describing the ongoing investigation into the Ferguson Police Department's practices in the use of force); *see also* Horwitz, *supra* note 18 (describing civil rights investigations of police departments across the nation).

21. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html (*on file with The University of the Pacific Law Review*); Dana Ford, et al., *Protests*

Missouri, and Staten Island, New York, chose not to indict the officers involved in the deaths of Mr. Brown and Mr. Garner.[22] Although the respective grand jury decisions represent an obstacle to each family's ability to obtain relief for their tragic losses, there are other legal avenues the families may pursue.[23]

One possible avenue involves bringing a federal civil rights action against the municipalities responsible for hiring and training the officers who killed Mr. Brown and Mr. Garner.[24] Such a civil claim would be entirely separate from any criminal proceeding.[25] Moreover, the focus of these claims moves beyond individual officer accountability and focuses on the municipal policymakers behind acts of excessive force.[26] The family of Tamir Rice brought this type of claim against the Cleveland Division of Police.[27] However, those who follow in the Rice family's footsteps will face a substantial barrier to their claim.[28]

The current standard for imposing municipal liability under Title 42, Section 1983 of the United States Code, also known as "Civil Action for Deprivation of Rights," is quite stringent, and in most situations leaves plaintiffs without any form of relief.[29] To meet the standard, a plaintiff has the burden of proving a municipal policy or custom exhibited a deliberate indifference to his or her constitutionally protected rights.[30] Realizing the unlikelihood of proving liability under this standard, Mr. Garner's family accepted a settlement offer releasing the City of New York from liability in any civil rights claim connected with Mr. Garner's death.[31] Because the deliberate indifference standard effectively

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Erupt in Wake of Chokehold Death Decision, CNN (Dec. 8, 2014, 8:14 PM), http://www.cnn.com/2014/12/04/justice/ new-york-grand-jury-chokehold/ (on file with *The University of the Pacific Law Review*).

22. See Davey, *supra* note 21, and Ford, *supra* note 21, for a description of the lack of indictments in these cases.

23. *See* Davey, *supra* note 21 (indicating that the Ferguson Police Department may have engaged in patterns of civil rights violations); *see also* Ford, *supra* note 21 (indicating there will be a civil rights investigation).

24. 42 U.S.C. § 1983 (West 2014).

25. *See id.* (indicating that § 1983 claims are a *civil* remedy for plaintiffs who have suffered violations of their constitutionally protected rights).

26. *See* Lowenstein, *supra* note 2 (contemplating whether there is an institutional problem that leads to the unequal use of excessive force against persons of color). In any event, the officers involved will likely be entitled to qualified immunity as the actions may fall within the scope of their duty. *See* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (indicating that protection from civil liability applies regardless of whether the government official makes a mistake of law, mistake of fact, or both).

27. Complaint, Rice. v. City of Cleveland, *supra* note 13, at 5.

28. Matthew J. Cron, et al., *Municipal Liability: Strategies, Critiques, and a Pathway toward Effective Enforcement of Civil Rights*, 91 DENVER UNIV. L. REV. 584, 585 (2014).

29. § 1983; Cron, *supra* note 28, at 585.

30. City of Canton v. Harris, 489 U.S. 378, 379, 392 (1989); *see* Teressa. E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 161 (2011).

31. *See* BUREAU OF LAW & ADJUSTMENT, NEW YORK CITY OFFICE OF THE COMPTROLLER, ERIC GARNER SETTLEMENT RELEASE (July 13, 2015), *available at* http://www.nydailynews.com/new-york/family-

insulates municipalities from liability under § 1983 claims,[32] this Comment suggests imposing municipal liability when a municipality *consciously disregards* the risk of a constitutional violation to the rights of a citizen.

Part II of this Comment discusses the legal background that gave rise to the deliberate indifference standard, and where it stands today.[33] Part III argues that a new standard is needed if § 1983 claims against municipalities are to be an effective remedy for those who suffer civil rights violations at the hands of municipal employees.[34] Part IV addresses justifications for the current standard, and endorses retention of qualified immunity for police officers in order to prevent municipal liability from collapsing into respondeat superior liability under § 1983 claims.[35] Part V promotes the imposition of a conscious disregard standard, and explains how it would afford relief to plaintiffs with colorable claims while also preserving the justifications for the current standard.[36] Part VI applies both standards to the cases of Mr. Brown, Mr. Garner, and Mr. Rice.[37]

II. THE DELIBERATE INDIFFERENCE STANDARD

This section discusses the development of the deliberate indifference standard in the context of § 1983 cases and articulates the extreme burden the Supreme Court's interpretation of this standard imposes on plaintiffs in suits against municipalities. Part A details the origins of the deliberate indifference standard in § 1983 claims against municipalities.[38] Part B discusses the confirmation and qualification of the deliberate indifference standard.[39] Part C discusses the modern articulation of the deliberate indifference standard.[40] Part D provides definitions for "policy" and "custom," terms that the Court consistently

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eric-garner-accept-5-9m-settlement-source-article-1.2291065 (on file with *The University of the Pacific Law Review*) (providing details of the settlement).

32. *See* Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978) (showing that, although *Monell* held that municipalities are not entitled to qualified immunity and complete insulation from § 1983 claims, the Supreme Court has failed to hold a municipality liable applying the deliberate indifference standard); *see also Canton*, 489 U.S. 378 (1989); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997); Connick v. Thompson, 131 S. Ct. 1350 (2011) (all holding the municipality was not liable under the deliberate indifference standard). *See generally* Cron, et al., *supra* note 28 (describing the harshness of the deliberate indifference standard).

33. *Infra* Part II.

34. *Infra* Part III.

35. *Infra* Part IV. Respondeat superior is a legal doctrine, most commonly used in tort actions, that holds an employer or principal legally responsible for the wrongful acts of an employee or agent if such acts occur within the scope of the employment or agency. BLACK'S LAW DICTIONARY 1505 (10th ed. 2014).

36. *Infra* Part V.

37. *Infra* Part VI.

38. *nfra* Part II.A.

39. *Infra* Part II.B.

40. *Infra* Part II.C.

employs when discussing the deliberate indifference standard.[41] Part E argues that the deliberate indifference standard provides municipalities with an unreasonable level of insulation from § 1983 claims.[42]

A. The Birth of § 1983 Claims Against Municipalities and the Deliberate Indifference Standard

Today, anyone who has been deprived of a constitutional right by a person acting under the color of state law may bring a § 1983 claim.[43] However, § 1983 actions could not be brought against municipalities until the Supreme Court decided *Monell v. Department of Social Services of City of New York* in 1978.[44] Although *Monell* held that municipalities were subject to § 1983 claims, it did not provide a standard for determining municipal liability.[45] Moreover, the Court qualified its holding by requiring a plaintiff's injury to be the result of a municipal "policy" or "custom," and further held that municipalities could not be liable under the theory of respondeat superior liability.[46]

City of Canton v. Harris established the initial standard for municipal liability under § 1983 claims.[47] The Supreme Court acknowledged that a plaintiff may have a legal claim under § 1983 when a city's failure to provide adequate training to police officers deprives the plaintiff of a constitutional right.[48] However, the Court held that a city faces liability only where a particular policy or custom of the city—in this case, the alleged failure to train—"amounts to *deliberate indifference* to the constitutional rights of persons with whom the police come into contact."[49]

Justice O'Connor's concurring opinion detailed what must be proven in order for a municipality to be liable under the deliberate indifference standard.[50] First, the plaintiff must prove both fault and causation as to the acts or omissions of the city.[51] Second, proof of fault must be shown by events and circumstances that establish a policy of action or inaction that is parallel to a city's decision to violate the Constitution.[52]

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41. *Infra* Part II.D.
42. *Infra* Part II.E.
43. U.S.C. § 1983 (West 2014). Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).
44. *Id.*
45. *See id.* at 695 (discussing municipal liability without providing a standard).
46. *Id.* at 694.
47. City of Canton v. Harris, 489 U.S. 378, 379 (1989).
48. *Id.* at 392.
49. *Id.* at 379 (emphasis added).
50. *Id.* at 394–95.
51. *Id.* at 394.
52. *Id.* at 395.

Although the Court ultimately remanded the case for determination under the newly announced deliberate indifference standard, the majority and concurring opinions both suggested that Ms. Harris would not prevail under the standard.[53] Ms. Harris fell down several times following arrest.[54] She was asked if she required medical attention, but could not respond coherently.[55] The officers did not summon medical personnel to assist Ms. Harris.[56] Instead, the arresting officers left Ms. Harris lying on the floor of the police station for over an hour.[57] The Canton Police Department gave shift commanders discretion to determine whether an arrestee required medical assistance.[58] However, the shift commanders were not trained to make these determinations.[59] Ms. Harris was thereafter released from custody and an ambulance transported her—at her own cost—to the nearest hospital.[60] She was hospitalized for one week because of severe emotional ailments.[61] The Court suggested the city was not deliberately indifferent to Ms. Harris' constitutionally protected rights because she would be unable to prove existence of a policy of inaction among officers in providing medical aid to arrestees.[62]

As in *Monell*, the *Canton* Court was keen to establish a difficult standard for imposing municipal liability because of a strong desire to insulate municipalities from respondeat superior liability.[63] To support this stance, the Court expressly disapproved of a standard that promoted frivolous claims; the Court was wary of a standard that allowed plaintiffs to argue there was something the city "could have done" to prevent injury to plaintiff's rights.[64] The *Canton* Court provided very little reasoning for why it imposed such a harsh standard of municipal liability,[65] and it provided no reasoning for why a lesser standard than deliberate indifference would not meet the concern of preventing respondeat superior

53. *Id.* at 392–94.

54. *Id.* at 381.

55. *Id.*

56. *Id.*

57. *Id.* at 381.

58. *Id.* at 381–82.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.* at 392–95 (indicating the record was not sufficient to impose municipal liability under the deliberate indifference standard).

63. *See id.* at 378–79 (reasoning that "lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983; [it] would result in de facto respondeat superior liability, a result rejected in *Monell*").

64. *See id.* at 391–92 (arguing a lesser standard would encourage § 1983 plaintiffs to point to something the city "could have done" and engage the courts in endless second-guessing of municipal training programs).

65. *See id.* at 391. The Court also suggests avoidance of standards that would impose municipal liability due to municipal negligence or allow municipal liability for an employee's negligence. *Id.*

liability in § 1983 actions.[66] Rather, the Court asserted that the deliberate indifference standard is most consistent with the precedent of *Monell*.[67]

The *Canton* Court established a strict standard for imposing municipal liability, but also posed hypothetical situations that could serve as the basis for municipal liability:[68]

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.[69]

These hypothetical situations are discussed after analyzing whether the Brown, Garner, and Rice cases would be successful under the deliberate indifference standard.[70]

B. Confirmation and Qualification of the Deliberate Indifference Standard

The Court further developed the deliberate indifference standard in *Board of County Commissioners of Bryan County v. Brown*: "A plaintiff must demonstrate that a municipal decision reflects *deliberate indifference* to the risk that a violation of a *particular constitutional or statutory right* will follow the decision."[71] It would not be enough for a plaintiff to simply identify conduct that was properly attributable to the municipality.[72] Rather, the plaintiff must show that the municipality's *deliberate* conduct was the "moving force" behind plaintiff's injury.[73] Moreover, the Court held that there must ordinarily be a pattern or practice that leads to violations in order to find a municipality deliberately indifferent to the consequences of failing to train its employees.[74]

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66. *Id.* at 385–400.

67. 489 U.S. at 388–89 (referencing *Monell's* precedent that § 1983 municipality liability can only be imposed where municipal policies are the "moving force [behind] the constitutional violation.")

68. *Id*. at 390.

69. *Id.*

70. *See infra* Part VI (analyzing the three cases under both the deliberate indifference and conscious disregard standard).

71. Bd. Cty. Comm'rs Cty. v. Brown, 520 U.S. 397, 411 (1997) (emphasis added).

72. *Id.* at 404.

73. *Id.* (emphasis in original).

74. *Id.* at 407; s*ee* City of Canton v. Harris, 489 U.S. 378, 389–90 (1989).

The Court recognized the limited circumstances outlined in *Canton*, in which a municipality may be found liable for singular incidents—namely, the municipality's failure to adequately train its officers—but also emphasized that there must be a "program necessarily intended to apply over time to multiple employees" to impose liability.[75]

In *Brown*, the officer who used excessive force while arresting a young woman had a criminal history, which included resisting arrest, driving while intoxicated, public drunkenness, and multiple charges of assault and battery.[76] The officer was also related to the sheriff in charge of screening and hiring new applicants.[77]

The *Brown* Court acknowledged that the sheriff's decision to ignore the officer's background amounted to an indifference of the consequences of hiring the officer, but found that the decision did not amount to a *deliberate* indifference.[78] Apparently, ignoring the officer's criminal record and hiring him onto the police force would not "lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right."[79]

The Court echoed the precedents of *Monell* and *Canton*, reasoning that municipalities could not be held liable under the theory of respondeat superior, and that the plaintiff must identify a municipal policy or custom as the cause of injury.[80] The Court expressed a desire to avoid respondeat superior multiple times before announcing the holding,[81] but, like the *Canton* Court, gave no reason why

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75. *Brown*, 520 U.S. at 407. *See Canton* 489 U.S. at 388–90 (describing the limited circumstances of municipal liability discussed in Part II.B of this Comment).

76. *Brown*, 520 U.S. at 401, 428. The full rap sheet listed repeated traffic violations, driving while intoxicated, driving with a suspended license, resisting arrest, and more than one charge of assault and battery. Furthermore, the officer pled guilty to assault and battery and other charges only sixteen months before being hired by the Sheriff. *Id.*

77. *Id.* at 401. Perhaps realizing that the officer was not the best hire, the Sheriff authorized Officer Burns to make arrests, but did not authorize the officer to carry a weapon. *Id.*

78. *Id.* at 411 (emphasis added). The consequences referred to were violations of Plaintiff's right to be free from the use of excessive force. *Id*.

79. *Id.*

80. *See id.* at 403–04 ("Locating a policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.").

81. *Id.* at 406, 410, 414. "That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation." *Id.* at 406. "To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged." *Id.* at 410. "[Section] 1983 cases involving hiring decisions present the greatest risk that a municipality will be found liable for an injury it did not cause, therefore rigorous standards of culpability and causation must be adhered to prevent that from happening." *Id.* at 414.

a lesser standard than deliberate indifference would not address the respondeat superior liability concern.[82]

Instead, the Court provided examples of situations that would meet this high standard of liability, such as an intentional decision by municipal policymakers to deprive an individual of a federally protected liberty or an action directed by the municipality itself that violated federal law.[83] Presumably, municipalities do not *affirmatively* instruct officers to violate constitutionally protected liberties. Consequently, proving these examples would be a tall, if not impossible, hurdle for a plaintiff to overcome in order to succeed in a § 1983 action against a municipality.[84]

Brown did nothing more than muddle the definition of the deliberate indifference standard by attempting to distinguish liability for a municipal policy or custom from respondeat superior liability.[85] This distinction is far from clear and has made it difficult for courts to distinguish between the policymaking authority of the municipality and the delegated discretionary authority of individual municipal employees.[86]

C. Modern Application of the Deliberate Indifference Standard

The Supreme Court most recently applied the deliberate indifference standard to a § 1983 case in *Connick v. Thompson*.[87] In *Connick*, prosecutors failed to disclose evidence that should have been provided to the opposing counsel defending Thompson against a robbery charge.[88] As a result, Thompson was convicted.[89] Because of the conviction, Thompson did not testify in a

82. *See id.* at 402–16 (providing no reason why a lesser standard of municipal liability would not address the concerns of the majority); City of Canton v. Harris, 489 U.S. 378, 385–400 (1989) (making no mention of why a lesser standard of municipal liability could not prevent respondeat superior liability).

83. *Id.* at 405.

84. Cron, et al., *supra* note 28 at 584, 604.

85. *See also* Auriemma v. Rice, 957 F.2d 397, 400–01 (7th Cir. 1992) (describing the lower courts' confusion in determining municipal liability). *Compare Brown*, 520 U.S. at 408, 435 (finding sheriff was a policymaker) *and* Harris v. Pagedale, 821 F.2d 499, 508 (8th Cir. 1987) (finding that municipality was deliberately indifferent to allegations of sexual assault), *with* Greensboro Prof'l Fire Fighters Ass'n. v. Greensboro, 64 F.3d 962, 965–66 (4th Cir. 1995) (determining fire chief was not a policymaker) *and* Wilson v. Chicago, 6 F.3d 1233, 1240–41 (7th Cir. 1993) (ruling municipality was not deliberately indifferent to allegations of abuse).

86. *Brown*, 520 U.S. at 434.

87. Connick v. Thompson, 131 S. Ct. 1350 (2011). Although *Connick* did not address claims of the excessive use of force, the affirmation of the deliberate indifference standard and the high burden the decision imposed upon plaintiffs will be similarly applied to municipalities that fail to train or inadequately train police officers who continually impinge upon the constitutional rights of citizens. *Id.*

88. *Id.*

89. *Id.*

subsequent jury trial for a murder charge against him.[90] Thompson was convicted of murder and spent eighteen years in prison, including thirteen on death row.[91] Shortly before his execution date, an investigator discovered the evidence that prosecutors failed to disclose during his robbery trial.[92] Both of Thompson's convictions were vacated, and this suit followed.

To succeed under the deliberate indifference standard, Thompson had to show that the District Attorney was on notice it was so predictable prosecutors would make evidence disclosure mistakes absent specific training that failure to train the prosecutors amounted to a conscious disregard of Thompson's rights.[93] The majority reasoned that failure to train the prosecutors on evidence disclosure requirements did not amount to a deliberate indifference of Thompson's rights because the prosecutors received such training while obtaining their juris doctorates.[94] By this same logic, the Court distinguished the municipal employees' violation of Thompson's rights from the *Canton* and *Brown* hypothetical rights violation that would amount to a deliberate indifference.[95]

The majority then reiterated that stringent fault standards must be adhered to prevent municipal liability under § 1983 from collapsing into respondeat superior.[96] However, the Court again failed to offer any reasoning for why these assertions must be taken as true.[97] Specifically, the Court did not mention, let alone explain, why a lesser standard than deliberate indifference would fail to accomplish the goal of preventing municipal liability from becoming respondeat superior liability.[98] All that was provided was a bare assertion with citations to the Court's past decisions.[99]

The dissenting opinion pointed out four specific reasons why the Court should have found the district attorney's office deliberately indifferent to Thompson's rights: (1) the district attorney, as the office's sole policymaker, did not understand the disclosure requirements; (2) those in the office who were

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1365.

94. *Id.* at 1361–66. The prior training consisted of taking Criminal Procedure in law school. One of the four prosecutors who violated Thompson's rights admitted he did not remember the disclosure requirements from law school. Another prosecutor admitted that his law school did not require students to take Criminal Procedure. *Id.* at 1385.

95. *See id.* at 1361–63 (arguing that the facts before the Court were sufficiently different than the *Canton* hypothetical because the municipal employees had knowledge of the constitutional implications of their actions via the training they received in preparation for entering into the profession).

96. *Id.* at 1365.

97. *See id,* at 1365 (providing no empirical or statistical support for why a standard any less stringent would result in respondeat superior liability).

98. *Id*.

99. *See id.* at 1360 (citing Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986) and City of Canton v. Harris, 489 U.S. 378, 392 (1989)).

directly responsible for training less experienced prosecutors were also uninformed; (3) prosecutors in the office did not receive any training on disclosure requirements; and (4) the office did not keep prosecutors up to date on relevant legal developments concerning disclosure requirements.[100] Moreover, several other facts supported a different outcome: the district attorney admitted that he failed to provide training even though he was aware that prosecutors would regularly face evidence disclosure decisions;[101] there were no repercussions for attorneys who violated evidence disclosures rules;[102] and, when the district attorney retired, more than half of the assistant attorneys in the office revealed that they had not received the training needed to do their jobs.[103]

It is only natural that such a widespread lack of understanding, enforcement, and accountability would lead prosecutors to violate the disclosure requirements and, in doing so, violate the constitutional right of a private citizen to receive those disclosures.[104] In spite of this evidence, the Court did not find that the prosecutor's need for training was "so obvious," or that the lack of training was "so likely" to result in constitutional violations, such that the actions amounted to a deliberate indifference to the rights of the plaintiff.[105] If the acts of the municipality in *Connick* did not amount to a deliberate indifference of the Plaintiff's constitutionally protected rights, it is hard to imagine that the facts of Mr. Brown's, Mr. Garner's, or young Mr. Rice's cases will be able to survive the Supreme Court's interpretation of the standard.[106]

D. Municipal Policy or Custom

Monell, *Canton*, *Brown*, and *Connick* all held, with slight variation, that the municipality must have a policy or custom that causes the plaintiff to suffer injury of a federally protected right in order to impose municipal liability in a § 1983 action.[107] However, the Supreme Court did not define what constitutes a

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100. *Id.* at 1378.

101. *See id.* at 1382, 1387 (Ginsburg, J., dissenting) (explaining that the district attorney admitted he was certain that prosecutors would confront issues of evidence disclosure and that he had also been indicted for suppressing evidence).

102. *See id.* (pointing out that no prosecutor was disciplined or fired for violating evidence disclosure requirements).

103. *Id.* at 1380.

104. *See id.* (arguing it was inevitable that prosecutors would misapprehend disclosure requirements due to the widespread lack of understanding of the requirements in the district attorney's office).

105. *Id.* at 1366. *See also* City of Canton v. Harris, 489 U.S. 378, 390 (1989) (noting there may be limited circumstances in which the need for training is so obvious, or the lack of training so likely to result in constitutional violations, that a municipality is deliberately indifferent to the consequences of failing to train or inadequately training municipal employees).

106. *Id.* at 1378–80 (Ginsburg, J., dissenting) (providing a multitude of reasons why the DA's office was deliberately indifferent to the rights of Thompson).

107. *Id.* at 1365; *Monell*, 436 U.S. at 694; *Canton*, 489 U.S. at 385; *Brown*, 520 U.S. at 417.

municipal policy or custom in those cases.[108] In *Bryson v. Oklahoma City*, the Tenth Circuit defined a municipal "policy" or "custom" as:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.[109]

This Comment analyzes the deliberate indifference standard under the definitions of municipal "policy" and "custom" provided in *Bryson*.

E. The Deliberate Indifference Standard Provides Municipalities with an Unreasonable Level of Insulation from § 1983 Claims

The Supreme Court decisions discussed above create so many hurdles for plaintiffs seeking to recover against a municipality that, in effect, many cases are decided before they are presented to a court.[110] As Justice Souter stated in his dissenting *Brown* opinion, the Supreme Court's skepticism of municipal liability has "gone too far."[111]

In each case where the Supreme Court affirmed the deliberate indifference standard, it expressed a desire to avoid respondeat superior liability.[112] A thorough examination of how respondeat superior liability would function in

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108. *Id.*

109. Bryson v. Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (internal quotations omitted). A full analysis of what amounts to a municipal "policy" or "custom" is outside the scope of this Comment. However, the *Bryson* court's definition is comprehensive and incorporates other court's characterizations of these terms. *Id.*

110. *See* Bd. Cty. Comm'rs Cty. v. Brown, 520 U.S. 397, 416–21 (1997) (Souter, J. dissenting) (arguing against the majority's "policy" or "custom" requirement and the requirement that the "particular" harm must be "plainly obvious").

111. *Id.* at 423.

112. *See* Connick v. Thompson, 131 S. Ct. 1350, 1365 (2011) (reasoning that *Monell* established that respondeat superior must be avoided); *Brown*, 520 U.S. at 406 (observing the Court's precedent of avoiding respondeat superior since *Monell*); City of Canton v. Harris, 489 U.S. 378, 391–92 (1989) (reasoning that the teaching of *Monell* was to avoid respondeat superior liability in § 1983 claims).

§ 1983 claims is beyond the scope of this Comment.[113] Nor does this Comment suggest respondeat superior should apply in this context.[114] However, one must wonder whether a desire to avoid respondeat superior liability is adequate justification for repeatedly refusing to impose municipal liability.[115] If respondeat superior is liability without fault, the deliberate indifference standard has been interpreted, in effect, as the opposite: a standard of no liability even when fault is present.[116]

Justice Souter's dissent accurately described the result of repeatedly adhering to the deliberate indifference standard.[117] The skepticism of respondeat superior liability has converted the deliberate indifference standard in § 1983 actions into a "virtually categorical impossibility," even in cases where the facts are seemingly sufficient to impose municipal liability.[118] A desire to avoid respondeat superior liability should not result in complete insulation of municipalities when a municipal policy or custom has caused a substantial and cognizable injury to a plaintiff.[119] A new standard—that of "conscious disregard"—would accomplish what many thought *Monell* was supposed to accomplish: namely, to make municipalities subject to liability under § 1983.[120]

III. A NEW STANDARD IS NEEDED

While supporters of the deliberate indifference standard have a legitimate basis for desiring a strict standard for imposing municipal liability,[121] municipal insulation has gone too far.[122] Currently, there is no effective deterrent to the

113. For a complete analysis and arguments in support of imposing respondeat superior liability on municipalities see Charles A Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 6 U. CHI. L. REV. 935 (1979).

114. *See infra* Part V.B. (arguing against respondeat superior).

115. *See Connick*, 131 S. Ct. 1350 (finding district attorney's office was not deliberately indifferent to rights of plaintiff); *Brown*, 520 U.S. 397 (holding Sheriff's Department was not deliberately indifferent to rights of plaintiff); *Canton*, 489 U.S. 378 (affirming the deliberate indifference standard and suggesting Harris did not meet the standard); *see also* Cron et al., *supra* note 28, at 584, 608 (outlining the Court's stance in regards to municipal liability).

116. *See Connick*, 131 S. Ct. 1350 (holding deliberate indifference standard was not met); *Brown*, 520 U.S. 397 (ruling plaintiff did not meet burdens imposed by deliberate indifference standard); *Canton*, 489 U.S. 378 (suggesting municipality was not deliberately indifferent to the rights of the plaintiff).

117. *Brown*, 520 U.S. at 423 (Souter, J., dissenting).

118. *Id.* at 421.

119. *See Connick*, 131 S. Ct. 1350 (expressing a desire to avoid respondeat superior liability); *Brown*, 520 U.S. at 397 (observing Court's precedent to avoid respondeat superior liability); *Canton*, 489 U.S. 378 (reasoning that the standard of municipal liability should not mirror respondeat superior liability).

120. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality* Cases, 44 HASTINGS L.J. 499, 521–23 (1993) (explaining the approach in *Monell* and what the case stood for at the time).

121. *See infra* Part V (discussing countervailing concerns).

122. *Supra* Part II.E.

recent patterns and practices of excessive force by police departments.[123] Instead, the inconsistent application of the deliberate indifference standard has a net deterrent effect on potential plaintiffs.[124]

A. Deterring Excessive Force

Courts must deter municipal patterns or practices that allow for violations of citizens' constitutionally protected rights.[125] Department of Justice (DOJ) investigations in Cleveland and Ferguson indicate that these municipalities have employed policies and customs that result in repeated constitutional rights violations.[126] But these two investigations are not anomalous—the DOJ has launched more than thirty civil rights investigations into police departments across the nation.[127] This indicates that the current standard for municipal liability is not an effective deterrent of municipal policies or customs that promote excessive use of force by police officers.[128]

Surprisingly, there is no comprehensive accounting of how many police shootings occur per year in our nation's 17,000 police departments.[129] Many police departments file shooting reports during some years, but not others, and many do not file police shooting reports at all.[130] However, studies have emerged that evidence a significant, disproportionate use of deadly force by police officers during encounters with persons of color as compared to encounters with Caucasians.[131]

Whether a municipality fails to train employees, inadequately trains employees, or employs practices that lead to a municipal employee violating a

123. *Infra* Part III.A.

124. *Infra* Part III.B.

125. *See* INVESTIGATION OF CDP, *supra* note 2 (concluding that the Cleveland Police Department engages in a pattern or practice of the excessive use of force that must change); *see also* Horwitz, *supra* note 18 (describing the Justice Department's report of the Albuquerque Police Department, which concluded there had been repeated incidents of the use of deadly and excessive force in violation of citizens' constitutional rights when there was no imminent threat to them or the community); Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249 (1987) (arguing that the current standard for municipal liability under § 1983 claims is economically inefficient).

126. *See* INVESTIGATION OF CDP, *supra* note 2 (describing Cleveland's pattern of excessive use of force); Attorney General Remarks, *supra* note 20 (detailing that Attorney General Holder called for "wholesale changes" in the Ferguson police department); *see also* DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (detailing findings of the investigation into the Ferguson Police Department's policies and practices).

127. Horwitz, *supra* note 18 (noting that most investigations result in lawsuits by the Justice Department against the police department).

128. *See id.* (outlining the DOJ's investigations into police departments across the nation).

129. *See* Lowenstein, *supra* note 2, *and* Gabrielson, *supra* note 2 (describing the failure of police departments to statistically account for victims of police shootings).

130. *See id.* (describing the varying rates of police accounting of police shootings).

131. *See id.* (detailing the racial disparity among victims in the few police departments that do account for victims of police shootings).

citizen's rights, deterrence is the only way to stop these unsound police practices.[132] The best form of deterrence that the Courts can provide is reducing the burden of proof for imposing municipal liability.[133] The threat of substantial monetary damages against a municipality will create an economic incentive among policymakers to promote better patterns of practice and better training of municipal employees.[134] When a court holds a municipality accountable for constitutional rights violations, it forces the municipality to address unsound policies and practices in order to prevent similar violations from occurring in the future.[135] Municipal liability makes "reform of police practices an economic, as well as political imperative."[136]

B. Interpretation of the Deliberate Indifference Standard is Far From Uniform and Deters Plaintiffs

The judicial interpretations of the Supreme Court decisions discussed above are far from uniform, especially when defining municipal "policy" or "custom."[137] Moreover, there has been no uniformity as to what conduct does or does not amount to a deliberate indifference of private citizens' constitutionally protected rights.[138] There have been occasions when lower courts held that a municipality was deliberately indifferent to a constitutionally protected right of a plaintiff.[139] However, the Supreme Court has yet to find a municipality liable under the deliberate indifference standard in a § 1983 action.[140]

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132. *See* INVESTIGATION OF CDP, *supra* note 2 (concluding that the CPD engages in a pattern or practice of excessive use of force that must be changed). *See also* Connick v. Thompson, 131 S. Ct. 1350 (2011) (holding the DA's office was not liable); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) (finding no deliberate indifference on behalf of the Sheriff's department); City of Canton v. Harris, 489 U.S. 378 (1989) (suggesting lower courts should not find municipal liability on remand).

133. Kramer, *supra* note 125.

134. *Id.*

135. Cron et al., *supra* note 28, at 607.

136. Colbert, *supra* note 120, at 502.

137. *See also* Auriemma v. Rice, 957 F.2d 397, 400–401 (7th Cir. 1992) (observing confusion in courts when determining municipal liability). *Compare Brown*, 520 U.S. at 408 (sheriff was a policymaker), *with* Greensboro Prof'l Fire Fighters Ass'n. v. Greensboro, 64 F.3d 962, 965–966 (4th Cir. 1995) (fire chief not a municipal policymaker).

138. *See, e.g.*, *Brown*, 520 U.S. at 435 (finding no municipal liability under the deliberate indifference standard); *see also Auriemma*, 957 F.2d at 400–01 (explaining that courts have not applied the standard consistently).

139. *See, e.g.*, Harris v. Pagedale, 821 F.2d 499, 505–08 (8th Cir. 1987) (holding that municipality was deliberately indifferent to allegations of sexual assault).

140. *See* Connick v. Thompson, 131 S. Ct. 1350 (2011) (holding that the DA's office was not deliberately indifferent to consequences of failing to train employees); *Brown*, 520 U.S. 397 (finding that facts did not satisfy deliberate indifference standard); City of Canton v. Harris, 489 U.S. 378 (1989) (suggesting that the municipality was not deliberately indifferent to the rights of plaintiff).

Even more concerning is that there is no way to determine the true impact of the deliberate indifference standard. There is no way to quantify how many potential plaintiffs are deterred from filing § 1983 claims against municipalities because of the burdens imposed by the deliberate indifference standard.[141] There are no statistics indicating how many claims settle confidentially for a low sum when a municipality's actions are particularly egregious.[142] The legal field would be best served by leaving the varying interpretations and counterintuitive results of the deliberate indifference standard in the past and providing plaintiffs with a new standard for municipal liability in § 1983 claims.[143]

IV. UNDERSTANDING THE NEED FOR QUALIFIED IMMUNITY, AVOIDING RESPONDEAT SUPERIOR, AND A STRINGENT STANDARD FOR IMPOSING MUNICIPAL LIABILITY IN § 1983 ACTIONS

This Part deals with alternative approaches proposed by commentators to curtail the excessive use of force by police officers.[144] Section A explores the advantages of qualified immunity and argues for its retention.[145] Section B identifies the advantages of a tough standard of liability and argues that respondeat superior is not the best standard for municipal liability in § 1983 claims.[146]

A. Officers Need Qualified Immunity to Serve and Protect

We must not lose sight that thousands of police officers put their lives in danger every day to ensure that the rest of us are not in harm's way.[147] The vast

141. *See* Cron et al., *supra* note 28, at 604 (explaining that high standards of municipal liability have resulted in a scarcity of successful claims in the federal courts); *see also Brown*, 520 U.S. at 421 (Souter, J., dissenting) (arguing that the deliberate indifference standard of fault is a "virtually categorical impossibility" in many cases where the evidence is sufficient to support a finding of municipal liability).

142. *See, e.g.*, INVESTIGATION OF CDP, *supra* note 2, at 15 (indicating that the Cleveland Police Department has settled many allegations of excessive force on confidential terms and diminishing transparency on confidential terms, thereby calling for serious review of these cases going forward).

143. *See infra* Part V (suggesting a conscious disregard standard).

144. *See* Rothfeld, *supra* note 113 (discussing respondeat superior's role in municipal liability); see also Kramer, *supra* note 125 (arguing that the current standard for municipal liability under § 1983 claims is economically inefficient); *see also* David P. Stoelting, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. CIN. L. REV. 243 (1990) (arguing that qualified immunity should not be applied at all).

145. *Infra* Part IV.A.

146. *Infra* Part IV.B.

147. *See* NAT'L LAW ENFORCEMENT MEM'L FUND, LAW ENFORCEMENT FACTS: KEY DATA ABOUT THE PROFESSION, http://www.nleomf.org/facts/enforcement/?print=t (last visited Dec. 19, 2014) (on file with *The University of the Pacific Law Review*) (indicating that there are more than 900,000 law enforcement officers serving in the U.S.); *see also* NAT'L LAW ENFORCEMENT MEM'L FUND, OFFICER DEATHS BY YEAR, http://www.nleomf.org/facts/officer-fatalities-data/year.html?print=t (last updated April 24, 2014) [hereinafter

majority of police officers do their best to keep the streets safe for our mothers, brothers, and children.[148] There is no denying that effective police forces are necessary for our society to function—the alternative would be chaos.[149] Yet, many take for granted the protection afforded to them by our nation's police officers and argue that officers should not be entitled to qualified immunity.[150]

Officers cannot and should not be thinking about the risks of an impending lawsuit when there is a genuine belief that their lives, or the lives of others, are in danger.[151] It would restrict the officers' ability to keep the peace if the law said otherwise.[152] Society needs police officers to keep our streets safe, and to keep our streets safe, police officers need the ability to use force.[153] The problem does not lie in the officers' ability to use force, but rather, it lies in the lack of accountability when officers in a particular municipality *continually and unreasonably* use excessive force.[154]

B. Respondeat Superior Needs to Be Avoided

Previous sections criticized the Supreme Court's reasoning in repeatedly affirming the deliberate indifference standard in § 1983 actions.[155] To be clear,

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"OFFICER DEATHS"] (on file with *The University of the Pacific Law Review*) (noting that there were 2,211 police officers killed in the line of duty from 2000 to 2013); *see also* Press Release, FBI, FBI Releases 2013 Statistics on Law Enforcement Officers Killed and Assaulted (Nov. 24, 2014), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2013-statistics-on-law-enforcement-officers-killed-and-assaulted (on file with *The University of the Pacific Law Review*) (noting that 49,851 officers were assaulted in the scope of duty in 2013).

148. *See* DISASTER CTR., UNITED STATES CRIME RATES 1960–2013 (2014), *available at* http://www.disastercenter.com/crime/uscrime.htm (on file with *The University of the Pacific Law Review*) (showing a steady decline in the total number of crimes since 2002).

149. *See* George L. Kelling & James Q. Wilson, *Broken Windows*: *The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1, 1982), *available at* http://www.theatlantic.com/magazine/archive/1982/03/broken windows/304465/? single_page=true (on file with *The University of the Pacific Law Review*) (arguing that the presence of a police forces in communities has a limiting effect on the evolution of crime and community degradation).

150. *See, e.g.*, Stoelting, *supra* note 144 (arguing against qualified immunity).

151. S*ee* Harlow v. Fitzgerald, 102 S. Ct. 2727, at 2732, 2735–36 (1982) (describing the policy behind Qualified Immunity); *see also* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989) (describing the policy behind qualified immunity).

152. S*ee Harlow*, 102 S. Ct. at 2732, 2735–36 (explaining the reasoning in support of qualified immunity).

153. *See* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (arguing that one rationale for qualified immunity is that officials need to be shielded from harassment, distraction, and liability when they perform their duties reasonably); s*ee generally Harlow*, 102 S. Ct. 2727.

154. *See, e.g.*, INVESTIGATION OF CDP, *supra* note 2 (detailing various accounts of the Cleveland division of police that exhibits a pattern of the excessive use of force); *see also* Attorney General Remarks, *supra* note 20 (describing the ongoing investigation into the Ferguson Police Department's practices in the use of force).

155. *See supra* Part III.A. (analyzing the Court's reliance on avoiding respondeat superior as a reason for affirming the deliberate indifference standard).

that criticism is not focused on the reasoning per se, but rather, on the Court's over-reliance on that reasoning.[156] Like *Monell, Canton, Brown,* and *Connick,* this Comment agrees that municipal liability should not collapse into respondeat superior liability.[157]

The first reason to avoid respondeat superior liability is that it is inconsistent with the language of § 1983.[158] Employing a plain reading of § 1983, liability attaches to any person who "subjects [another], or *causes* [another] to be subjected" to the deprivation of constitutionally protected rights.[159] The language indicates the drafters' intent to impose liability only when a municipality is responsible for an officer's violation of the constitutional rights of another.[160]

Another reason to reject municipal liability that mirrors respondeat superior liability is the economic effect it would have on already-burdened municipalities.[161] Clever counsel would be able to craft material issues of fact in an attempt to induce settlement with municipalities that fear the monetary consequences of putting a sympathetic plaintiff in front of a jury.[162] Municipalities may be crippled and face bankruptcy as a result of such lawsuits.[163] Any new standard must address these concerns to be an effective and desirable solution.

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156. *See* Connick v. Thompson, 131 S. Ct. 1350 (2011) (relying primarily on an argument against respondeat superior); Bd. of Cty. Comm'rs of Bryan Cty. Brown, 520 U.S. 397 (1997) (relying on the *Monell* and *Canton* precedent of avoiding respondeat superior); City of Canton v. Harris, 489 U.S. 378 (1989) (allowing no reasoning other than avoiding a standard of liability that mirrored respondeat superior liability).

157. Monell v. Dept. of Soc. Servs., 436 U.S. 658, 692–94 (1978); *Connick,* 131 S. Ct. at 1365; *Brown*, 520 U.S. at 416; *Canton*, 489 U.S. at 391–92.

158. 42 U.S.C. § 1983 (West 2014).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Respondeat superior is not an imposition of liability due to a finding of fault. Rather, it is an imposition of liability based on the employer-employee relationship. BLACK'S LAW DICTIONARY (10th ed. 2014). *See also Monell*, 436 U.S. at 692 (arguing that the legislative intent cuts against the imposition of respondeat superior liability in the context of § 1983 claims).

159. 42 U.S.C. § 1983 (West 2014) (emphasis added).

160. *Monell*, 436 U.S. at 692.

161. *See* Rothfeld, *supra* note 113, at 963 (observing that the economic pressure of municipal liability forces the municipality to make difficult choices). *But see* Kramer, *supra* note 125 (explaining the economic inefficiency of the deliberate indifference standard).

162. *See* Jim Christie, *Stockton, California Files for Bankruptcy*, REUTERS, *available at* http://www.reuters.com/article/2012/06/29/us-stockton-bankruptcy-idUSBRE85S05120120629 (on file with *The University of the Pacific Law Review*) (observing the effect municipal liability has on municipalities). Stockton is only one of many notable U.S. cities (others include Vallejo, California. and Detroit, Michigan) to file for municipal bankruptcy, supporting the theory that respondeat superior liability can rack up millions of dollars in judgments against municipalities, forcing them to file for Chapter 9 bankruptcy.

163. *Id.*

V. THE CONSCIOUS DISREGARD STANDARD—LESS STRINGENT THAN DELIBERATE INDIFFERENCE, BUT MORE STRINGENT THAN NEGLIGENCE

Section A of this Part defines "conscious disregard."[164] Section B proposes a conscious disregard standard for municipal liability.[165] Section C details why conscious disregard is the proper standard for municipal liability under § 1983 claims.[166] Section D explains that the new standard would not be a great departure from precedent.[167] Section E argues that the conscious disregard standard addresses the inherent inconsistency of *Monell*.[168]

A. Definition and Other Uses—California & Nevada[169]

California has applied a conscious disregard standard in cases involving bad faith insurance, wrongful discharge of an employee, products liability, drunk driving, and gross negligence.[170] In the context of employer liability, California allows punitive damages when "[an] employer has advance knowledge of the unfitness of an employee, and employs [said employee] with a *conscious disregard* of the rights or safety of others."[171] A plaintiff may also receive punitive damages if the employer "authorized or ratified the wrongful conduct" that led to the plaintiff's damages.[172] California requires that a corporation's officer, director, or managing agent exhibit "a conscious disregard of the rights or safety of others."[173]

California's requirement that an "officer, director, or managing agent of [a] corporation" must consciously disregard the rights or safety of others in order to impose punitive damages is analogous to the requirement that a municipal "policy" or "custom" must cause the violation of the plaintiff's constitutional rights under the deliberate indifference standard.[174] In order to impose liability,

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164. *Infra* Part VI.A.

165. *Infra* Part VI.B.

166. *Infra* Part VI.C.

167. *Infra* Part VI.D.

168. *Infra* Part VI.B.

169. This Comment proposes that the conscious disregard standard be used in all states, but is only using California and Nevada as examples.

170. *See* Bruce C. Bennett, *Punitive Damages in California under the Malice Standard: Defining Conscious Disregard*, 57 S. CAL. L. REV. 1065 (1984) (examining the application of the conscious disregard standard in these areas of the law).

171. CAL. CIV. CODE § 3294 (West 2014) (emphasis and substitutions added).

172. *Id.*

173. *Id.*

174. *Compare id.*, *with* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978) *and* City of Canton v. Harris, 489 U.S. 378 (1989) *and* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) *and* Connick v. Thompson, 131 S. Ct. 1350 (2011).

both standards require persons in managing positions to ignore warning signs that an employee may engage in "wrongful acts" that lead to "harmful consequences" for those persons that the employee comes in contact with.[175]

The California legislature did not provide parameters as to what constitutes a "conscious disregard."[176] However, California's sister state, Nevada, codified a definition of the term.[177] Under Nevada law, a finding of conscious disregard requires proof of two elements: (1) "knowledge of probable harmful consequences of a wrongful act," and (2) "willful and deliberate failure to act to avoid those consequences."[178] Nevada's definition of "conscious disregard" provides a framework for crafting a new conscious disregard standard for municipal liability under § 1983.

B. The Standard

The Court should revisit the standard for municipal liability in § 1983 actions and provide an actual definition to prevent confusion and varying application by lower courts.[179] A standard of conscious disregard that combines the California law for imposing punitive damages with the definition from the Nevada Legislature would remedy the failings of the deliberate indifference standard.[180] This comment proposes the courts adopt the following standard for imposing municipal liability in § 1983 actions:

> (a) knowledge of probable harmful consequences of a wrongful act; and[181]
>
> (b) willful or deliberate failure to avoid those consequences;[182]
>
> (c) by a municipal policymaker, or those persons acting on behalf of a municipal policymaker.[183]

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175. *Compare* CAL. CIV. CODE § 3294 (West 2014), *with* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997) (arguing that locating a policy ensures a municipality is held liable only for rights deprivations resulting from decisions that "may fairly be said to be those of the municipality") *and* Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011) (arguing that the municipal policy requirement ensures a municipality is liable only for "actions for which the municipality is actually responsible").

176. *See* Bennett, *supra* note 170, at 1091 (proposing a definition for the conscious disregard standard).

177. NEV. REV. STAT. § 42.001 (West 2014).

178. *Id.*

179. *See* Auriemma v. Rice, 957 F.2d 397, 400–401 (7th Cir. 1992) (expanding on the confusion in courts).

180. *Compare* CAL. CIV. CODE § 3294 (West 2014) *and* NEV. REV. STAT. § 42.001 (West 2014) (using conscious disregard), *with* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) *and* Connick v. Thompson, 131 S. Ct. 1350 (2011) (upholding deliberate indifference).

181. STAT. § 42.001.

182. *Id.*

This Comment revisits these elements when analyzing the facts of the Brown, Garner, and Rice cases under both the deliberate indifference standard and the proposed conscious disregard standard.[184]

C. The Right Balance: A Perennial "Middle-Ground"

The analysis of *Canton*, *Brown*, and *Connick* indicates that the Supreme Court's application of the deliberate indifference standard has insulated municipalities from liability under § 1983 claims.[185] Although municipal liability should not collapse into respondeat superior liability, the standard employed should not completely insulate municipalities in cases where the factual record is sufficient to support a finding of liability.[186]

This standard can satisfy both sides of the debate if applied properly. The conscious disregard standard will preserve *Monell, Canton, Brown,* and *Connick*'s precedent of not imposing municipal liability under the theory of respondeat superior.[187] It will require a plaintiff to prove that there was a municipal pattern or practice that led to the violation of plaintiff's constitutional rights, thereby ensuring a municipality is liable only for "the actions for which it is actually responsible."[188]

Unlike the deliberate indifference standard, the conscious disregard standard provides an effective remedy for plaintiffs who have suffered constitutional violations at the hands of municipal employees.[189] The current standard often functions as an impossible barrier to relief.[190] Although a court may consider a particular municipal "policy" or "custom" as exhibiting an indifference to the

183. *See* CIV. § 3294 (deleting "officer" to prevent confusion in context of excessive force claims, and deleting "director" and "managing agent" to remain as consistent as possible to the Supreme Court's precedent and to reduce unnecessary language).

184. *See infra* Part VI (applying both standards to the facts of these three cases).

185. *See Connick*, 131 S. Ct. 1350 (denying municipal liability); *Brown*, 520 U.S. 397 (holding the deliberate indifference standard was not met); *Canton*, 489 U.S. 378 (affirming the deliberate indifference standard); *see also supra* Part III (analyzing the Court's reasoning in these cases).

186. *See supra* Part II.E.

187. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978) (denying municipal liability that would come close to respondeat superior liability; City of Canton v. Harris, 489 U.S. 378 (1989) (suggesting respondeat superior must be avoided); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997) (reasoning that the Court's precedent is to avoid respondeat superior in § 1983 claims); Connick v. Thompson, 131 S. Ct. 1350 (2011) (arguing against respondeat superior liability in § 1983 claims).

188. *See Canton*, 489 U.S. 378 (promoting the "policy" or "custom" requirement of the deliberate indifference standard); *Brown*, 520 U.S. 397 (upholding the "policy" or "custom" requirement); *Connick*, 131 S. Ct. at 1359 (2011) (arguing the "policy" or "custom" requirement is necessary to prevent respondeat superior liability in §1983 claims).

189. *See supra* Part II.E.

190. *Brown*, 520 U.S. 397.

rights of a citizen, the court will generally not interpret the policy as amounting to a deliberate indifference.[191]

The conscious disregard standard addresses this problem by reducing the burden of proving municipal liability in § 1983 actions.[192] Instead of the confusing, repetitive language of the deliberate indifference standard, the conscious disregard standard will provide a workable definition for lower courts.[193] The language is clear and the goal is straightforward: prevent municipalities from engaging in patterns or practices that violate the constitutional rights of citizens.[194]

D. Not a Departure from Precedent

City of Canton v. Harris established the deliberate indifference standard in § 1983 actions and interchangeably referred to a municipality's "deliberate" or "conscious" choice in failing to train or inadequately training a municipal employee as a basis for municipal liability.[195] Additionally, *Board of County Commissioners of Bryan County v. Brown* used the language of a "conscious disregard for the consequences of their action" in affirming the deliberate indifference standard.[196] Finally, the most recent Supreme Court case affirming the deliberate indifference standard in § 1983 actions, *Connick v. Thompson*, used the language "conscious disregard" when analyzing whether the acts of the district attorney's office amounted to deliberate indifference to the rights of the respondent.[197]

For these reasons, the conscious disregard standard would not be a great departure from Supreme Court precedent.[198] Rather, it would provide much-needed clarity to a standard that has been difficult to define and set boundaries

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191. *Id.* at 411 (arguing that the Sheriff's actions may have amounted to an indifference that the officer would violate the rights of plaintiff, but not a deliberate indifference).

192. *See* Bennett, *supra* note 170, at 1092 (indicating that conscious disregard is less stringent than actual malice and more stringent than simple negligence).

193. *See Canton*, 489 U.S. at 390 (describing municipal decisions that were "so likely" or "plainly obvious" to result in a violation of constitutional rights" as possible bases for municipal liability); *see also Connick*, 131 S. Ct. 1350 (need for training was not "so obvious" that district attorney was deliberately indifferent to need for such training).

194. *See, e.g.*, INVESTIGATION OF CDP, *supra* note 2 (explaining DOJ's finding that the Cleveland Division of police exhibited a pattern or practice of the excessive use of force); DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (finding the Ferguson Police Department displayed a pattern or practice of excessive force).

195. *Canton*, 489 U.S. at 389.

196. Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 407 (1997) (referring to "their" as the municipality).

197. *Connick*, 131 S. Ct. at 1365.

198. *Canton*, 489 U.S. 378.

under.[199] This standard will deter unsound municipal practices and enhance the protection of individual civil liberties while ensuring municipalities are not liable under a theory that mirrors respondeat superior.[200]

E. The Conscious Disregard Standard Addresses the Inconsistency of Monell

If a municipality cannot be held liable for the sort of actions the sheriff's department took in *Brown* and the district attorney's office took in *Connick*, then what was the point of *Monell*?[201] There was no reason to create a right for plaintiffs to bring a civil rights claim against a municipality and then impose a standard for obtaining relief that borders on the impossible.[202] The deliberate indifference standard precludes recovery for too many who have suffered § 1983 violations at the hands of municipal employees, and the conscious disregard standard is better suited to bring relief to plaintiffs who bring these claims.[203]

VI. HOW THE STANDARDS WOULD PLAY OUT IN THE CASES OF MICHAEL BROWN, ERIC GARNER, AND TAMIR RICE[204]

This Part will apply both the deliberate indifference standard and the conscious disregard standard to the facts surrounding the deaths of each of these young men.[205]

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199. Auriemma v. Rice, 957 F.2d 397, 400–01 (7th Cir. 1992).

200. *See supra* Part IV.B. (arguing that many current police practices need deterring); *see also Canton*, 489 U.S. 378; *Brown*, 520 U.S. 397; *Connick*, 131 S. Ct. 1350 (arguing against respondeat superior liability in § 1983 claims).

201. Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978). *See* David J. Achtenberg, *Taking History Seriously: Municipal Liability under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2184 (2005) (tracing the history and justifications of the *Monell* Doctrine).

202. *See Monell*, 436 U.S. 658 (holding that municipalities could be sued as "persons" under 42 U.S.C. § 1983); *see also* City of Canton v. Harris, 489 U.S. 378 (1989) (establishing the deliberate indifference standard); *see further* Achtenberg, *supra* note 201 (recounting *Monell*'s history).

203. *See supra* Part II.E.

204. This Comment uses the analysis and reasoning of precedent of the Supreme Court to make an educated guess as to how the deliberate indifference standard would function if applied to the facts of the Michael Brown, Eric Garner, and Tamir Rice cases. This is not to say that the Court will not change its position in holding municipalities liable. There are always moments in history that result in changes to a Court's precedent. That being said, this Comment was written under the assumption that the Court will adhere to its current precedent. The same applies to the analysis of each case under the newly proposed conscious disregard standard.

205. *Infra* Part VII.A–D.

A. Michael Brown

A DOJ investigation into the Ferguson Police Department (FPD) found a pattern or practice of using excessive force in violation of the Fourth Amendment that was specifically targeted at African American residents.[206] At the time of Michael Brown's death, one former and five current members of the Ferguson police force faced unrelated federal lawsuits for excessive use of force.[207] The police department also conducted at least six internal investigations into the excessive use of force prior to Mr. Brown's death.[208] Despite having knowledge of their officers' use of excessive force, the Ferguson Police Department repeatedly put these officers into situations where civil rights violations were likely to occur.[209]

1. Estimation Under the Deliberate Indifference Standard

The conduct of the FPD is similar to, but more egregious than, the conduct of the sheriff's department in *Brown*.[210] Federal claims and internal investigations into the FPD included allegations that a twelve-year-old boy was "hog-tied" for checking his family's mailbox; that officers "pistol-whipped" young children; that officers killed a mentally ill man with a stun gun; and that officers used canines to injure nonviolent offenders, including children.[211]

In *Brown*, the officer who used excessive force when arresting the respondent had a recent history of violent behavior.[212] The officer's history should have alerted the sheriff, acting as a municipal policymaker, that the particular officer was likely to use excessive force in violation of citizens' rights.[213] However, the Supreme Court found that the sheriff's department was not deliberately indifferent to the likelihood that the officer would use excessive

206. *See* DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 3–5 (detailing the findings of the investigation into the Ferguson Police Department's policies and practices).

207. Horwitz, *supra* note 18.

208. *See id.* (detailing federal claims and internal investigations into the Ferguson Police Department).

209. *Id.; see also* DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (indicating that the Ferguson Police Department employed a pattern or practice of the excessive use of force especially targeted toward African American residents).

210. *Compare* Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 425–30 (1997) (detailing how the Sheriff, as policymaker, hired a relative of his as an officer after ignoring his criminal record and the likelihood of rights violations), *with* Horwitz, *supra* note 18 (describing the allegations against the Ferguson Police Department).

211. Horwitz, *supra* note 18; DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 31.

212. *Brown*, 520 U.S. at 428.

213. *Id.* at 429 (Souter, J., dissenting) (arguing that the officer's use of excessive force against the respondent was a "plainly obvious consequence of hiring him as a law enforcement officer authorized to employ force in performing his duties").

force in violation of the respondent's constitutionally protected rights.[214] If Michael Brown's case is tried consistent with the Supreme Court's precedent, a similar result will follow.[215]

2. Estimation Under the Conscious Disregard Standard

Taken together, the first and third prongs of the conscious disregard standard require a municipal policymaker to have knowledge of the probable harmful consequences of a wrongful act.[216] In this case, the wrongful act was the disproportionality of Ferguson officers' use of excessive force against the African American community.[217] The probable harmful consequences were that an officer's excessive use of force would gravely injure an African American member of the community.[218]

The DOJ investigation into the FPD indicates knowledge among policymakers of patterns of excessive force by Ferguson police officers.[219] The investigation indicates that FPD supervisors were aware that officers consistently used excessive force against vulnerable groups of the community, such as the mentally ill, the cognitively disabled, and juveniles.[220] Furthermore, the investigation indicates that the FPD was aware that the overwhelming use of excessive force was targeted at African Americans.[221] The findings indicate municipal policymaker knowledge of the probable harmful consequences of the FPD's wrongful conduct.

The second and third prongs of the conscious disregard standard require willful failure by the municipality to avoid the probable consequences of the FPD's wrongful acts.[222] The DOJ investigation into the FPD indicates that no corrective measures were taken to remedy the practice of excessive use of force, even though the practice was evident.[223] Rather, the status quo continued at least

214. *Id.* at 415–16.

215. Again, this is assuming that the family of Mr. Brown will pursue a civil rights action against the Ferguson Police Department.

216. *See supra* Part V.B. (providing the three prongs of the proposed conscious disregard standard).

217. DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 62.

218. *Id.*; *see also* Transcript of Grand Jury Proceedings Vol. 5, *supra* note 4, at 229 (recounting the factual circumstances of Michael Brown's death in Ferguson).

219. *See* Attorney General Remarks, *supra* note 20 (describing policymaker actions and inaction as a basis for knowledge); DOJ INVESTIGATION OF FERGUSON, *supra* note 2 (describing patterns of excessive force throughout the Ferguson police force); *see also* Horwitz, *supra* note 18 (describing some of the Ferguson Police Department's unlawful acts).

220. DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 28.

221. *See id.* (indicating that ninety percent of excessive use of force incidents were aimed at African Americans).

222. *See supra* Part V.B. (introducing the conscious disregard standard).

223. *See* DOJ INVESTIGATION OF FERGUSON, *supra* note 2, at 38 (indicating that review of the use of force is ineffectual because supervisors do little investigation and do not see patterns of abuse that are evident).

until Officer Wilson shot and killed Mr. Brown.[224] Instead of implementing practices to promote public safety and effective law enforcement, many of the FPD's practices were focused on generating revenue.[225] The investigation indicates that officers viewed African Americans in Ferguson as "potential offenders and sources of revenue," rather than viewing them as members of the community that officers are responsible to protect.[226] This amounts to a willful failure by Ferguson policymakers to avoid the probable harmful consequences of Ferguson officers' wrongful conduct, and should, under the newly proposed standard, warrant municipal liability.[227]

B. Eric Garner

Prior to killing Eric Garner, Officer Pantaleo was the subject of three separate suits for civil rights violations, all by men who, like Mr. Garner, are African American.[228] Additionally, the NYPD Patrol Guide prohibited the use of chokeholds—the maneuver that led to Mr. Garner's death—for over twenty years.[229] Furthermore, between June 2013 and July 2014, the NYPD received more than 200 complaints for the use of chokeholds.[230] During this time, the NYPD developed a pattern of failing to hold officers accountable for violating the mandates of the chokehold ban, and, in doing so, promoted the maneuver.[231]

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224. *Id.*

225. *Id.* at 22. (outlining FPD's practice of generating revenue through policing).

226. *Id.* at 2.

227. *See supra* Part V.B.

228. *See* Kevin McCoy, *Choke-hold Cop Sued in Prior Misconduct Cases*, USA TODAY (Dec. 4, 2014, 9:21 PM), *available at* http://www.usatoday.com/story/news/nation/2014/12/04/choke-hold-cop-pantaleo-sued/19899461/ (on file with *The University of the Pacific Law Review*).

229. *See* Roberto A. Ferdman, *Why Quibbling about the Cause of Eric Garner's Death Completely Misses the Point*, WASH. POST (Dec. 3, 2014), *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/03/the-nypd-banned-chokeholds-20-years-ago-but-hundreds-of-complaints-are-still-being-filed/ (on file with *The University of the Pacific Law Review*) (detailing Officer Pantaleo's history of civil rights transgressions against African American men).

230. *See id.* (explaining that the NYPD failed to take action for the reported incidents of a banned maneuver).

231. N.Y.C. CIVILIAN COMPLAINT REV. BD., AN EVALUATION OF CHOKEHOLD ALLEGATIONS AGAINST MEMBERS OF THE NYPD FROM JANUARY 2009 THROUGH JUNE 2014 (2014), *available at* http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study_20141007.pdf [hereinafter CHOKEHOLD ALLEGATIONS] (on file with *The University of the Pacific Law Review*) (arguing that the department effectively endorses officers use of the chokehold maneuver by not enforcing the ban against it).

1. Estimation Under the Deliberate Indifference Standard

To begin with, the NYPD was aware that officers continually violated the department's chokehold ban.[232] Although the municipality had knowledge of these violations, it did not hold the officers accountable for the violations.[233] Moreover, the NYPD did not take any measures to prevent officers like Officer Pantaleo from violating the chokehold ban in the future.[234]

This is analogous to *Connick*, where the city banned the particular civil rights violation the plaintiff suffered: the failure to comply with required evidence disclosures.[235] The failure had occurred in the past, the municipality had knowledge that required evidence was not disclosed in the past, and no corrective measures were taken to prevent the violation from occurring in the future.[236] However, in *Connick* the Court held that this conduct did not amount to a deliberate indifference and did not impose municipal liability, albeit by a slim 5–4 majority.[237]

Perhaps the facts surrounding Mr. Garner's death would have led to a different result.[238] Perhaps these facts are so analogous to the hypothetical situations Justice O'Connor posited in *Canton* that the Court would have changed its position on imposing municipal liability under § 1983 claims.[239] However, the Court's precedent suggests the chances of that happening were quite improbable and was likely a major consideration in the Garner family's decision to accept a settlement offer releasing the city from liability.[240]

2. Estimation Under the Conscious Disregard Standard

The first and third prongs of the conscious disregard standard require municipal policymaker knowledge of the probable harmful consequences of a

232. *Id.*

233. *Id.*; *see also* Ferdman, *supra* note 229 (pointing out the NYPD's failure to take action after repeated chokehold incidents).

234. Ferdman, *supra* note 229.

235. Connick v. Thompson, 131 S. Ct. 1350 (2011).

236. *Id.* at 1374–84.

237. *Id.* at 1369.

238. *See supra* notes 9–12 and accompanying text.

239. *See* City of Canton v. Harris, 489 U.S. 378, 390 (1989) (providing hypothetical scenarios that should give rise to municipal liability); *see also supra* Part II.B. (providing *Canton*'s hypothetical situations).

240. *Connick*, 131 S. Ct. 1350; Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397 (1997); *Canton*, 489 U.S. 378; Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978); *see* J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (July 13, 2015), *available at* http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html (on file with *The University of the Pacific Law Review*) (providing some of the considerations that went into the family's decision to accept the city's settlement offer).

wrongful act.[241] The wrongful act here was allowing officers to repeatedly violate the chokehold ban.[242] The probable harmful consequences of repeatedly allowing chokeholds were that someone would be gravely injured by the maneuver.[243] The two-hundred-plus complaints about chokehold usage in the year immediately preceding Mr. Garner's death gave the NYPD policymakers adequate knowledge of the probable harmful consequences of allowing officers to violate the chokehold ban.[244]

The second and third prongs of the conscious disregard standard require willful failure by the NYPD to avoid the probable consequences of its officers' wrongful acts.[245] First, the NYPD failed to enforce the chokehold ban and failed to hold officers accountable for violating the chokehold ban.[246] Second, the NYPD failed to remove Officer Pantaleo, a repeat offender, from foot patrol while he was a defendant in three pending lawsuits.[247] These two facts indicate a willful failure to avoid the probable consequences of allowing officers to violate the chokehold ban. Therefore, the conscious disregard standard would provide Mr. Garner's family with relief.[248]

C. Tamir Rice

When Officer Loehmann shot and killed Tamir Rice, Mr. Rice was playing alone at a park, not pointing his toy gun anywhere or at anyone.[249] When the officers approached in their vehicle, Mr. Rice did not point the fake gun at the officers, nor did he direct any threats toward the officers.[250] In fact, Mr. Rice's possession of the toy gun was in accordance with Ohio law at all times of the incident.[251] Nevertheless, Officer Loehmann fired his weapon twice within two seconds of approaching Mr. Rice.[252] Just twelve days after Mr. Rice's death, the DOJ issued an investigative report finding that the Cleveland Division of Police

241. *See supra* Part V.B. (providing the three prongs of the proposed conscious disregard standard).

242. Ferdman, *supra* note 229.

243. *Id.*

244. *Id.*

245. *See supra* Part V.B. (introducing the conscious disregard standard).

246. Ferdman, *supra* note 229.

247. *See* McCoy, *supra* note 228 (describing the past constitutional violations by Officer Pantaleo).

248. *See supra* Part V.B. (providing the conscious disregard standard).

249. Complaint, *supra* note 13, at 3.

250. *See id.* (demonstrating that Tamir Rice acted in accordance with Ohio law when in possession of the airsoft gun, and providing video surveillance footage showing that Mr. Rice did not brandish the gun at the officers when they approached and got out of their police cruiser).

251. *Id.*

252. *Id.*

(CDP) engaged in a pattern or practice of the use of excessive force.[253] The transgressions outlined include inadequate training on the use of force, and insufficient accountability for officers who had developed a pattern of using excessive force.[254]

1. Estimation Under the Deliberate Indifference Standard

Before Mr. Rice's death, there were other incidents of CDP officers using lethal force on people who did not pose an immediate threat to the officers or others.[255] Furthermore, the CDP failed to implement any system of accountability for the use of excessive or lethal force.[256] The findings of the DOJ investigation should provide the Court with the evidence needed to hold the CDP liable.[257]

The fact that unsound police practices, of which supervisors were aware, ultimately led to the death of a twelve-year-old boy may also play a role in the court's disposition of the case.[258] On the other hand, the precedent is difficult to overcome.[259] Nonetheless, until the deliberate indifference standard is reexamined and ultimately replaced by a slightly lower threshold for municipal liability, too many citizens who have suffered recognizable violations of their constitutionally protected rights will be left without any form of relief.[260]

2. Estimation Under the Conscious Disregard Standard

The first and third prongs of the conscious disregard standard require a municipal policymaker to have knowledge of the probable harmful consequences of a wrongful act.[261] The wrongful acts in this case included the CDP officers'

253. *See* INVESTIGATION OF CDP, *supra* note 2, at 4 (concluding that the CPD engages in a pattern or practice of excessive use of force in violation of the Fourth Amendment, including, but not limited to: unnecessary and excessive use of deadly force in the form of shootings and head strikes; the excessive and unnecessary use of tasers, chemical spray, and fisticuffs; using excessive force on the mentally ill; and tactics that place officers in situations where avoidable force becomes inevitable).

254. *Id.*

255. *Id.*

256. *Id.*

257. *See id.* at 3 (outlining the Cleveland Division of Police's various constitutional violations).

258. *See* Complaint, *supra* note 13, at 2 (providing Mr. Rice's age at the time of death); *see also* INVESTIGATION OF CDP, *supra* note 2, at 3 (indicating CDP supervisors tolerated and in some cases endorsed unsound police practices).

259. *See* City of Canton v. Harris, 489 U.S. 378, 379 (1989) (suggesting the municipality was not deliberately indifferent to plaintiff's rights); Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 397 (1997) (holding that the sheriff's department was indifferent, but not deliberately indifferent to plaintiff's rights); Connick v. Thompson, 131 S. Ct. 1350, 1358 (2011) (holding that the municipality did not display a deliberate indifference to the constitutional violations suffered by plaintiff).

260. *See supra* Part II.E.

261. *See supra* Part V.B. (providing the three prongs of the proposed conscious disregard standard).

continual use of unnecessary and unreasonable force.[262] The probable harmful consequences were such that a member of the community would be seriously hurt by an officer's excessive use of force.[263] The DOJ investigation indicates that policymakers and supervisors in the CDP tolerated the use of unnecessary and unreasonable force, and, in some cases, endorsed it.[264] Furthermore, supervisor investigation of officers' use of force was designed to justify the officers' actions.[265] These findings show that municipal policymakers at the CDP knew of the probable harmful consequences of wrongful acts by municipal employees.[266]

The second and third prongs of the conscious disregard standard require willful failure by the CDP to avoid the probable consequences of CDP officers' continual use of excessive force.[267] CDP supervisors knew that officers were using excessive force, but did not take any actions to avoid the probable consequences of these officers' actions.[268] The DOJ outlined the CDP transgressions in its report as follows: failure to properly investigate the officers' use of force, failure to "objectively investigate" allegations of misconduct, and failure to respond to clear patterns of risky police behavior.[269] Under the second prong of the proposed conscious disregard standard, the CDP's repeated decision not to remedy patterns of excessive use of force amounts to a willful failure to avoid the probable harmful consequences of that use of force.[270] Therefore, the proposed conscious disregard standard would also afford relief to the family of Tamir Rice.[271]

D. Summary and a Look to the Future

The limited circumstances for imposing municipal liability under the failure to train theory that *Canton* describes foreshadow the facts and circumstances surrounding the deaths of these three young men.[272] The DOJ investigations of the Cleveland and Ferguson police departments indicate that the officers of these departments "so often violate constitutional rights that the need for further

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262. INVESTIGATION OF CDP, *supra* note 2, at 3.

263. *See* Complaint, *supra* note 13, at 3 (providing the factual circumstances of Mr. Rice's death).

264. INVESTIGATION OF CDP, *supra* note 2, at 4.

265. *Id.* at 5.

266. *See id.* (outlining knowledge among high ranking officials in the Division of Fourth Amendment violations).

267. *See supra* Part V.B. (introducing the conscious disregard standard).

268. INVESTIGATION OF CDP, *supra* note 2, at 3–4.

269. *Id.*

270. *Id.*

271. *Supra* Part V.B.

272. *See* City of Canton v. Harris, 489 U.S. 378, 390 n. 10 (1989) ("It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need.").

training must have been plainly obvious to the city policymakers."[273] A review of the NYPD officers' recent practices—specifically Officer Pantaleo's practices in Staten Island—would lead to a similar conclusion regarding the NYPD.[274] The hope is that the Court will alter its staunch stance on the application of the deliberate indifference standard, but hoping is not enough.

Given the Court's precedent—even with the strong dissents in *Brown* and *Connick*—it is not likely to find that the municipalities were deliberately indifferent to the likelihood that municipal employees would violate the rights of private citizens.[275] Barring a change in approach, it is unlikely that the Court will step back from its deliberate insulation of municipalities in § 1983 claims.[276]

VII. CONCLUSION

The Court should adopt a conscious disregard standard to make municipal liability under § 1983 a genuine possibility. Although *Monell* established a right to bring § 1983 claims against municipalities, *Canton* effectively precluded that right by crafting such a staunch standard for liability.[277] Moreover, the Court's application of the standard in *Brown* and *Connick* can be taken as nothing short of deliberate indifference to the results of the deliberate indifference standard.[278]

A conscious disregard standard would serve as an appropriate middle ground between the legitimate concern of citizens for the protection of their rights, and the legitimate concern of municipalities of being exposed to respondeat superior liability for the independent actions of municipal employees.[279] The conscious disregard standard would curtail over-protection of municipalities' wrongful conduct, while preserving the Supreme Court's longstanding precedent of avoiding a standard of municipal liability in § 1983 actions that mimics respondeat superior liability.[280]

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273. *See* INVESTIGATION OF CDP, *supra* note 2, at 3 (explaining Cleveland Division of Police's pattern of excessive use of force in violation of the Fourth Amendment); Attorney General Remarks, *supra* note 20 (describing the ongoing investigation into the Ferguson Police Department's practices in the use of force); *see also Canton*, 489 U.S. at 390 (indicating that a municipality's constructive notice of repeated constitutional violations may lead to municipal liability in limited situations).

274. *See* CHOKEHOLD ALLEGATIONS, *supra* note 231 (arguing with statistical support that the department effectively endorses officers use of the chokehold maneuver by not enforcing the ban against it). *But see* McCoy, *supra* note 228 (describing the past events of alleged constitutional violations by Officer Pantaleo).

275. Bd. Cty. Comm'rs Bryan Cty. v. Brown, 520 U.S. 397, 416–38 (1997); Connick v. Thompson, 131 S. Ct. 1350, 1370–87 (2011).

276. *See Connick*, 131 S. Ct. 1350; *Brown*, 520 U.S. 397; *Canton*, 489 U.S. 378 (the Supreme Court has avoided finding municipal liability in § 1983 claims).

277. Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978); *Canton*, 489 U.S. 378.

278. *See supra* Part II.E.

279. *See supra* Part IV.B.

280. *See supra* Part II.E. (arguing municipal insulation has gone too far); *see also supra* Part II.A. (discussing the Court's stance in avoiding respondeat superior liability).

Although the conscious disregard standard cannot bring back those tragically lost due to officer's excessive use of force, it may bring some semblance of relief to the families of Michael Brown, Eric Garner, and Tamir Rice.[281] Moreover, unlike the current standard, the imposition of a conscious disregard standard will act as a deterrent against unsound municipal policies and customs by serving as a check on the hiring practices and training methods of municipalities.[282]

281. *See supra* Part VI (applying the conscious disregard standard to the facts of each anticipated case).

282. *See supra* Part III.A. (arguing that the practices of many police departments across the nation must be deterred).

Stop Hamburglaring Our Wages: The Right of Franchise Employees to Union Representation

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I. INTRODUCTION

"Hey, hey, what do you say? We demand fair pay."[1] More than 200 fast food restaurant employees chanted this statement on November 29, 2012 in New York City in an attempt to raise awareness of their inability to live above the poverty line with their current wages.[2] The demonstration marked the beginning of a nationwide campaign to raise wages and obtain union rights for employees of franchises such as McDonald's and Burger King.[3] Employees of McDonald's franchisees made the company the center of current litigation, however, as employees alleged multiple instances of unfair labor practices against McDonald's in contravention of the National Labor Relations Act (NLRA).[4] Case precedent shows that only franchisees, as opposed to franchisors, could be responsible for unfair labor practices in any franchise agreement, as they exercise immediate control over their employees.[5] Such claims of franchisee control originally made the employees' cases against McDonald's as a franchise appear weak.[6] However, on July 29, 2014, the National Labor Relations Board (NLRB)

1. Steven Greenhouse, *With Day of Protests, Fast Food Workers Seek More Pay*, N.Y TIMES (Nov. 29, 2012), http://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html?_r=0 (on file with the *University of the Pacific Law Review*).

2. *Id.*

3. Jay-Anne Casuga, *NLRB General Counsel Issues 13 Complaints Alleging McDonald's Jointly Liable for ULPs*, BLOOMBERG BNA (Jan. 2, 2015), http://0-laborandemploymentlaw.bna.com.gocat.law.pacific.edu/lerc/2445/split_display.adp?fedfid=60620598&vname=lecbnnews&wsn=499758500&searchid=24191921&doctypeid=5&type=date&mode=doc&split=0&scm=2445&pg=0 (on file with *The University of the Pacific Law Review*).

4. *See* MCDONALD'S FACT SHEET, NAT'L LAB. REL. BD., *available at* http://www.nlrb.gov/news-outreach/ fact-sheets/mcdonalds-fact-sheet (last visited Dec. 27, 2014) (on file with *The University of the Pacific Law Review)* (showing multiple complaints issued against McDonald's for violations of the NLRA).

5. *See* Amicus Brief of General Counsel, Browning-Ferris Indus. (N.L.R.B. 2014) (Case No. 32-RC-109684) [hereinafter Amicus Brief of General Counsel] (stating that under the current joint employer definition, franchisors are not held liable for labor violations of their franchisees employees).

6. *See* Allen Smith, *NLRB General Counsel: McDonald's is Joint Employer with Franchisees,* SOC'Y FOR HUMAN RES. MGMT. (July 30, 2014), http://www.shrm.org/legalissues/federalresources/pages/nlrb-joint-

ruled that for the purpose of the employees' cases, McDonald's should be considered a joint employer with its franchisees.[7] The decision brought about much controversy, especially in light of the fact that the NLRB did not give any legal justification[8] for its decision to make McDonald's a joint employer.[9]

The Service Employees International Union (SEIU) assisted in the execution of these protests and believes the NLRB decision to find McDonald's as a joint employer in cases associated with the protests will make it easier to unionize employees of franchisees.[10] It is possible for workers to unionize within their franchise against the respective franchise owners (the franchisee), but generally, this is not as effective for multiple reasons: (1) the strategies the SEIU uses are not as effective with small business owners; (2) with over 3,000 independently owned franchises, the cost of organizing each individual unit generally outweighs the benefits—there are over 3,000 independently owned franchises, generally making the cost of organizing each individual unit outweigh the benefits; and (3) because McDonald's exerts so much control over its franchisees, company protocol constrains management at local franchises and leaves them without discretion to change their employees' wages and benefits.[11] The SEIU stated that a broader definition of "joint employer" will make it easier to organize employees of franchises into unions.[12] The Board's recent holding in *Browning-*

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employers.aspx (on file with *The University of the Pacific Law Review*) (The ruling by the NLRB's Division of Advice asserting that McDonald's Corp. is a 'joint employer' of its franchisees' employees overturns 30 years of established law regarding the franchise model in the United States.").

7. Office of Public Affairs, *NLRB Office of the General Counsel Authorizes Complaints against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, NAT'L LAB. REL. BD. (Jul. 29, 2014), *available at* http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds [hereinafter *NLRB General Counsel Authorizes Complaints*] (on file with *The University of the Pacific Law Review*).

8. However, a recent opinion, *Browning-Ferris Industries,* __N.L.R.B.__, Case 32-RC-109684 (2015), held that it would be overruling the stricter definition of "joint employer" and implements a "joint employer" standard that is easier to fulfill. The decision outlines reasons for the return to a broader interpretation of "joint employer" and is discussed in Part IV.C of this Comment. *Browning-Ferris* came out approximately one year after the Board announced that it would hold McDonald's as a "joint employer" for the purposes of these decisions.

9. Jeffrey Dorfman, *McDonald's Ruling by NLRB Counsel Puts SEIU's Unionization Goal within Reach*, FORBES (July 30, 2014), *available at* http://www.forbes.com/sites/jeffreydorfman/2014/07/30/mcdonalds-ruling-by-nlrb-counsel-puts-seius-unionization-goal-within-reach/ (on file with *The University of the Pacific Law Review*); *see NLRB General Counsel Authorizes Complaints*, *supra* note 7 (stating that the NLRB will consider McDonald's a joint employer).

10. *Id.*

11. Amicus Brief of General Counsel, *supra* note 5, at 14–15; *See* James Sherk, *Unions for Big Businesses,* NAT'L REV. (Aug. 4, 2014), *available at* http://www.nationalreview.com/article/384453/unions-big-businesses-james-sherk (on file with *The University of the Pacific Law Review*) (explaining franchisees handle all hiring and employment).

12. *See* Ben Penn, *To Unions, McDonald's Joint Employer Status No Slam Dunk, as Fast Food Push Intensifies*, DAILY LAB. REP. (Sept. 18, 2014), *available at* http://www.bna.com/unions-mcdonalds-joint-n17179895030/ (on file with the *University of the Pacific Law Review*) (stating "[a] more liberal NLRB joint employer definition could put franchisors in the situation of having to bargain on behalf of franchisees," which the current standard does not require).

Ferris, which signaled the return of a broader joint employer standard, only reaffirmed the SEIU's hopes for unionization efforts.[13]

However, the SEIU's optimism is not well-founded. The joint employer analysis calls for a case-by-case examination[14] of the franchisor-franchisee relationship.[15] Because the definition of joint employer requires a case-by-case analysis of relevant facts, unions such as those the SEIU created will have to independently establish a joint employer relationship with each franchise before they can unionize all employees working for McDonald's.[16] Although McDonald's has uniform standardized contracts with its franchisees, case precedent does not make it easy for other franchisees to establish a joint employer relationship with their franchisors.[17] Unionizing employees will still have the burden of showing that there are no franchise-to-franchise distinctions large enough to warrant an individual review of the relationships between particular franchisees and McDonald's.[18] McDonald's has a substantial interest in preventing case precedent that establishes a joint employer relationship with a franchisee, and will work hard to prevent courts from recognizing that relationship.[19] The court's declaration of a joint employer relationship is important to unions because McDonald's is only legally bound by the provisions of the NLRA if they it is a joint employer with its franchisees.[20] Therefore, under any case-by-case analysis standard, the SEIU will not be able to effectively unionize McDonald's franchisee's employees; instead, courts should incorporate a new doctrine in which they perform a franchise-by-franchise analysis:[21] once a franchisor is determined to be a joint employer with any one of its franchisees, a joint employer relationship is established between the franchisor and *all* of its franchisees.

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13. Noam Scheiber & Stephanie Strom, *Labor Board Ruling Eases Way for Fast-Food Union's Efforts*, N.Y. Times (Aug. 27, 2015), *available at* http://www.nytimes.com/2015/08/28/business/labor-board-says-franchise-workers-can-bargain-with-parent-company.html?_r=0 (on file with *The University of the Pacific Law Review*).

14. *See Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 18–20 (stating that each case presents "material issues").

15. *Infra* Part IV.C.

16. *Infra* Part IV.C.

17. *Infra* Part IV.C.

18. *See* TLI, Inc., 271 N.L.R.B. 798 (1984) (requiring the moving party to establish a joint employer relationship).

19. *See* Melanie Trottman & Julie Jargon, *NLRB Names McDonald's as 'Joint-Employer' at Its Franchisees*, WALL ST. J. (Dec. 19, 2014), *available at* http://www.wsj.com/articles/nlrb-names-mcdonalds-as-joint-employer-of-workers-at-its-franchisees-1419018664 (stating that McDonald's plans to contest the joint employer allegations against them as they are improperly placed).

20. *See* Raymond G. McGuire, *The Labor Law Aspects of Franchising,* 13 B.C. INDUS. & COM. L. REV. 215, 239 (1972) ("Whether the franchisor will be characterized as an employer of the interest group which the union seeks to represent.").

21. *See infra* Part V.

This Comment will establish the necessity of a franchise-by-franchise doctrine by first analyzing the NLRA. Part II discusses the policy goals of the NLRA, both in its initial enactment and with the Taft-Hartley amendment.[22] Part III will explain the current business-format model of the franchise, whether employees of franchisees were a likely class of persons the NLRA meant to protect, and why the current business-format model does not allow employees to receive their established rights under the NLRA.[23] Part IV will develop the history of the term "joint employer" and conclude that despite a broader interpretation of the joint employer standard, the implementation of the current joint employer doctrine still does not adequately protect collective bargaining rights of employees of franchisees.[24] Part V will examine proposals sent to the Board by the General Counsel suggesting a return to the broader definition of joint employer developed in the 1950s.[25] This Comment will then conclude that the only way employees of franchisees' rights under the NLRA can be fully realized is through the courts' application of a franchise-by-franchise analysis.[26]

II. THE NATIONAL LABOR RELATIONS ACT

Congress enacted the NLRA—also known as the Wagner Act—in part to decrease the number of strikes[27] that were obstructing interstate commerce.[28] Congress believed that meaningful collective bargaining for employees would scale back the strikes—the larger an employee's voice in employment negotiations, the less reason they had to strike.[29] However, in 1947, the Taft-Hartley Act amended the NLRA and imposed restrictions on union practices, causing courts and the NLRB to question whether unions promoted or obstructed interstate commerce.[30] An in-depth analysis of the Taft-Hartley Act shows that the amendments do not change the original policy of the NLRA, and that meaningful collective bargaining is still an essential employee right.[31]

22. *Infra* Part II.

23. *Infra* Part III.

24. *Infra* Part IV.

25. *Id.*

26. *Infra* Part V.

27. The strikes were mainly to gain recognition of labor unions, which in turn would help end the deplorable working conditions during that time (low wages and long hours). Florence Peterson, *Review of Strikes in the United States*, 46 MONTHLY LAB. REV. 1047, 1059–60 (1938).

28. *See infra* Part II.B.

29. *See infra* Part II.B.

30. *See infra* Part II.C.1.

31. *See infra* Part II.C.2.

A. A Brief Overview of the NLRA

"Congress enacted the National Labor Relations Act in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[32] Proponents of the NLRA envisioned that the Act would give employees means to collectively bargain with employers and create a system of self-governance.[33]

1. The Board and General Counsel

The NLRA established the National Labor Relations Board (the Board) to help enforce the NLRA.[34] The President appoints five members to the Board, and the Senate approves the President's selections.[35] The Board has the power to examine issues employees present alleging unfair labor practices.[36] After a hearing, if the Board finds that a preponderance of the evidence shows that the employer violated fair labor practices, it can issue an order requiring desistance of the behavior.[37] Non-compliance with board decisions triggers a review by the United States District Court or direct review by the United States Court of Appeals.[38]

32. *National Labor Relations Act*, NAT'L LAB. REL. BD., http://www.nlrb.gov/resources/national-labor-relations-act (last visited Dec. 30, 2014) [hereinafter *National Labor Relations Act*] (on file with *The University of the Pacific Law Review*).

33. *See* Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 218 (1960) (explaining that the NLRA meant more to Wagner than simply negating industrial strife).

34. 29 U.S.C. § 153 (2014).

35. *Id.*

36. *Id.* at § 160 (unfair labor practices include any violation listed in § 158); *see also id.* at § 158 (listing unfair labor practices such as: interfering with employees right to self-organization, join unions, or bargain collectively through representatives; interfering with the formation or administration of labor organizations; hiring employees on the basis of whether they are or are not in a union . . . etc.).

37. *Id.* at § 160.

38. The case can be brought "in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transactions business, or in the United States Court of Appeals for the District of Columbia." *Id.*

2. Rights of Employees and Employers and Unfair Labor Practices

The NLRA establishes the rights of employees[39] as follows:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted actives for the purpose of collective bargaining or other mutual aid or protection,[40] and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized [in section 158 of this title].[41]

The NLRA then lists five employer actions[42] that are considered unfair labor practices under the Act: (1) interfering with the employee's granted rights, as stated above; (2) interfering with "formation or administration of any labor organization or contribut[ing] financial or other support to it;" (3) "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

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39. The NLRA defines "employee" as:

> [A]ny employee, and shall not be limited to the employees of a particular employer, unless the Act . . . explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an en employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

Id. at § 152. It is important to note that the Taft-Hartley Act restricted the definition of employee by adding "or any individual having the status of an independent contractor, or any individual employed as a supervisor" to those groups explicitly excluded from the definition of employer. Archibald Cox, *Some Aspects of the Labor Management Relations Act,* 61 HARV. L. REV. 1, 4 (1947). Others argue that courts had already dissociated these categories of employees from protection under the NLRA. Robert J. Rosenthal, *Exclusions of Employees under the Taft-Hartley Act*, 4 INDUS. & LAB. REL. REV. 556, 559, 565 (1951).

40. Under the Wagner Act, the text preceding this footnote represented the complete section of the Rights of Employees; the Taft-Hartley Act amended this section by adding the right to refrain from activities. *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. REL. BD., *available at* http://www.nlrb.gov/resources/national-labor-relations-act (last visited Jan. 1, 2014) [hereinafter *1947 Taft-Hartley Substantive Provisions*] (on file with *The University of Pacific Law Review*).

41. 29 U.S.C. § 157 (2014).

42. An employer is defined in the NLRA as "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act." *Id.* at § 152. This comment analyzes the meaning of employer, more specifically of joint employer, in Part III, *infra*.

organization;"[43] (4) "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;" and (5) "refus[ing] to bargain collectively with the representatives of his employees."[44]

The NLRA also restricts "unfair labor practices by labor organization[s]."[45] There are seven practices that union organizations cannot engage in: (1) compelling employees to exercise rights guaranteed by the NLRA; (2) trying to make an employer discriminate against an employee because they are not part of a union; (3) "refus[ing] to bargain collectively with an employer;" (4) participating in or encouraging strikes; (5) requiring excessive payments by employees; (6) coercing employers to pay for services not received; and (7) negotiations must be with certified representatives when employees threaten to strike based on disregard of the representative by the employer.[46]

B. The National Industrial Recovery Act: The NLRA's Predecessor

The National Industrial Recovery Act (NIRA) was enacted before the NLRA, and Senator Wagner intended the NLRA to be modeled after the NIRA.[47] The NIRA's failures shaped the stated purpose of the NLRA.[48]

During the Great Depression, supporters of the New Deal undertook various means to help boost the economy.[49] Congress enacted the NLRA only after the Supreme Court found its predecessor, the NIRA, unconstitutional.[50] Although both the NIRA and the NLRA encourage union organizing, the Acts had different stated purposes.[51] Congress enacted the NIRA with the purpose of harmonizing a balance of production and consumption.[52] Proponents of the NIRA believed economic problems arose because workers who produced goods did not have enough money to purchase them.[53] This resulted in a market imbalance: a high

43. The Act makes various exceptions that allow employers to make agreements with unions under certain conditions. *Id.* at § 158.

44. *Id.*

45. It is important to note that these violations were not part of the original Wagner Act, but were added by the Taft Hartley Act. *1947 Taft-Hartley Substantive Provisions, supra* note 40. This is discussed in more detail in Part II.C of this comment.

46. 29 U.S.C. § 158.

47. *See* E.G. Latham, *Legislative Purpose and Administrative Policy under the National Labor Relations Act*, 4 GEO. WASH. L. REV. 433, 434–39 (1936) (discussing the history of legislation that led to the enactment of the NLRA).

48. *Id.*

49. *Id.*

50. *Id.* at 541–42, 549.

51. *Id.* at 443.

52. LEVERETT S. LYON, ET AL., THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL 5 (1935).

53. *Id.* at 6.

number of goods available for purchase, but few consumers capable of purchasing the goods.[54]

Part of the NIRA was aimed at stabilizing this imbalance by giving workers broader collective bargaining rights, thereby giving them higher salaries and greater purchasing power.[55] However, *A.L.A. Schechter Poultry Corporation v. United States* found the NIRA unconstitutional because it granted legislative powers to the executive branch and extended federal power beyond that granted to Congress under the Commerce Clause.[56] The Supreme Court found the link between interstate commerce and the NIRA too attenuated and therefore outside the power of the Commerce Clause, making the NIRA unconstitutional.[57]

Congress enacted the NIRA with an expiration date and it contained many deficiencies[58] that prompted Senator Wagner to propose similar legislation—the NLRA.[59] Senator Wagner completed the legislation and presented it to Congress before the *Schechter* decision.[60] Wagner originally stated two purposes of the NLRA. The first and main purpose mirrored the NIRA: to keep balance in workers' wages and the amount of goods produced.[61] The second purpose was to limit strikes that obstructed interstate commerce.[62] However, in light of the *Schechter* decision and the NIRA's unconstitutionality, Congress shifted the primary focus of the NLRA to the second reason in order to demonstrate a more direct effect on interstate commerce and ensure the NLRA's constitutionality.[63] In 1937, the Supreme Court declared the NLRA constitutional in *N.L.R.B. v. Jones & Laughlin Steel Corp*.[64]

C. How the NIRA's Policy Affected the Purpose of the NLRA

Despite Congress stating the primary purpose of the NLRA was to prevent strikes, Wagner often said the purpose of the NLRA is "to make the worker a free man."[65] The NLRA enabled workers to live in an industrial democracy, bargain for rights, and establish alternatives other than compliance with decisions of the

54. *Id.*

55. *See* Latham, *supra* note 47, at 441 (explaining section 7(a) of the NLRA).

56. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 541–42, 549 (1935).

57. *Id.*

58. *See* Theda Skocpol et al., *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297, 1301 (1990) (stating that NIRA policies were difficult to enforce).

59. *Id.*

60. Latham, *supra* note 47, at 440.

61. *Id.* at 442–43.

62. *Id.*

63. *Id.* at 443.

64. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30–31(1937).

65. Keyserling, *supra* note 33, at 215.

industrialist bourgeoisie.[66] However, according to Leon Keyserling, Senator Wagner's legislative assistant, "[Wagner] never valued the [NLRA] primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for the economic and related social progress to which his life-long efforts were devoted."[67] This purpose aligns with that of the NIRA, and, despite the shortcomings that caused Congress to shift its primary purposes for enacting the NLRA, Wagner still believed in the original purpose of the NIRA and attributed its failures to faulty administration.[68]

Wagner and other NLRA drafters who had worked on the NIRA took many ideas that were not successfully executed under that legislation and inserted them into the NLRA.[69] The NLRA provided procedures for the Board to successfully enforce its decisions.[70] This demonstrates that Wagner's focus while securing the enactment of the NLRA centered on crafting a long-term solution to regulate interstate commerce by giving workers a voice in employment negotiations.[71] Empowering workers decreases the necessity for strikes that interrupt the flow of business. [72] Further by giving workers a voice in negotiations, their economic leverage is heightened, which helps balance consumer purchasing power with the amount of goods available on the market.[73] The remedy in section 10(a) of the NLRA furthers Wagner's view by empowering the Board "to prevent any person from engaging in any unfair labor practice [listed in the NLRA] affecting commerce."[74]

Therefore, it appears that the purpose of the NLRA is a combination of two goals. The first is to develop a self-governing industry, one where workers are not forced to work in an economy with employers fixing wages and benefits without representation of their employees' needs.[75] The second is to stabilize interstate commerce through means of ensuring communicative measures other

66. *See* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 229–30 (2005) ("NLRA policies set out steps to make workplaces more democratic and to empower workers by giving them the skills to be citizens of a democracy").

67. Keyserling, *supra* note 33, at 218.

68. *Id.* at 219.

69. *See* Skocpol, et al., *supra* note 58, at 1301 (stating that many legislators who worked on the NIRA also helped draft the NLRA, imposing many of the same ideals in both).

70. *See id.* (stating that NIRA policies were difficult to enforce).

71. *See* Keyserling, *supra* note 33, at 220–21 (stating that Wagner "foresaw that this process within our enterprise system could become an integral part of a . . . larger cooperative process guided by intelligence which would animate the whole economy).

72. *See* Cox, *supra* note 39, at 2–3 ("Employer interference with employee organization and denials of recognition were prime causes of industrial disputes.").

73. *See* Keyserling, *supra* note 33, at 218–19 (quoting Senator Wagner stating "[a]s profits rose faster than wages, the excess earnings were invested in more factories, turning out an ever-increasing volume of goods").

74. 29 U.S.C. § 160 (2014).

75. *Supra* Part II.A.

than strikes, and preserve harmony in the economy by keeping employee wages high enough to allow employees to purchase goods.[76]

D. The Taft-Hartley Amendment and its Effect on the NLRA

In 1947, Congress amended the NLRA by passing the Taft-Hartley Act.[77] The Taft-Hartley Act has created confusion regarding the purpose of the NLRA[78] because Congress enacted it with the intent of narrowing union organizations' power.[79] There are two major changes the Taft-Hartley Act made to the Wagner Act: first, the declaration of purpose, and second, the addition of unfair labor practices by labor organizations.[80]

1. Change in Declaration and Findings Clause

The Taft-Hartley Act did not change the original Wagner Act declaration stressing the importance of collective bargaining;[81] however, it did add additional findings that "certain practices by some labor organizations . . . have the intent or necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest."[82] The amendment further stated that "[t]he elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."[83] Courts' confusion in interpreting the purpose of the NLRA stems from this addition to the findings clause.[84] Although the Taft-Hartley Act kept the findings of the importance of collective bargaining to prevent barriers to the stream of

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76. *Supra* Part II.A.

77. *1947 Taft-Hartley Substantive Provisions*, *supra* note 40.

78. *See* James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. REL. REV. 7, 12–13 (1985) (describing the new purpose clause in the NLRA resulting from the Taft-Hartley amendment, and noting that "[a]s a consequence of all of this, the Taft-Hartley Act contains conflicting statements of purpose that open the national labor law to conflicting interpretations of congressional intent").

79. *Id.* at 11.

80. *Infra* Part II.C.1–2. It is important to note that the Taft-Harley Act brought other changes to the NLRA; however, they are not relevant to the discussion within this Comment.

81. The Wagner Act declaration stated in part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (2014).

82. *Id.*

83. *Id.*

84. *See* Gross, *supra* note 78, at 13 (discussing how the different meanings of the purposes clauses in the Wagner Act and the Taft-Hartley Act have led to conflicting interpretations of the NLRA).

commerce, it appears to simultaneously discredit these findings by stating that labor organizations contribute to these obstructions.[85] This resulted in two interpretations of the NLRA's purpose: (1) to use unions as a means to encourage collective bargaining, and (2) to discourage the use of unions because they obstruct the stream of commerce.[86]

2. Addition of Unfair Labor Practices by Labor Organizations

The Taft-Hartley Act also extended potential liability to labor organizations for engaging in unfair labor practices.[87] Originally, the NLRA only contemplated unfair labor practices by employers.[88] The amendment made employers and unions equal under the NLRA.[89] Commentators believe the Wagner Act had not contemplated unfair labor practices by labor organizations because at the time, they had no power to implement them.[90] However, because Congress enacted the NLRA with the purpose of empowering unions, it seems likely that Congress considered the implications of the unions' potential new-found power.[91] Congress did in fact contemplate curtailing the power of unions, but "rejected this view . . . on the ground that since labor organizations exist for the purpose of organizing employees, while employers should not be concerned with questions of organization."[92]

Ultimately, the Taft-Hartley Act placed the process of collective bargaining under Board regulation.[93] Its enactment reflected the shift in view from a belief that unions help the "free flow of commerce," to the view that unions inhibit commerce and that their power needs to be restricted.[94] However, the NLRA as it stands today still states the original purpose of the Wagner Act—thus, courts should interpret the NLRA consistent with Congress' intent.[95] Courts should interpret the addition as simply stating that some labor organization practices may have the effect of obstructing commerce, resulting in Congress placing

85. 29 U.S.C. § 151.

86. *See* Gross, *supra* note 78, at 13.

87. 29 U.S.C. § 158.

88. Jerome S. Wohlmuth & Rhoda P. Krupka, *The Taft-Hartley Act and Collective Bargaining*, 9 MD. L. REV. 1, 6 (1948).

89. Guy Farmer, *The NLRB: Its Past, Present and Future*, 23 TENN. L. REV. 112, 113–14 (1954).

90. *Id.*

91. *See* Cox, *supra* note 39, at 24–25 ("[W]hen the Wagner bill was before Congress, it was argued that labor organizations should be prohibited to the same extent as employers from interfering with, coercing, and restraining employees in the exercise of their rights.").

92. *Id.*

93. Wohlmuth & Krupka, *supra* note 88, at 2.

94. *Supra* Part II.C.1.

95. Dannin, *supra* note 66, at 262–63.

limitations on labor practices by labor organizations.[96] This finding can coexist with Senator Wagner's policy goals, as Congress' preservation of the original purpose clause in the NLRA demonstrates.[97]

The Taft-Hartley Act changed courts' interpretation of the NLRA,[98] but the conservation of the original purpose clause demonstrates that meaningful collective bargaining is still an important policy behind the NLRA.[99] Taft-Hartley's NLRA purpose clause addition does not undermine the importance of collective bargaining and its necessity to keep the economy balanced.[100] The NLRA's purpose is to promote meaningful collective bargaining between employees and employers; this finding justifies the importance of empowering employees of franchisees with collective bargaining power.[101]

III. THE BUSINESS-FORMAT MODEL AND WHY IT SHOULD BE REGULATED UNDER THE NLRA

Two predominant franchise business models exist: (1) the traditional franchise and (2) the business-format franchise.[102] Generally, the traditional franchise involves sale of a final good from franchisors to franchisees.[103] Franchisors with a business-format franchise model offer an entire business-format to their franchisees.[104] Therefore, the two differ in how much guidance the franchisee gets from the franchisor when it purchases a franchise.[105] Because of the larger amount of guidance in the business-format franchise, franchisors directly and indirectly make employment decisions regarding the employees of the franchisees.[106] Thus, franchisors make these decisions without any legal

96. *See id.* at 262 (stating that the Taft-Hartley Act should be read as "exist[ing] within the framework of the NLRA rights").

97. *1947 Taft-Hartley Substantive Provisions*, *supra* note 40.

98. *See* Cox, *supra* note 39, at 45 (stating that "[t]he greatest danger in the amendments, however, lies less in the actual changes in the statute than in the philosophy on which they are based").

99. *See 1947 Taft-Hartley Substantive Provisions*, *supra* note 40 (demonstrating that the original findings clause is still intact).

100. *See* Dannin, *supra* note 66, at 262–63 (noting that the Taft-Hartley amendment should not be read as undermining the original policy goals of the NLRA).

101. *See infra* Part III.B.

102. Francine Lafontaine & Roger D. Blair, *Article: The Evolution of Franchising and Franchise Contracts: Evidence from the United States,* 3 ENTREPRENEURIAL BUS. L.J. 381, 383–84 (2009).

103. *Id.* at 385.

104. Byron E. Fox & Henry C. Su, *Franchise Regulation—Solutions in Search of Problems?*, 20 OKLA. CITY U. L. REV. 241, 249 (1995).

105. *See* Lafontaine & Blair, *supra* note 102, at 385 (2009) (describing a traditional franchise). *But see* Fox & Su, *supra* note 104, at 249 (1995) (describing a business-format franchise).

106. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that franchises presently exercise more control over franchisees, such that they are a necessary party to meaningful collective bargaining).

responsibility for labor violations under the current joint employer doctrine.[107] Because franchisors are not considered employers of the franchisees' employees, the franchisee employees do not have a chance to discuss the parameters of their employment with the franchisors the parties that truly control the labor decisions.[108] Consequently, the franchisee employees are left without the ability to engage in meaningful collective bargaining that the NLRA guarantees to them.[109] This is why the design of business-format franchises warrants the judicial declaration such franchisors' statuses as joint employer.

A. The Business-Format Franchise

In the business-format franchise, "a franchisor, instead of merely licensing the right to distribute and sell a branded product, offers a complete 'business-format' to its franchisees for a substantial fee, with the franchisees bearing most of the business development costs."[110] The distinction between the traditional franchise and the business-format franchise is that franchisors of a traditional franchise simply offer a trademarked product, whereas business-format franchisors offer a product as well as the marketing and business scheme.[111] The business-format is advantageous to franchisees because it lowers the costs of entering the market.[112] Those who want to enter a franchise deal know that the public is familiar with the product or service they are going to offer.[113] The business-format franchise is also advantageous to franchisors because the franchisees are familiar with the local economy, which makes it more likely that the franchises will be profitable.[114] For example, McDonald's affords people the opportunity to enter the market with a product and service that has been successful with the public.[115] McDonald's, the franchisor, also benefits from the

107. *See id.* (noting that under the current joint employer definition, franchisors are not held liable for labor violations of their franchisees employees).

108. *See* Richard F. Griffin, Jr., Gen. Counsel, Nat'l Lab. Rel. Bd., Keynote Address at West Virginia University College of Law's Labor Law Conference: Zealous Advocacy for Social Change (Oct. 24, 2014), *available at* http://wvulaw.mediasite.com/Mediasite/Play/31e143f0990647558b0268e9086ca3e4 [hereinafter Keynote Address at WVU] (on file with *The University of Pacific Law Review*) (stating that McDonald's employees are sent home as a result of a decision made by franchisors).

109. *See* 29 U.S.C. § 151 (2014) (stating the findings clause of the NLRA and its purpose to promote meaningful collective bargaining).

110. Fox & Su, *supra* note 104, at 249.

111. *See* Lafontaine & Blair, *supra* note 102, at 385 (describing a traditional franchise). *But see* Fox & Su, *supra* note 104, at 249 (describing a business-format franchise).

112. Fox & Su, *supra* note 104, at 252.

113. *Id.* at 252 ("The business-format generally results in lower risks of small business failure because the franchisee establishes and operates his business in strict conformance with the format").

114. *Id.* at 251.

115. *See id.* at 252 (stating generally how business format franchises work and that McDonald's is an example of one).

franchisee's localized knowledge of the market.[116] This guaranteed profitability allows the franchise to expand rapidly.[117] The business-format model offers potential for large profits to both parties, which explains its growing popularity.[118]

B. The Business-Format Franchise and the NLRA

Though the concept for the business-format model developed in the 1890s, it did not become popular until the 1950s—fifteen years after Congress enacted the NLRA.[119] This begs the question of whether Congress would have intended the NLRA to cover modern business-format franchisors as employers had they existed in 1935.

Congress enacted the NLRA to provide workers with a way to collectively bargain with employers.[120] Wagner wanted the Act to adapt as the marketplace changed.[121] Even though labor problems today are not identical to those in the 1930s, the continuous strikes over the last two years by fast food workers demonstrate worker dissatisfaction resembling the industrial strife in existence when Congress enacted the NLRA: both stemming from a lack of worker recognition.[122] Therefore, it seems likely that Congress intended the NLRA to encompass the modern franchise because employees of franchisees should be enabled to collectively bargain with franchisors.

C. The Business-Format Franchise and the NLRA after the Taft-Hartley Act

Although courts began interpreting the NLRA as if the Taft-Hartley Act weakened the importance of collective bargaining, the amendment left the statement of the importance of collective bargaining in the NLRA.[123] The Taft-Hartley Act added that some labor organization practices negatively impact interstate commerce.[124] However, Congress knew and contemplated the fact that strikes obstruct interstate commerce.[125] In fact, NLRA legislators recognized collective bargaining as a solution to strikes.[126] Studies had shown that strikes

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116. *Id.*

117. *Id.* at 251.

118. *See* Lafontaine & Blair, *supra* note 102, at 386 (stating that the business-format franchise became popular in the US and Canada, and eventually all over the world).

119. *Id.* at 385–86. *See also* National Labor Relations Act, *supra* note 32.

120. *Supra* Part II.

121. See *supra* note 33 and accompanying text.

122. *See* Cox, *supra* note 39, at 2 (noting that strikes resulted from a lack of collective bargaining and non-recognition by employers).

123. Gross, *supra* note 78, at 11.

124. *1947 Taft-Hartley Substantive Provisions*, *supra* note 40.

125. Cox, *supra* note 39, at 3.

126. *See id.* (stating that Congress had recognized through a study in 1894 that "interference with employee organization and denials of recognition were prime causes of industrial disputes").

resulted from workers frustrated by their lack of recognition from employers.[127] This is why NLRA legislators encouraged collective bargaining as a means to increase employers' worker recognition and, in turn, to reduce strikes.[128] Under this interpretation, the Taft-Hartley Act aligns perfectly with the original intent of the NRLA and the importance of collective bargaining still stands strong.[129]

D. Franchisors Manipulating the Business-Format Franchise to Avoid Labor Violations

The franchise business-format model promotes rapid expansion of companies.[130] The difference today is that the franchise model allegedly leaves all employment decisions to the franchisees.[131] Franchisors claim no legal responsibility to collectively bargain with employees of franchisees because they have no control over working conditions in the franchises.[132] The model only allows employees to produce a company's product and wear the company's symbols.[133] Franchisors state that franchisees make the employment decisions for their workers, and the franchisee's control is generally enough to separate liability of the franchisor.[134] This may be true of the traditional franchise, where franchisees are simply provided with a product; but with a business-format franchise where the franchisor provides a franchisee with an entire model of how to do business, the idea that the franchisor has no control over employment is far-fetched.[135] The General Counsel of the NLRB, Richard Griffin, confirmed this finding by stating that the modern franchises exert more control over their employees than franchisors exercised in previous decisions.[136] The level of control franchisors exert over franchisees and their employees is so great that franchisors have become an indispensable party to any.[137] Griffin also suggests that rapid expansion of the modern franchise model may be partially attributed to the fact that franchisors embraced the ability to indirectly control employment

127. *See* Keyserling, *supra* note 33, at 218 (explaining Wagner's intent when enacting the NLRA).

128. *See id.* (explaining Wagner's understanding of workers frustration with lack of recognition).

129. *See 1947 Taft-Hartley Substantive Provisions, supra* note 40 (stating the intent of the Taft-Hartley Act was to stop obstructive labor organization practices).

130. Fox & Su, *supra* note 104, at 251.

131. Amicus Brief of General Counsel, *supra* note 5, at 14.

132. *Id.* at 14–15.

133. Fox & Su, *supra* note 104, at 251.

134. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that the General Counsel does not wish to overturn decisions where control of franchisors exercised over franchisees is to ensure brand quality).

135. *See id.* (recognizing they did not have the intent to overrule franchise decisions in which control was to protect brand quality). See Part IV.D.2 for a more in-depth analysis of a joint employer standard being applied to a traditional franchise.

136. *Id.*

137. *Id.*

matters without the liability of labor violations.[138] These findings solidify the conclusion that the enactors of the NLRA would have meant for the Act to encompass the modern business-format franchise.

E. The NLRB's Decision to Establish McDonald's as a Joint Employer Reflects the Original Intent of the NLRA

During a keynote speech to law students at West Virginia University, Griffin gave insight into the Board's decision to establish McDonald's as a joint employer.[139] He stated that McDonald's has more everyday involvement with its franchisees than most other franchises.[140] Software has made it possible to monitor various activities in the franchises at any given time.[141] Griffin gave an example of how McDonald's monitors the number of customers being served and employees working.[142] The software contains algorithms that tell the franchisor when a particular franchise is not cost efficient and the franchisee has "to start sending [employees] home."[143]

If an employee is sent home because the franchisor's software determined it was the most cost-effective way to do business that day, any negotiating the employee does with the franchisee will not affect that decision, because it was not the franchisees' decision—it was the franchisor's.[144] Senator Wagner often stated that the purpose of the NLRA was "to make the worker a free man."[145] When a worker is told to go home and is powerless to change the decision, Senator Wagner's goal, and the purpose of the NLRA, is not met.[146] Every worker deserves the opportunity to engage in collective bargaining and reserve some autonomy in the workplace.[147]

F. Why Franchises Do Not Want to be Held Jointly Liable for Labor Violations

Franchises fear the NLRB's decision finding McDonald's a joint employer with its franchisees, because of the consequences the decision brings to all

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138. *Id.*

139. Keynote Address at WVU, *supra* note 108.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that the franchise model exercises control over employees, but does not allow them to collectively bargain with those that are making their employment decisions).

145. Keyserling, *supra* note 33, at 215.

146. *Id.* at 215–16.

147. *See* Cox, *supra* note 39, at 3 (stating that strikes increase when workers are not recognized by employers).

modern business-format franchises.[148] If courts determine that McDonald's is a joint employer, then it will be held jointly liable for any labor violations the franchisees commit.[149] As a result, franchisors believe they will have to make business changes that will ultimately undermine the entire franchise model.[150] However, if the current franchise system developed to allow franchisors to retain control over franchisees' employees without being amenable to suits under the NLRA, as suggested above, workers' rights will better be protected if the franchise system operates differently.[151]

IV. THE DEVELOPMENT OF THE JOINT EMPLOYER DOCTRINE

The NLRA includes in its definition of employer, "any person acting as an agent of an employer."[152] Whether a franchisee is an agent of the franchisor is a complex question that has led courts to develop the joint employer doctrine.[153]

The Board would have to establish that the franchisor and franchisee are joint employers before a franchisor could be liable to franchise employees for alleged labor violations.[154] The National Labor Relations Board developed its current definition of 'joint employer' in both *TLI* and *Laerco*:[155]

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.[156]

148. *See* Trottman & Jargon, *supra* note 19 (stating that McDonald's plans to contest the joint employer allegations against them as they are improperly placed).

149. *See* 29 U.S.C. § 158 (2014) (stating the forbidden practices of employers).

150. Trottman & Jargon, *supra* note 19.

151. *See* Amicus Brief of General Counsel, *supra* note 5, at 5 (stating that there is a possibility the franchise model has developed into what it is today to avoid potential labor violations).

152. 29 U.S.C. § 152.

153. *See id.* (not defining joint employer); *see also* Laerco Transp. and Warehouse, 269 N.L.R.B. 324, 325 (1984) (referring to joint employer issue and not mentioning the NLRA).

154. *See* McGuire, *supra* note 20, at 238–39 (discussing the jurisdictional element of the NLRB's power to find a franchisor violated an employee of a franchisees rights under the NLRA requires a finding that the franchisee and the franchisor are joint employers).

155. TLI, Inc., 271 N.L.R.B. 798, 798 (1984); Laerco Transp. and Warehouse, 269 N.L.R.B. at 325.

156. Laerco Transp. and Warehouse, 269 N.L.R.B. at 324.

To be considered a joint employer, the narrow standard requires actual, direct control by both employers over the employees.[157] The General Counsel of the NLRB proposed a switch to an older definition of joint employer as an attempt to steer away from the new, stricter, standard of joint employer.[158] However, both definitions require a case-by-case analysis.[159]

A. Tracing the Roots of the Doctrine

The initial uses of the joint employer doctrine helped determine whether employees of franchises were able to effectively unionize, either at the term's inception, or under the traditional definition of joint employer. The Board has to find a franchisor to be a "'joint employer' within the meaning of the National Labor Relations Act [for the franchisor] to be liable for a violation of the NLRA."[160] The term, however, is not actually used in the NLRA.[161] The National Labor Relations Board developed its current definition of "joint employer" from two cases decided in 1984: *TLI* and *Laerco*.[162] In those two cases, the definition of joint employer was supported by multiple cases.[163] Two other decisions, *Condenser*[164] and *Hod Carriers*[165] have been cited as support for finding a joint employer relationship, but neither actually uses the term.[166] Therefore, it is likely that these two cases were decided before the term was popularly used to determine employer status under the NLRA.[167] *Condenser* and *Hod Carriers* help explain how courts initially examined factual situations that would trigger a joint employer analysis in courts today.[168]

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157. *See id.* at 325 ("There must be a showing that the employer meaningfully affects matters relating to the employment relationship.").

158. Amicus Brief of General Counsel, *supra* note 5, at 16–17.

159. *See id.* at 4 ("determining joint-employer status has always been a factual issue regardless of how the Board has defined the standard.").

160. N.L.R.B. v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1119 (3d Cir. 1982).

161. 29 U.S.C. § 152.

162. *See* TLI, Inc., 271 N.L.R.B. 798 (1984) (stating the current definition of joint employer); *see also* Laerco Transp. and Warehouse, 269 N.L.R.B. 324 (1984) (stating the current definition of joint employer).

163. *See* TLI, Inc., 271 N.L.R.B. at 802 (citing N.L.R.B. v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1119 (3d Cir. 1982) and Laerco Transp. and Warehouse, 269 N.L.R.B. 324 (1984)) (using the standards created by the cited cases when stating its joint employer definition).

164. N.L.R.B. v. Condenser Corp. of Am., 128 F.2d 67, 71 (3d. Cir. 1942).

165. Hod Carriers Local 300 (Austin Co.), 101 N.L.R.B. 197 (1952).

166. *See Condenser Corp.*, 128 F.2d at 67 (not using the term joint-employer); *see also Hod Carriers*, 101 N.L.R.B. 197 (1952) (also not using the term joint-employer).

167. *See Condenser Corp.*, 128 F.2d at 67.

168. *See infra* Part IV.C.

B. Analyses of Condenser *and* Hod Carriers

In *Condenser*, the Third Circuit Court of Appeals confronted the problem of two separate corporations charged with violations under the NLRA.[169] The Board sought to enforce an earlier labor violation ruling against Condenser and Cornell—Condenser being a "wholly owned subsidiary of Cornell."[170] Cornell acquired materials and sold them to Condenser, who in turn produced goods that Cornell would purchase and sell on the market.[171] Cornell alleged that the corporation was not a proper target in the suit because they were "not an employer within the meaning of Section 2(2) of the Labor Relations Act."[172] The court disagreed with this argument.[173] The court found that because the company constituted one enterprise in the distribution of their products, the relative arrangement of the employees between the two corporations was irrelevant.[174] The two corporations simultaneously "[acted] as employers of those employees and together actively [dealt] with labor relations of those employees,'" and thus, both were liable under the NLRA.[175] However, this case was decided before courts drew the distinction between a "single employer" and a "joint employer."[176] The present day establishment of the "'single employer' relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'"[177] If that distinction existed at the time *Condenser* was decided, it would instead fall under a "single employer" rather than a "joint employer" analysis.[178]

In *Hod Carriers*, the Board found an independent company liable for violations of the NRLA.[179] Austin, a construction company, contracted with Pinkerton to supply guards for a construction project.[180] Employees of Austin, who were also members of the Local 300 union, objected to the presence of the guards because they were not a part of Local 300.[181] In response, Austin cancelled

169. *Condenser Corp.*, 128 F.2d at 71.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* (quoting N.L.R.B. v. Pennsylvania Greyhound Lines Inc., 303 U.S. 261, 263 (1938)).

176. *See* N.L.R.B. v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1122 (3d Cir. 1982) (noting that there has been "a blurring of concepts" regarding the concepts of 'single employer' and 'joint employer').

177. *Id.*

178. *See id.* (using the same language of 'single integrated enterprise' to describe 'single employer' as was used to describe the relationship between Condenser and Cornell); *see also* Condenser Corp. of Am., 128 F.2d at 71 (describing the relationship between Condenser and Cornell as one "where in fact the production and distribution of merchandise is one enterprise").

179. *Austin Co.*, 101 N.L.R.B. 1257, 1258 (1952).

180. *Id.*

181. *Id.*

the contract with Pinkerton.[182] The Pinkerton guards filed suit against Austin for violating the NLRA.[183] Austin responded that the NLRA only applied to them in relation to their own employees.[184] However, the Board looked at the construction of the NLRA and found to the contrary.[185] They held that while particular sections of the NLRA did restrict application to employers and their respective employees, section 8(a)(3) did not restrict application of the statute to employers in this manner; therefore, the NLRA was applicable, even though the guards were not employees of Austin.[186]

The Board recognized that Austin had to terminate the employment contract because the guards assigned were not affiliated with the Local 300 union.[187] In affirming the Trial Examiner's holding that Austin was amenable to suit under the NLRA, the Board "did not adopt his broad rationale to the effect that conduct of any employer which results in coercion of any employee necessarily constitutes unfair labor practice."[188] The Board restricted its finding to section (a)(3) because the statutory language does not include a restriction specific to "[the employer's] employees."[189] However, other sections, notably section (a)(5),[190] do limit application to "[the employer's] employees," making it unlikely that this case' would apply to those sections of the NLRA.[191]

The statutory construction analysis used in *Hod Carriers* would not turn out well for employees of franchisees attempting to unionize for the purpose of collective bargaining.[192] The Board specifically rejected the use of section (a)(5), which forbids employers "to refuse to bargain collectively with the representative of *his* employees."[193] The guards were not considered employees, so the Board would not honor a case where the Pinkerton guards tried to collectively bargain with Austin.[194] Presently, franchisors are not considered employers of their franchisees' employees.[195] Therefore, under *Hod Carrier's* reasoning, it would be

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1258–59.

186. *Id.* at 1259.

187. *Id.*

188. *Id.* at 1260.

189. *Id.* at 1259; 29 U.S.C. § 158 (a)(3) (2014).

190. 29 U.S.C. § 158 (a)(5) states "to refuse to bargain collectively with the representatives of his employees."

191. *Austin Co.*, 101 N.L.R.B. 1257, 1259 (1952) (noting that the Board was limiting the Trial Examiners decision).

192. *See id.* (finding Austin guilty of violation of NLRA because section 158 (a)(3) does not restrict violations to "[employer's employees]").

193. 29 U.S.C. § 158 (a)(5) (emphasis added); *Austin Co.*, 101 N.L.R.B. at 1259.

194. *See id.* (pointing out that 29 U.S.C. § 158 (a)(5) does restrict to "[employer's employees]," making it unlikely that it would extend their holding to a collective bargaining case).

195. *See* Daniel Fisher, *California Supreme Court Rejects Obama Administration Theory on Franchise Employees*, FORBES (Aug. 28, 2014), *available at* http://www.forbes.com/sites/danielfisher/2014/08/28/

impossible for employees of franchisees to collectively bargain with franchisors without a new definition of "joint employer."

C. Interim Developments: The Board's Decision in Browning-Ferris *and Why This Standard is Favorable, but Will Not Help Employees of Franchisees to Unionize*

Under the traditional standard, as set forth by the General Counsel of the National Labor Relations Board:

> [A]n entity was a joint employer where it exercised direct *or* indirect[196] control over significant terms and conditions of employment of another entity's employees; where it possessed the unexercised potential to control such terms and conditions of employment; or where 'industrial realities' otherwise made it an essential party to meaningful collective bargaining.[197]

The Board, in deciding *Browning-Ferris* in 2015, called for amici to brief on the question of whether the Board should return to the traditional standard, or continue to adhere to the standard as laid out in *TLI* and *Laerco*.[198] In his Amicus Brief to the Board, the General Counsel stated his intent to reinstate the traditional standard for determining joint employer status.[199] The traditional standard is relatively broad in comparison to the current standard.[200] Congress enacted the NLRA with the intent that courts would interpret the term "employer" broadly.[201] The General Counsel asserted that the best way to achieve these goals is to return to the traditional standard.[202]

The Brief addressed current problems in meaningful collective bargaining, one of which is the franchise model.[203] This showed that the General Counsel intends to allow collective bargaining between franchisees' employees and franchisors.[204] The Board appeared to adopt the General Counsel's position and

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california-supreme-court-rejects-obama-administration-theory-on-franchise-employees/ (on file with *The University of the Pacific Law Review*) (discussing the California Supreme Court's recent rejection of the franchisor Domino's being responsible for the act of an employee of one of its franchisees).

196. Note that under the current definition, control must be direct. *See* Laerco Transp. and Warehouse, 269 N.L.R.B. at 325 (1984) ("There must be a showing that the employer meaningfully affects matters relating to the employment relationship.").

197. Amicus Brief of General Counsel, *supra* note 5, at 4–5.

198. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1.

199. *Id.* at 17.

200. *See id.* at 4 (stating that the current definition is much narrower than the traditional approach).

201. *Id.* at 9–10.

202. *Id.* at 4.

203. *Id.* at 14.

204. *See* Amicus Brief of General Counsel, *supra* note 5, at 14–15 (stating that the current amount of control exerted over franchises essentially allows franchisors to control employees of franchisees).

found that the expansion of workplace arrangements warranted revisiting the joint employer standard.[205] The Board stated that it may find a joint employer relationship exists if "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law,[206] and if they share or codetermine those matters governing the essential terms and conditions of employment."[207] The Board detailed that it "will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner."[208] The Board then expressly stated that it overruled *TLI* and *Laerco*, as well as any other Board decisions to the extent that they are inconsistent with their current ruling.[209] However, the Board then stated, "[t]he existence, extent, and object of a putative joint employer's control, of course, all may present material issues."[210] The Board applied the new standard to the facts presented in the case.[211] This suggests that the Board will continue to use a case-by-case analysis.

Although the new broader standard will likely classify the McDonald's franchisor-franchisee relationship as a joint employer relationship, the case-by-case factual determination will make unionization efforts difficult for franchisee employees.[212] The problem with using a case-by-case analysis to establish a union is that before employees of a franchisee will be able to establish a legal right to collectively bargain with a franchisor, they will have to establish that the franchise they work for is a joint employer with the franchisor.[213] Most franchises use standardized contracts, with almost no difference in form from franchise to franchise.[214] The identical contracts may make it easier to present a case, but there are factors besides the contracts that are examined under the analysis as well.[215] When other factors are present, it will be easier for large franchisors to draw out

205. *Browning-Ferris Industries* at 11.

206. The opinion details that under common law standards, "the right to control is probative of an employment relationship—whether or not that right is exercised." *Id.* at 13. The opinion discusses several restatements, and then states that the courts, in imposing the traditional standards, have always imposed a common law employment relationship definition. *Id*. at 13–14.

207. *Id.* at 15.

208. *Id.* at 15–16.

209. *Id.* at 16.

210. *Id.*

211. *Id.* at 18–20.

212. *See id*. (stating that different cases present "material issues").

213. *See* McGuire, *supra* note 20, at 239 (explaining that the threshold question is "whether or not the franchisor will be characterized as an employer of the interest group which the union seeks to represent").

214. Lafontaine & Blair, *supra* note 102.

215. *See* Amicus Brief of General Counsel, *supra* note 5, at 16–17 (stating that to find joint employer status, the Board should look at "the totality of the circumstances, including the way the separate entities have structured their commercial relationship").

litigation using minor discrepancies between franchises.[216] Therefore, any definition of joint employer that involves a case-by-case analysis will make unionizing unnecessarily difficult for employees of all franchisees.[217]

V. THE NEED FOR A FRANCHISE-BY-FRANCHISE DOCTRINE

Part III of this Comment established that, under the original intent of the NLRA, meaningful collective bargaining needs to take place between franchisors and employees of franchisees in modern franchises.[218] The traditional standard the General Counsel presented as the solution to foster collective bargaining is not sufficient because it does not allow union formation.[219] Unions and labor organizations are vital for employees engaging in the collective bargaining process.[220] The joint employer definition should still be based on the totality of the circumstances and indirect effect tests, but instead of requiring a case-by-case analysis, the definition should require a franchise-by-franchise analysis. This Part will define the franchise-by-franchise doctrine and then apply it to a traditional franchise, a business-format franchise, and a distributorship.[221]

A. The Franchise-by-Franchise Analysis Doctrine

The franchise-by-franchise doctrine will encompass the same factors used in the *Browning-Ferris* decision: (1) whether the franchisors are exercising any kind of control over the employees of franchisees and (2) whether there is "potential to control terms and conditions of employment."[222] Employees will have the burden to show that the franchisor exercises enough control such that meaningful collective bargaining cannot occur without the involvement of the franchisor.[223] If the employees are able to prove control is strong enough to establish a joint employer relationship, the joint employer relationship will be applied throughout the entire franchise. This means that every franchisee in the franchise would be considered a joint employer with the franchisor.

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216. *See* Trottman & Jargon, *supra* note 19 (stating that McDonald's plans to contest the joint employer allegations against them, as they are improperly placed).

217. *See supra* Part IV.C.

218. *Supra* Part III.C.

219. *Supra* Part IV.C.

220. Dannin, *supra* note 66, at 251.

221. *Infra* Part V.A.

222. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 13–15.

223. Application of a three-factor test will demonstrate how much control is necessary to develop a joint employer relationship. *See infra* Part V.B.

B. Applying the Franchise-By-Franchise Doctrine

The franchise-by-franchise doctrine will be applied to three different types of franchises: a traditional franchise, a business-format franchise, and a distributorship. The doctrine applied to a traditional franchise demonstrates a middle-ground where a joint employer designation will depend on the factual scenario.[224] The doctrine applied to a business-format franchise will generally return a joint employer finding.[225] The doctrine applied to a distributorship, a franchise that typically has no contractual support or training from its franchisor,[226] generally will not result in a joint employer relationship.[227]

1. Application of the Doctrine to a Traditional Franchise

A car dealership is the quintessential traditional franchise.[228] In the traditional franchise, "the franchisor is a manufacturer who sells finished or semi-finished products to its franchisees . . . [i]n turn, the franchisees resell these products to consumers or other firms in the distribution chain."[229] Franchisors retain control over various elements of the business, such as requiring a certain number of cars to be sold, requiring only parts from the manufacturer to be stocked at the dealership, and the overall appearance of the franchised store.[230] However, because the dealership is receiving a final product, the necessity for franchisors to control aspects of the franchisee dealership is minimal.[231] Brand quality is assured because the franchisor manufactures the product.[232]

Applying the first factor of the proposed joint employer test, which questions whether the franchisor has exercised any control over the franchisee, demonstrates a low level of control. The franchisor does not control the employees at the dealership; it merely maintains control over the appearance of

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224. *See infra* Part V.B.1.

225. *See infra* Part V.B.2.

226. *See* BARBARA BESHEL, IFA EDUC. FOUND., AN INTRODUCTION TO FRANCHISING (2010), *available at* http://www.franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/introtofranchising_final.pdf (on file with *The University of the Pacific Law Review*) (stating that a distributorship is an alternative to franchising).

227. *See infra* Part V.B.3.

228. *See* Lafontaine & Blair, *supra* note 102, at 385 ("[T]raditional franchising in the United States is comprised largely of automobile dealerships, gasoline service stations, and soft-drink bottlers).

229. *Id.*

230. *See* Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L. J. 1135, 1140–45 (discussing the amount of control that franchisors used to have over automobile dealerships, and how that amount has decreased).

231. *See* Lafontaine & Blair, *supra* note 102, at 385 (stating that traditional franchises typically receive the final product from the franchisor).

232. *See* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1203, 1528 (1990) (stating that brand quality is still a legitimate reason for franchisors to direct control over franchisees).

the dealership.[233] Applying the second factor, regarding the capability of the franchisor to exercise control over the employees of the franchisee, weighs against a joint employer finding as well. Generally, dealership contracts do not contain clauses allowing the franchisor to control any aspect of employment.[234] In fact, franchisors intentionally keep clauses giving a franchisors' right to control franchisees' employees out of the contracts because they do not want to be responsible for labor violations.[235] Although it is unlikely that any franchise contract, including business-format contracts, contain such a clause,[236] the relevant distinction lies in the control necessary to maintain brand quality. In the traditional franchise, the need is low because the product has already been made.[237]

Employees may bring in evidence showing the way the entities have chosen to structure their relationship as well.[238] If there is sufficient evidence that the franchisor controls aspects of franchise employee's employment, the franchise will be deemed a joint employer. Once this declaration is made, the franchisor will be a joint employer with all of its franchisees. Therefore, under a broad definition of joint employer combined with application of the franchise-by-franchise doctrine, all employees of a traditional franchise will be able to unionize and collectively bargain with the franchisor.

2. Application of these Factors to the McDonald's Cases

The application of the first factor of the test comes out strongly in favor of the employees in the McDonald's cases. The General Counsel unearthed evidence that McDonald's would monitor business in real time and tell franchisees immediately how many employees to have on duty when business was slow.[239] This is a perfect example of a franchisor exercising control over the employment of franchisees' employees. The second factor, as stated above, will generally come out in favor of the franchise.[240] The franchise will always shy away from including any kind of contract clause that grants them control over

233. *See* BESHEL, *supra* note 226; s*ee also* Amicus Brief of General Counsel, *supra* note 5, at 4–5 (stating what traditional franchises typically exert control over).

234. Kessler, *supra* note 230, at 1140–45.

235. *See* Lafontaine & Blair, *supra* note 102, at 385 (stating that franchises know that clauses directly affecting employment of employees of franchisees will make them liable for employment violations).

236. *Id.*

237. *See* BESHEL, *supra* note 226 (stating that product distribution franchises, another common name for traditional franchises, simply distribute the franchisors finished product).

238. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 13, n. 68.

239. *See* Keynote Address at WVU, *supra* note 108 (stating that McDonald's employees are sent home as a result of a decision made by franchisors).

240. *See supra* Part IV.D.2.

aspects of franchise employment because they are aware this may expose them to liability.[241]

However, due to the structure of the arrangement, it is clear that the franchisor has the opportunity to exercise control over the franchisees employees. McDonald's, the franchisor, called franchisees and told them to send some of their employees home.[242] Franchise owners then sent their employees home.[243] These employees cannot meaningfully bargain with franchisee owners to change this practice because it is not the franchisee owner making the decision, it is the franchisor.[244] The only way these employees can change the conditions of their employment is to negotiate with the franchisors. Therefore, McDonald's should be designated as a joint employer with all of its franchisees.

McDonald's is now clearly established as a joint employer with the franchisees that brought these cases under the franchise-by-franchise doctrine. The joint employer designation is justified here because McDonald's demonstrated its ability to control aspects of franchise employment decisions. This control needs to be balanced with the employees' ability to collectively bargain with the franchisor. Because McDonald's ability to control has been established, the workers' right to be protected through union representation need to be established. Thus, all employees of McDonald's franchisees will be able to collectively bargain with the franchisor.

3. Application to a Distributorship

A distributorship is a franchise that generally has no contractual support or training from its franchisor.[245] Because distributorships do not require a storefront, they generally do not need as much guidance as a traditional or business-format franchise.[246] Distributorship contracts between the franchisor and the franchisee only specify amounts of goods to be purchased.[247] Because franchisors do not exercise control over franchisees in distributorship contracts, there is no joint employer relationship.

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241. *See* Trottman & Jargon, *supra* note 19 (stating that McDonald's plans to contest the joint employer allegations against them as they are improperly placed, demonstrating their fear of being held liable for labor violations).

242. *See* Keynote Address at WVU, *supra* note 108.

243. *Id.*

244. *See supra* Part III.D.

245. *See* BESHEL, *supra* note 226 (stating that a distributorship is an alternative to franchising).

246. *See id.* (stating that distributorships are generally companies such as Amway and Color Me Beautiful Cosmetics).

247. *See* Mack Mitsheva, *Difference Between a Franchise & a Distribution Agreement*, HOUSTON CHRON., *available at* http://smallbusiness.chron.com/difference-between-franchise-distribution-agreement-41153.html (last visited Feb. 5, 2015) (on file with *The University of the Pacific Law Review*) (stating that distributorships do not have control over the way products are sold).

VI. CONCLUSION

There is clearly worker dissatisfaction under the current franchise model; there have been multiple strikes in the last few years because of employment conditions.[248] The strikers are not just demanding higher wages; they are demanding the ability to unionize.[249] Congress enacted the NLRA to grant these rights to employees.[250]

The General Counsel's intent to allow collective bargaining for franchisee employees is clear.[251] This is further reflected in the Board's new decision in *Browning-Ferris*, which emphasized that one of the reasons for a broader joint employer standard is the ever evolving structure of workplace arrangements.[252] The only problem in its effort to empower workers of franchises is that the new definition of joint employer will make it difficult for franchisee employee's to unionize.[253] Any definition that continues to use a factual determination of joint employer status that will be ineffective in unionization efforts because of the difficulty posed by individually labeling each franchise a joint employer with its franchise. With the franchise-by-franchise doctrine, the goal of unionization is within reach. Once the ability to control is demonstrated over one franchisee, the franchisors' ability to control all of their franchisees is apparent. The franchise-by-franchise doctrine compensates for this ability to control by empowering employees of franchisees to unionize, and thus, to collectively bargain with their respective franchisors.

248. Greenhouse, *supra* note 1.

249. *Id.*

250. *Supra* Part III.

251. *Browning-Ferris Industries*, __ N.L.R.B. __, Case 32-RC-109684, 1, 11.

252. *Id.*

253. *Supra* Part IV.D.