

Claremont Journal of Law & Public Policy

VOLUME 11
ISSUE 1

ABOUT THE JOURNAL

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. Together, we foster a community of like-minded students who are passionately engaged in learning and debate about the critical issues of our time!



04

CULTURE FOR SALE: THE EXPLOITATION OF INDIGENOUS KNOWLEDGE AND THE CALL FOR A *SUI GENERIS* INTELLECTUAL PROPERTY FRAMEWORK

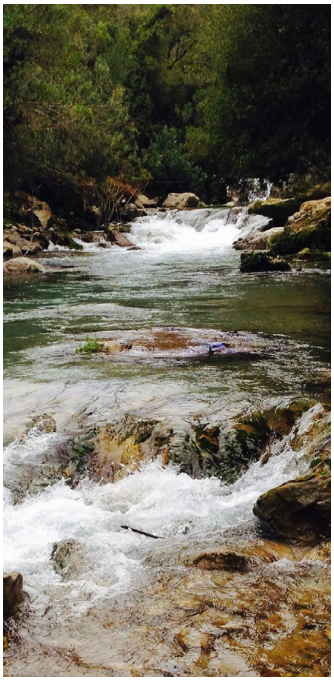
Grace Zheng PO '26
Staff Writer



11

GOVERNMENT SHUTDOWNS: AN AMERICAN DYSFUNCTION AND HOW TO ADDRESS IT

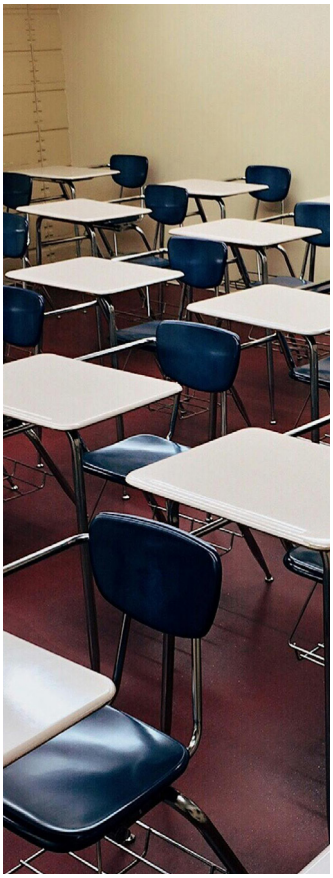
Kevin Wang CMC '27
Staff Writer



28

PROTECTING LAGUINTAS CREEK: AN ANALYSIS OF CALIFORNIA'S ENVIRONMENTAL LITIGATION FRAMEWORKS

Samantha Gottsegen PZ '25
Staff Writer



41

INTRA-DISTRICT FUNDING DISPARITIES: UNEQUAL STUDENT OUTCOMES HAVE DRASTIC CONSEQUENCES

Sophia Saunders SC '26
Staff Writer

EXECUTIVE BOARD

Co-Editors-in-Chief

Celia Parry PO ’23.5

Jon Burkart PO ’24

Managing Editor

Anna Short PO ’24

Executive Aides

Arivumani Srivastava PO ’26

Grace Zheng PO ’26

Staff Editors

Anna Chiang PO ’24

Arivumani Srivastava PO ’26

Bayarmaa Bat-erdene PO ’26

Elena Townsend-Lerdo PO ’26

Gina Yum PO ’25

Ireland Griffin PO ’26

Michelle Lee PO ’25

Design Editor

Grace Zheng PO ’26

BEHIND THE COVER



This photo courtesy of Pomona College shows an image of the fountain located in the center of the Smith Campus Center.

LETTER FROM THE EDITORS

Dear Reader,

We are thrilled to welcome you to Volume 11, Issue 1 of the Claremont Journal of Law and Public Policy! This edition of the Journal came together during the Fall 2023 semester and features work from writers across the 5Cs. We are pleased to announce Kevin Wang and Grace Zheng as the co-winners of this edition's Byron Cohen Prize for excellence in research, writing, and analysis.

This fall, Celia Parry PO '23.5 and Jon Burkart PO '24 lead the Journal as Co-Editors-in-Chief with Anna Short PO '24 as the Managing Editor. Executive Aides Arivumani Srivastava PO '26 and Grace Zheng PO '26 were essential to Journal functioning, helping with administrative work, meetings. and event planning. This fall, we had many writers and editors stay on with the Journal from last year, and we were excited to welcome 12 new writers to our team in September after one of our most competitive application cycles to date. This fall was Celia's last semester, and she's grateful to her fellow journalers for their commitment to the study of law and public policy and their friendship. She's happy to be leaving the Journal in such capable hands.

In addition to working on this edition of the Journal, we hosted a variety of social and career development events this fall, including presentations for the 10.2 edition, legal writing workshops, a headshot event for journalers, a trip to Bert and Rocky's, and an end-of-the-semester celebration at Union on Yale. We're looking forward to continuing these events in the spring.

We are grateful for the time that contributors, editors, and staff writers put into this edition. Thank you to Grace Zheng, Kevin Wang, Sami Gottsegen, and Sophia Saunders for their contributions to this edition. Thank you to our Executive Aides, Arivumani Srivastava and Grace Zheng, for their organizational prowess and enthusiasm and to our editors Anna Chiang, Arivumani Srivastava, Bryan Thomas, Elena Townsend-Lerdo, Gina Yum, and Michelle Lee for working with our writers throughout the semester. Thanks to our faculty advisor, Professor Amanda Hollis-Brusky, for her sponsorship and our longtime partnering organization, the Salvatori Center at Claremont McKenna College.

For those who are interested in joining us, email us at info.5clpp@gmail.com. We also welcome outside submissions to future print editions. Happy reading!

Best,

Celia Parry
Co-Editors-in-Chief

Jon Burkart
Co-Editors-in-Chief

Anna Short
Managing Editor

CULTURE FOR SALE:

THE EXPLOITATION OF INDIGENOUS KNOWLEDGE AND THE CALL FOR A *SUI GENERIS* INTELLECTUAL PROPERTY FRAMEWORK

INTRODUCTION

Debates surrounding intellectual property (IP) rights in developing countries have typically focused on the transfer of knowledge from the West. The most common area of concern is increasing the accessibility of inventions from the Global North—such as drugs and equipment—that can be used to facilitate economic development. However, knowledge transfer is a process that goes both ways. Especially with globalization accelerating in recent years, there is an increasing need to recognize how institutions from the Global North use IP laws to exploit indigenous knowledge (IK). Whilst many Indigenous communities lack the resources necessary to interpret and use IP laws, the problem extends beyond accessibility. This essay will illustrate how our IP systems are not inclusive of Indigenous communities in their design, depriving them of the ability to acquire adequate compensation and attribution for knowledge that is rightfully theirs.

Through analyzing conflicts between IK and IP systems on the African continent, this essay will argue for the development of *sui generis* IP frameworks at the national level. This essay is divided into four sections. First, it will provide a brief overview of the existing standards for IP protection and how they have developed over time. Second, it will highlight the incompatibility between IK and current IP systems. Third, it will dive into an in-depth case study where the knowledge of the San people, an Indigenous group, was exploited without their consent. Finally, it will propose some components for a *sui generis* IP framework for IK, before analyzing the solution adopted by the South African Government and its limitations.

I: A BRIEF OVERVIEW OF INTELLECTUAL PROPERTY SYSTEMS

To understand the problem facing Indigenous communities, it is important to understand current standards of IP protection and how they came to be. While the idea of IP protection can be traced back to 500 B.C.E., the seeds of our modern IP system didn't come to fruition until the 17th-18th century, when the British parliament passed the Statute of Monopolies and the Statute of Anne in 1624 and 1710 respectively.[1] Both statutes operate similarly to our current IP laws—the Statue of Monopolies provided patents to useful inventions and the Statue of Anne gave authors exclusive copyright over their works.[2] These statutes were enacted for the same reason we have IP protection today: the resources required to create an original piece of work almost always outweighs the amount necessary to replicate it. Without legal protection, piracy of works would run rampant, leaving the original creators with little incentive to create again. Thus, enacting IP protection was, and continues to be, critical to encouraging innovation within a society.

Although governments initially focused on creating IP legislation for domestic use, as trade amongst countries increased, they became concerned about the theft of IP across borders. This led to the creation of many important international treaties, including the 1886 Berne Convention for the Protection of Literary and Artistic Works and the 1883 Paris Convention for the Protection

1 Adam Moore & Ken Himma, *Intellectual Property*, Stan. Encyclopedia of Phil. (Edward N. Zalta & Uri Nodelman eds., Fall 2022 ed. 2022), https://plato.stanford.edu/archives/fall2022/entries/intellectual-property/ (last visited Dec. 6, 2023).

2 *Id.*

of Industrial Property.[3][4] However, the most comprehensive multilateral treaty on IP remains the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights, otherwise known as the TRIPS Agreement.[5] The TRIPS Agreement is comprehensive because it encompasses all key categories of IP, including copyright, trademarks, geographical indications, industrial designs, patents, integrated circuits, and undisclosed information.[6] It not only sets out minimum standards of protection for members with regard to those categories, but scholars also note it has more "teeth" compared to earlier conventions.[7] This is because the TRIPS Agreement contains binding enforcement mechanisms. For example, member states can initiate proceedings against others for non-compliance through the World Trade Organization (WTO)'s dispute settlement system, which may result in penalties such as trade sanctions.[8] Even though cross-border theft of IP still undoubtedly occurs, with over 164 member countries, the TRIPS Agreement lays out fundamental standards for IP protection.

To fully understand the issue, we must then define what IP and IP rights are. As defined by the World Intellectual Property Organization (WIPO), the specialized agency of the United Nations for IP policy, IP refers to "creations of the mind."[9] It encompasses any piece of work ranging from a poem to the formula of a medication. Building from this definition, IP rights refer to the legal rights a creator has with regard to their IP. In practice, they are divided into two categories: economic rights and moral rights. Economic rights refer to the right to monetize a piece of work and derive profits.[10] They are essential to innovation—without the ability to derive financial reward from their work, creators would lose the incentive to create. Additionally, economic rights are transferable, meaning another person can derive profits from a piece of work as long as permission is granted by the original rights holder. This is commonly done through licensing, selling, etc.

In addition to economic rights, IP rights also encompass moral rights, which primarily consist of the right of attribution and the right of integrity. The right of attribution empowers creators to claim ownership of their work, whilst the right of integrity enables creators to prevent harmful modifications, such as distortion, mutilation, or unapproved alterations.[11] Unlike economic rights, moral rights cannot be transferred through contracts. This is because they are designed to preserve the original creator's connection to their work and as such, cannot be separated from the creator.

Finally, IP rights have an expiration date. Though this varies depending on the jurisdiction and type of work, in general, economic rights end after a set amount of years, which may occur during the creator's lifetime or after their death.[12] On the other hand, as moral rights are intrinsically tied to the creator, they simply end with the creator's death.[13] After the IP protection on a piece of work expires, it enters the public domain, meaning it can now be freely used without permission from the original rights owner.

II. THE CONFLICT BETWEEN INDIGENOUS KNOWLEDGE AND INTELLECTUAL PROPERTY SYSTEMS

To understand the conflict between IK and current IP systems, we must first identify what constitutes IK.

3 *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, World Intell. Prop. Org., https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Dec. 6, 2023).

4 *Summary of the Paris Convention for the Protection of Industrial Property (1883)*, World Intell. Prop. Org., https://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Dec. 6, 2023).

5 *Overview: the TRIPS Agreement*, World Trade Org., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Dec. 6, 2023).

6 *Id.*

7 *Module 2: The International Framework - Copyright for Librarians*, Berkman Klein Ctr. for Internet & Soc'y at Harv. U., https://cyber.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework (last visited Dec. 6, 2023).

8 World Trade Org., *supra* note 5.

9 World Intell. Prop. Org., What is Intellectual Property? (2020), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf (last visited Dec. 6, 2023).

10 *Id.*

11 *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, U.S. Copyright Off., https://www.copyright.gov/policy/moralrights/ (last visited Dec. 6, 2023).

12 *Moral Rights in U.S. Copyright Law*, Copyrightlaws.com (Jan. 8, 2023), https://www.copyrightlaws.com/moral-rights-in-u-s-copyright-law/ (last visited Dec. 6, 2023).

13 *Id.*

The South African 2019 Protection, Promotion, Development and Management of Indigenous Knowledge Act defines IK as "knowledge which has been developed within an Indigenous community and has been assimilated into the cultural and social identity of that community."[14] IK can be further divided into three subcategories: knowledge of a functional nature, knowledge of natural resources, and Indigenous cultural expressions.[15] To align with WIPO's terminology, I will refer to them in this essay as traditional knowledge (TK), genetic resources (GRs), and traditional cultural expressions (TCEs) respectively.[16]

Although there is still no universal agreement on how to define TK and TCEs, the WIPO provides some working definitions. TK refers to "knowledge, know-how, skills, and practices that are developed, sustained, and passed on from generation to generation within a community," such as knowledge of the specific properties of a plant.[17] However, TK only focuses on technical and scientific knowledge and does not include artistic practices. Those are considered TCEs, or "traditional cultural forms, whether tangible and/or intangible, in which traditional culture and knowledge are expressed."[18] Common examples include folklore, art, and textile practices.

Unlike TK and TCEs, there is an internationally agreed upon definition for GRs. In the 1992 Convention on Biological Diversity—which was signed by more than 150 nations—GRs refer to "genetic material of plant, animal, microbial or other origin containing functional units of heredity that has actual or potential value."[19] Common examples include medicinal plants used by Indigenous communities. Whilst naturally occurring GRs cannot be protected under IP laws, that is, they are not creations of the human mind, inventions based on them and their associated traditional knowledge are eligible for protection.[20]

One of the main challenges of protecting IK is the question of ownership. Current IP systems focus on ownership by an individual entity, such as an inventor or a corporation. On the other hand, IK involves collective ownership. This is because Indigenous communities are deeply rooted in a communal way of life in which property and cultural practices are shared, rather than owned by individuals.[21] IK is passed down through oral histories and gradually refined through intergenerational participation, making it the accumulation of Indigenous peoples' lived experiences.[22] However, the incremental development of these communal practices over time makes individual attribution impossible when it comes to IK. Indigenous communities also frequently live in territories that span across multiple present-day jurisdictions, which further complicates their ability to claim and receive benefits for their IP.

Another key challenge of integrating IK into existing IP systems is the lack of documentation. IP laws require ideas and expressions to be captured in a fixed form to be eligible for protection. This is crucial because it helps to establish information necessary to resolve IP disputes, such as ownership, originality, and the timestamp of the work. However, IK is often passed down orally, rather than through formal documentation. This makes it very difficult to prove the authenticity and ownership of IK within our existing IP framework and consequently impacts Indigenous communities' ability to resolve IP disputes.

Additionally, the limited period of protection offered by

14 *Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (No. 6 of 2019)*, Food & Agric. Org. United Nations (2022), https://www.fao.org/faolex/results/details/en/c/LEX-FAOC192229/ (last visited Dec. 6, 2023).

15 *Id.*

16 *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*, World Intell. Prop. Org., https://www.wipo.int/ip-development/en/agenda/flexibilities/resources/tk_gr_tce_f.html (last visited Dec. 6, 2023).

17 *Traditional Knowledge*, World Intellectual Prop. Org., https://www.wipo.int/tk/en/tk/index.html (last visited Dec. 6, 2023).

18 *Traditional Knowledge*, Traditional Cultural Expressions and Genetic Resources, Jamaica Intell. Prop. Off., https://www.jipo.gov.jm/node/90 (last visited Dec. 7, 2023).

19 *The Convention on Biological Diversity*, Convention on Bio. Diversity (2023), https://www.cbd.int/convention/ (last visited Dec. 7, 2023).

20 World Intell. Prop. Org., Intellectual Property and Genetic Resources (2023), https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-10-en-intellectual-property-and-genetic-resources.pdf.

21 George Mukuka, Reap What You Have Not Sown Indigenous Knowledge Systems and Intellectual Property Laws in South Africa 178 (2010).

22 Álvaro Fernández-Llamazares & Mar Cabeza, *Rediscovering the Potential of Indigenous Storytelling for Conservation Practice*, 11 Conservation Letters 12 (2018).

IP laws also conflicts with the intergenerational nature of IK. As discussed in Section I, creators only receive legal protection on their IP for a fixed period before it enters the public domain. Taking copyright in the US as an example, the economic rights associated with the work end 70 years after the creator's death, whilst moral rights end directly with the creator's death.[23] There are two problems: first, IK does not have a single creator, which already makes defining the expiration of rights difficult; second, IK (especially TCEs) is intended to be preserved and shared with future generations. Therefore, it can be argued that there shouldn't be an expiration date on moral rights—such as the right of attribution and right of integrity—for Indigenous communities. After all, having unlimited access to these rights is pivotal to Indigenous communities' ability to prevent the misappropriation or misuse of their knowledge. Here, it is also important to note that while we typically seek IP protection to incentivize innovation, IK already exists–we need not incentivize it.[24] Therefore, the motivations for protecting IK and non-IK are fundamentally different.

Lastly, Indigenous communities have a fundamentally different perspective on ownership. Due to the communal value placed on knowledge, most African communities believe that IK should be kept in the public domain so that it is accessible.[25] Sadly, this has proven to be a problem with the entrance of foreign organizations into South Africa. In particular, research institutions, biotechnology companies, and pharmaceuticals from the Global North have a vested interest in exploiting IK to the exclusion of others, including the original holders of the knowledge. Meanwhile, Indigenous communities have limited ability to challenge this exploitation, especially when such activity occurs outside the jurisdiction of their governments. The following case covers many of these issues.

III. THE SAN PEOPLE AND THE HOODIA PLANT: A CASE OF BIOPIRACY

To survive in the harsh environmental conditions of Africa, Indigenous communities have long depended on TK, especially knowledge of specific plant properties. The term biopiracy emerged in the early 1990s to describe the unethical appropriation of TK and GRs from developing regions by organizations, usually corporations or researchers from developed countries.[26] Specifically, it refers to when TK and GRs are used without consent or intent for access and benefit-sharing (ABS) with the original communities.[27] The entities or individuals that obtain the resources then patent the material, allowing them to privatize and profit from knowledge that is not theirs.[28] In effect, it furthers the exploitation of developing countries whilst advancing the interests of large corporations.

The case of biopiracy I examine specifically involves TK of a plant: the Hoodia. Hoodia is a spiny succulent plant that can be found in the Kalahari desert in South Africa.[29] It is leafless and slightly bitter, with appetite-suppressing abilities.[30] In 1995, the government-funded South African Council for Scientific and Industrial Research (CSIR) identified the active ingredient in Hoodia that acts as a hunger and thirst suppressant.[31] The CSIR proceeded to patent the use of the active ingredient, dubbing it "P57." CSIR then sold the commercial development rights of this active ingredient to Phytopharm, a British multinational pharmaceutical company.[32] Although Phytopharm did not ultimately develop the drug, they still announced to the public that they had found a potential cure for obesity that is completely derived from a natural product.[33] This drew the attention of American biotechnology and pharmaceutical company Pfizer, to whom Phytopharm sold the licensing rights for US$21 million.[34] However, with P57's new fame, a new problem

23 Copyrightlaws.com, *supra* note 12.

24 S. Afr Cultural Observatory, Publication Report: Intellectual Property in the Cultural and Creative Industries 55 (2018).

25 Loretta Feris, *Protecting Traditional Knowledge in Africa: Considering African Approaches*, 4 Afr. Hum. Rts. L. J. 243 (2004).

26 Rachel Wynberg, *Biopiracy: Crying Wolf or a Lever for Equity and Conservation?*, 52 Res. Pol'y 1 (2023).

27 *Id.*

28 *Id.*

29 Lere Amusan, *Politics of Biopiracy: An Adventure into Hoodia/Xhoba Patenting in Southern Africa*, 14 Afr. J. Tradit. Complement. Altern. Med. 103 (2016).

30 *Id.*

31 *Stolen Knowledge: The Hoodia Case*, Pub. Eye (2001), https://www.publiceye.ch/de/news/detail/stolen-knowledge-the-hoodia-case (last visited Dec. 7, 2023).

32 *Id.*

33 *Id.*

34 *Id.*

arose: CSIR did not discover the properties of Hoodia on its own. Some San members had given CSIR researchers information on the appetite-suppressing properties of Hoodia.[35] Not only did the CSIR researchers neglect this interaction, but when confronted, they erroneously stated that the San people had already gone extinct.[36]

The San people consist of several Indigenous ethnic groups who live in what is now known as Angola, Namibia, Botswana, and South Africa.[37] Though the San only have a population of around 100,000 today, it is estimated that they had a pre-colonial population of several million.[38] They are also thought to be the oldest inhabitants of Southern Africa, with archaeologists dating their culture back 20,000 years.[39] Unsurprisingly, surviving in the desert was difficult and the San relied on their extensive knowledge of plants to endure long periods of hunger and thirst. Specifically, hunters would carry the stem of Hoodia plants with them, using Hoodia's appetite-suppressing abilities to sustain themselves on long hunting expeditions.[40] When researchers in the CSIR learned of these practices, they thought that they could create a new weight-loss drug by extracting the appetite-suppressing ingredient of Hoodia. After learning about the CSIR's patent through a Phytopharm press release, the South African chapter of the Working Group of Indigenous Minorities in Southern Africa (WIMSA) decided to file a lawsuit against the CSIR and its licensees.[41] As WIMSA attorney Roger Chennells explained, "They are very concerned. It feels like somebody has stolen their family silver and is making a huge profit out of it. The bushmen do not object to anybody using their knowledge to produce a medicine, but they would have liked the drug companies to have spoken to them first and come to an agreement."[42]

In an initial meeting in June 2001, both parties agreed that the consumption of Hoodia was an intergenerational practice of the San community.[43] CSIR also apologized for not having obtained "prior informed consent" from the San, which was required by the 1993 Convention on Biological Diversity (CBD).[44] After negotiations, the CSIR agreed to create an access-and-benefit sharing (ABS) agreement if the plant received commercial success, officially recognizing the San's collective right to the knowledge of Hoodia as an appetite suppressant.[45] It was further agreed upon that San in all countries would share future benefits from Hoodia equally, which would consist of 8% of Phytopharm payments to CSIR and 6% of the royalties received by Pfizer and CSIR respectively once the drug reached the market.[46] The money would be further divided as follows: "75% to be equally divided between San of Namibia, Botswana, South Africa, and Angola as guided by WIMSA program priorities; 10% to go to the Hoodia Benefit Sharing Trust; 10% to be kept by WIMSA as an emergency reserve [and] 5% to go to WIMSA for administrative purposes."[47]

Although this outcome was heralded as a victory for the San people, there were still some lingering issues. First, the Hoodia grows in abundance across Southern Africa and the San people are not the only ones who consume it. Scholars have pointed out that when debating this issue, WIMSA claimants conveniently overlooked the fact that Northern Sotho and Tswana and Venda-speaking groups also use Hoodia, not just the San people.[48] Additionally, though the CBD is meant to promote fair ABS for Indigenous communities arising from GRs, it lacks binding enforcement mechanisms. As Chennells explains, the governments of South Africa, Namibia, and Botswana were determined to be the states that share the Hoodia GR, but "these three countries differ significantly in the manner and degree to which they have implemented their duties to require prior informed consent

35 Mukuka, *supra* note 21.
36 *Id.*
37 Anna, *The San People of Africa*, Natucate (2022), https://www.natucate.com/en/blog/nature/the-san-people-of-africa (last visited Dec. 7, 2023).
38 *San Victorious in Bio-Piracy Case*, Cultural Survival (2002), https://www.culturalsurvival.org/news/san-victorious-bio-piracy-case (last visited Dec. 7, 2023).
39 Anna, *supra* note 37.
40 Amusan, *supra* note 29.
41 Mukuka, *supra* note 21.
42 Antony Barnett, *In Africa the Hoodia Cactus Keeps Men Alive. Now Its Secret Is "stolen" to Make Us Thin*, Guardian, June 17, 2001, https://www.theguardian.com/world/2001/jun/17/internationaleducationnews.businessofresearch (last visited Dec. 6, 2023).
43 Mukuka, *supra* note 21, at 59.
44 *Id.*
45 *Id.* at 60.
46 *Id.* at 61.
47 *Id.* at 61-62.
48 *Id.* at 59.

relating to access to GRs from 'Indigenous and local communities,' the obtaining of 'mutually agreed terms,' and ABS with such communities."[49] Since then, more African organizations and multinational corporations have reached agreements regarding the use of GRs, but these largely occur in the absence of an official legislative framework for ABS. To date, many African countries either lack ABS regulations, or they are insufficient.[50]

IV: RECOMMENDATIONS FOR A *SUI GENERIS* INTELLECTUAL PROPERTY FRAMEWORK FOR INDIGENOUS KNOWLEDGE

Due to the challenges of accommodating IK within our current IP system, I argue that there should be a *sui generis* legal framework that recognizes a communal right to intellectual property. This national level legislation should recognize the communal nature of IK and designate Indigenous communities as the direct owners, allowing them to profit from their knowledge. Additionally, it could include limited economic rights, but it should allow perpetual moral rights for IK. Whilst IP legislation is typically implemented to incentivize innovation, the purpose of protecting IK is to preserve the cultural identity of Indigenous communities.[51] Thus, ensuring Indigenous peoples' right of attribution would help to ensure that IK is recognized as a part of their culture, whilst the right of integrity would prevent the misappropriation of IK.

However, solely recognizing the rights of Indigenous communities is insufficient. Although the San people's story is one of success, more often than not, Indigenous communities lack the resources and support to navigate IP legislation. There should also be a dedicated national body that performs several key functions relating to the preservation of IK. It should create a registry for IK and work with Indigenous communities to proactively document their IK and establish their ownership rights, such as through community-led archival initiatives. The national body should also provide Indigenous communities with necessary financial and legal support. Furthermore, as the case of Hoodia illustrates, entities that wish to commercialize IK should be legally required to obtain consent from the original communities, as well as distribute profits based on ABS principles. Whilst it will always be difficult to determine who the IK belongs to and how the profits can be distributed equitably, this body should work with the licensees and relevant bodies (e.g., WIMSA) to negotiate the conditions.

Finally, there should be a mechanism that allows for flexible dispute resolution, and, if necessary, the revoking of previously granted IP protection if a piece of IP is found to be IK. For example, there was a case in South Africa where a non-community member patented TK relating to the medicinal properties of the African potato, despite that information being provided to them by an Indigenous person.[52] Although it was eventually recognized that the information was TK, the patent had already been granted and the owner of the patent received profits that should have been shared with the community instead.[53] Therefore, there should be a body vested with the power to resolve similar conflicts involving IK.

An example of an existing *sui generis* legislation for IK that incorporates some of these ideas is South Africa's Protection, Promotion, Development, and Management of Indigenous Knowledge Act of 2019. South Africa previously attempted to protect IK, notably through the Protection, Promotion, Development, and Management of Indigenous Knowledge Systems Bill of 2016. However, it received criticism for trying to incorporate IK into the existing IP framework, rather than establishing *sui generis* legislation for IK.[54] The Protection, Promotion, Development, and Management of Indigenous Knowledge Act of 2019 recognizes IK that meets three criteria: it has been passed on from generation to generation within an Indigenous community, it has been developed within an Indigenous community, and it is associated with the cultural and social identity of that

49 *Id.* at 64.

50 *ABS Biotrade: Africa,* Deutsche Gesellschaft für Internationale Zusammenarbeit, https://www.abs-biotrade.info/partner-countries/africa/ (last visited Dec. 7, 2023).

51 S. Afr. Cultural Observatory, *supra* note 24.

52 Mukuka, *supra* note 21, at 101.

53 *Id.*

54 Lee-Ann Tong, *South Africa Adopts Sui Generis Indigenous Knowledge Protection Legislation*, 14 J. Intell. Prop. L. & Prac. 935 (2019).

Indigenous community.[55] First and foremost, it vests a set of rights in Indigenous communities under the custodianship of a delegated trustee.[56] This includes the exclusive right to claim benefits from the commercial use of IK, which formally allows indigenous communities to profit from their knowledge.[57] Economic rights are limited, as the requirement to pay royalties expires after 20 and 50 years for TK and TCEs respectively.[58] However, it does grant permanent moral rights, as it requires any non-community members to attribute the Indigenous community as the origin of the IK whenever it is used.[59]

Furthermore, the Act establishes two important bodies. First, it establishes a new organization, the National Indigenous Knowledge Systems Office (NIKSO) to implement the provisions within the act.[60] This organization performs many of the important aforementioned functions, including facilitating the redress of rights and benefits to indigenous communities and establishing and managing the registration of assessors and indigenous knowledge practitioners.[61] NIKSO also works directly with indigenous communities through education and awareness campaigns that aim to empower indigenous communities by enabling them to profit from IK.[62] Next, the Act grants the creation of a Dispute Resolution Committee that may be set up by the Minister of Science and Technology on an ad hoc basis.[63] The Dispute Resolution Committee has several important functions. It can issue a notice prohibiting the unauthorized use of indigenous knowledge by a license holder as well as recommend to NIKSO the canceling, suspending, or revoking of the license rights of a license holder.[64] This would help to prevent future cases like that of the African potato from happening again. To date, NIKSO has worked with 35 Indigenous communities and registered 10,377 claims.[65]

Whilst this Act is no doubt an example of what *sui generis* legislation could look like at the national level, scholars have pointed out that the Act is limited to South Africa only. This means an Indigenous community will not be able to rely on the Act to claim benefits if it was derived from the use of IK outside of South Africa.[66] Especially as the case of the San highlights, Indigenous communities are often dispersed across present-day countries. Therefore, there is not only a need for *sui generis* legislation at the national level, but also an international agreement that mandates other countries to implement such legislation as well. Ideally, there should also be a binding enforcement mechanism within this new international agreement similar to that of the TRIPS Agreement to ensure that it will actually be carried out by governments.

CONCLUSION

It is clear that more focus needs to be placed on navigating the conflict between IK and our current IP systems. Although this essay specifically focuses on the African continent, there is no doubt similar issues exist for Indigenous communities in other parts of the world. The creation of *sui generis* IP legislation in South Africa demonstrates a promising step forward, but as highlighted in Section I, these standards need to become international in order to account for the change brought by globalization. In the meantime, due to cases of misappropriation, Indigenous communities have been much more hesitant to share their knowledge with researchers. WIMSA announced in 1997 that it would no longer allow the media or researchers free access to the San people and requested that a contract be drawn up for the use of any materials emanating from the San's way of life.[67] There is no doubt that we have a lot to benefit from Indigenous communities' knowledge, but they will only trust us if we show that we are well-equipped to protect their rights as well.

55 Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 § 11 (S. Afr.).
56 *Id.* at 8.
57 *Id.* at 14.
58 *Id.* at 22.
59 *Id.* at 14.
60 *Id.* at 2.
61 *Id.* at 10.
62 *Id.* at 10.
63 *Id.* at 24.
64 *Id.* at 24.
65 *NIKSO Portal*, Nat'l Indigenous Knowledge Sys. Off. Portal, https://nikso.dst.gov.za/ (last visited Dec. 6, 2023).
66 Tong, *supra* note 54, at 15.
67 Peter Hawthorne, *The Hunter-Litigators*, TIME, Aug. 6, 2001, https://content.time.com/time/subscriber/article/0,33009,169370,00.html (last visited Dec. 6, 2023).

GOVERNMENT SHUTDOWNS: AN AMERICAN DYSFUNCTION AND HOW TO ADDRESS IT

INTRODUCTION

On January 19, 2023, the United States hit the debt ceiling, the limit on the amount of money the U.S. may legally borrow, setting off a crisis.[1] House Republicans demanded major spending cuts in return for raising the debt ceiling.[2] President Joe Biden wanted to raise the debt ceiling without strings attached.[3] This led to an impasse between Congress and the executive.[4] A bipartisan agreement resolving the crisis was eventually reached in June.[5] The law suspended the debt limit until January 1, 2025, but it also confirmed compromise spending levels negotiated by Democrats and Republicans.[6]

To enforce the deal, the Act threatened automatic across-the-board spending cuts if compromise spending levels were not enacted.[7] The reasoning behind this was that every year, Congress is expected to pass twelve regular spending bills to fund the federal government.[8] In reality, Congress almost never passes all of them on time.[9] It often has to resort to temporary spending bills, called continuing resolutions, to give itself more time.[10] The debt ceiling agreement mandated that if the 118th Congress fails to pass twelve compromise appropriations bills by January 1, 2024, spending levels for both defense and nondefense spending would be set to 1% below the levels for fiscal year 2023.[11] Unless all appropriations bills or a full-year continuing resolution are passed within the next four months, then 1% spending cuts will automatically occur by April 30, 2024.[12] Neither party wanted these cuts to happen, with the Democrats opposing spending cuts in general and many Republicans opposing reducing funding for the military.[13] Senator Susan Collins, Republican of Maine, called these cuts "a 'harmful' provision that would leave a 'threat hanging over' the Defense Department."[14] Seeking to avoid these cuts, Congress was expected to be more inclined to pass compromise spending bills.

However, some far-right Republicans demanded spending cuts beyond what was agreed to, which Democrats found unacceptable.[15] If new spending bills are not

1 Tami Luhby, *US Hits Debt Ceiling, Prompting Treasury to Take Extraordinary Measures*, CNN, Jan. 19, 2023, 1:38 PM https://www.cnn.com/2023/01/19/politics/debt-ceiling-deadline-treasury/index.html (last visited Mar. 22, 2024).

2 *Id.*

3 *Id.*

4 *Id.*

5 An Act to Provide for a Responsible Increase to the Debt Ceiling, Pub. L. 118-5, 137 Stat. 10 (2023).

6 *Id.*

7 *Id.* at 15.

8 Drew Desilver, *Congress Has Long Struggled to Pass Spending Bills on Time*, Pew Rsch. Center, https://www.pewresearch.org/short-reads/2023/09/13/congress-has-long-struggled-to-pass-spending-bills-on-time/ (last visited Dec. 2, 2023) [hereinafter Desilver, *Spending Bills on Time*]. See generally James V. Saturno, Cong. Res. Serv., R46240, Introduction to the Federal Budget Process, 25 (2023), https://crsreports.congress.gov/product/pdf/R/R46240 [hereinafter Saturno, Federal Budget Process] (discussing the United States federal budget process).

9 See Desilver, *Spending Bills on Time*, *supra* note 8 (providing data on the percentage of appropriations bills passed on time between 1977 and 2023).

10 Saturno, Federal Budget Process, *supra* note 8, at 26.

11 An Act to Provide for a Responsible Increase to the Debt Ceiling, Pub. L. 118-5, 137 Stat. 15 (2023); *see also* Paul M. Krawzak & Peter Cohn, *Automatic Spending Cuts Would Threaten Infrastructure Funding*, Roll Call, https://rollcall.com/2023/07/07/automatic-spending-cuts-would-threaten-infrastructure-funding/ (last visited Dec. 2, 2023) (describing the scope of spending cuts).

12 An Act to Provide for a Responsible Increase to the Debt Ceiling, Pub. L. 118-5, 137 Stat. 15 (2023).

13 Catie Edmonson, *How to Enforce a Debt Deal: Through 'Meat-Ax' Cuts Nobody Wants*, N.Y. Times, June 2, 2023, at A13, https://www.nytimes.com/2023/06/01/us/politics/debt-limit-spending-cuts.html (last visited Mar. 22, 2024).

14 *Id.*

15 Rob Graver, *Republicans' Spending Fight Pushes US Closer to*

passed in time, the federal government will shut down.[16] Neither Democrats nor far-right Republicans had enough votes to push through a spending bill of their design, so to avoid a shutdown, House Speaker Kevin McCarthy, Republican of California, drafted a compromise continuing resolution maintaining mostly current spending levels.[17] It became law and kept the government open until November 17, giving Congress more time to pass regular appropriations bills before a shutdown threatens again.[18]

In retaliation, far-right Republicans had McCarthy removed as speaker.[19] He was replaced with Representative Mike Johnson, Republican of Louisiana, who soon faced the same deadlock as November 17 approached.[20] Senate majority leader Chuck Schumer, Democrat of New York, called far-right Republican spending cuts "dead on arrival" in the Senate.[21] Meanwhile, twenty-one Republican lawmakers declared their opposition to any less drastic spending cuts.[22] On November 11, 2023, Speaker Johnson introduced another continuing resolution to fund the government at current spending levels, prompting a right-wing backlash.[23] It became law, keeping the government open until at least January 18, 2024.[24] In the meantime, Congress was unable to pass any regular appropriations bill. The Republican-controlled House passed seven appropriations bills, but all stalled in the Senate.[25] The Senate passed three bipartisan appropriations bills, but none of them made it through the House.[26]

During the struggle to pass spending bills, the specter of shutdowns hung over the horizon several times, and it motivated Speaker McCarthy to push through a compromise bill even though it cost him his job. However, what exactly are shutdowns? The U.S. government generally cannot spend any money without congressional authorization.[27] As doing almost anything needs money, a government without funding for any longer than a few hours must (with few exceptions) cease operations, leading to a shutdown.[28] Most federal employees do not get paid and are not allowed to work, not even voluntarily.[29] If only funding for some but not all agencies are missing, there will be a "partial shutdown."[30] In either case, shutdowns can be very disruptive.

Government shutdowns, the curtailment of most non-essential government services due to a lack of funding, are legally required though were almost unknown before the 1980s or outside the United States. Shutdowns may severely harm the public, the U.S. economy, and the federal government. This paper argues that shutdowns could be made less frequent by giving Congress greater incentives to pass spending bills on time, which can be achieved by associating shutdowns with more severe repercussions for the United States and for lawmakers personally.

I. HISTORICAL AND LEGAL BASIS OF

Government Shutdown, VOA News, Sept. 21, 2023, https://www.voanews.com/a/republicans-spending-fight-pushes-us-closer-to-government-shutdown/7277099.html (last visited Mar. 22, 2024)..

16 *Id.*

17 Kevin Breuninger, *Biden Signs 45-day Funding Bill to Keep Government Open*, CNBC, Oct. 1, 2023, https://www.cnbc.com/2023/09/30/government-shutdown-live-updates-congress-faces-funding-deadline.html (last visited Mar. 22, 2024).

18 *Id.*; An Act Making Continuing Appropriations for Fiscal Year 2024, and for Other Purposes, Pub. L. 118-15, 137 Stat. 74 (2023).

19 Catie Edmonson, *Johnson Faces the Same Spending Dilemmas That Plagued McCarthy*, N.Y. Times, Oct. 27, 2023, at A19, https://www.nytimes.com/2023/10/26/us/politics/mike-johnson-shutdown-ukraine-israel.html (last visited Mar. 22, 2024).

20 *Id.*

21 *Id.*

22 *Id.*

23 *House Speaker Mike Johnson Proposes 2-Step Stopgap Funding Bill to Avert Government Shutdown*, CBS News, Nov. 12, 2023, https://www.cbsnews.com/news/mike-johnson-proposes-stopgap-funding-bill-government-shutdown/ (last visited Mar. 22, 2024).

24 *Press Release: Bill Signed: H.R. 6363*, White House, https://www.whitehouse.gov/briefing-room/legislation/2023/11/17/press-release-bill-signed-h-r-6363/ (last visited Dec. 2, 2023); An Act Making Further Appropriations for Fiscal Year 2024, and for Other Purposes, Pub. L. 118-22, 137 Stat. 112 (2023).

25 Simon Moore, *As Government Shutdown Deadline Nears, Here Are The Likely Outcomes*, Forbes, Nov. 9, 2023, https://www.forbes.com/sites/simonmoore/2023/11/09/as-government-shutdown-deadline-nears-here-are-the-likely-outcomes/?sh=51da4dd7314c (last visited Mar. 22, 2024); *see also Appropriations Status Table: FY 2024*, Cong. Research Serv., https://crsreports.congress.gov/AppropriationsStatusTable (last visited Dec. 2, 2023) (listing the status of each regular appropriations bill in Congress).

26 Moore, *supra* note 25; *see also Appropriations Status Table: FY 2024*, *supra* note 25 (listing the status of each regular appropriations bill in Congress).

27 David Wessel, *What Is a Government Shutdown?*, Brookings Inst., Mar. 8, 2024, https://www.brookings.edu/articles/what-is-a-government-shutdown-and-why-are-we-likely-to-have-another-one/ (last visited Mar. 22, 2024).

28 *Id.*

29 *Id.*

30 *Id.*

GOVERNMENT SHUTDOWNS

The legal basis of government shutdowns ultimately rests in the Constitution. Congress has the power to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[31] The power to collect revenue implies the power to spend the money towards paying debts and providing for the "common defense and general welfare."[32] Spending money other than "in consequence of appropriations made by law" is prohibited.[33] The almost completely unqualified language grants Congress broad powers over appropriations, but crucially, the Constitution does not explicitly obligate Congress to always keep the government funded. Former Speaker Newt Gingrich refers to the power of the purse as his "trump [card]" during his 1995 battles with President Bill Clinton.[34]

The power of Congress over spending is further protected through numerous versions of the Antideficiency Act. It prohibits federal agencies from incurring contractual obligations (i.e., spending or promising to spend any amount of money) during a funding gap.[35] The Antideficiency Act of 1884 went further by prohibiting employees from volunteering to work without pay to keep the government open.[36] The intent of Congress in passing the Antideficiency Act was to avoid situations where Congress feels morally obligated to authorize payments for contracts made during funding lapses by preventing such contracts from being made in the first place.[37] At the time, successive governments would deliberately use up funding before the end of a fiscal year and continue to spend to keep the government open, presenting Congress with a *fait accompli* to authorize more spending than it otherwise would.[38]

The Antideficiency Act did not intend to cause shutdowns. During the seven funding gaps between 1952 and 1979, the government stayed open, with employees technically volunteering their services, even though this was arguably illegal under the 1884 act.[39] When Congress retroactively authorized obligations incurred and provided back pay for employees with no questions asked, it effectively overlooked a technical violation of the law.[40] However, this changed during the spending fights in fiscal year 1980. Faced with the prospect of a funding gap for the U.S. Federal Trade Commission, Congress and President Jimmy Carter requested legal advice on what should happen when executive agencies are no longer funded.[41]

The Antideficiency Act provided, "No officer or employee of the United States shall [] involve the Government in any contract or other obligation, for the payment of money for any purpose…unless such contract or obligation is authorized by law."[42] Concerning federal employees, "No officer or employee of the Unit-

31 U.S. Const. art. I, § 8, cl. 1.

32 U.S. Const. art. I, § 8, cl. 1. *accord* Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. Marshall L. Rev. 83, 85 (2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=223735.

33 U.S. Const. art. I, § 8, cl. 1. *But see, e.g.,* Jacob D. Charles, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 Duke L. J. 1228, 1232 (2013), https://scholarship.law.duke.edu/dlj/vol62/iss6/3/ (outlining potential arguments in support of the position that the president may be required, under article one, section 3, clause 3 and section 4 of the Fourteenth Amendment, to disregard the debt limit and unilaterally order the Secretary of the Treasury to continue borrowing funds if necessary to meet the government's obligation to not question the validity of United States public debt, implicitly allowing the president to spend money to repay debts without Congress explicitly authorizing this appropriation by law).

34 Alfred Hill, *Opinion: Shutdowns and the Constitution*, 115 Pol. Sci. Q. 273, 274 (2020), https://www.jstor.org/stable/2657903.

35 *Id.* at 279.

36 *Id.*

37 *Id.* at 279-280; ; *see also* Alan L. Feld, *Shutting Down the Government*, 69 Bos. Univ. L. Rev. 971, 974, 987 (1989), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=3929&context=faculty_scholarship (discussing how the Antideficiency Act seeks to limit the "creation of moral claims for later appropriations beyond the scope specified in the legislative scheme").

38 *See* Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 167 (1972), https://www.jstor.org/stable/1191125 (discussing coercive deficiencies and the different means by which politicians may compel Congress to authorize more funding that it otherwise would).

39 Hill, *supra* note 34, at 280.

40 *Id.*

41 Gov't Accountability Off., Funding Gaps Jeopardize Federal Government Operations (1981), https://www.gao.gov/products/pad-81-31.

42 *Id.* at 78; *see also* An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, "Money and Finance," Pub. L. 97-258, 96 Stat. 923 (1982) (codifying the relevant portions of the Antideficiency Act in force today, the Act itself having been slightly modified after Staats wrote his opinion).

ed States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property."[43] Comptroller General Elmer B. Staats, citing the plain text of the Antideficiency Act, concluded that the Federal Trade Commission should have avoided contractual obligations during funding lapses.[44] To strictly adhere to the letter of the law and in a break from past practices, it should technically have "suspend[ed] the operations of the agency and instruct employees not to report to work until an appropriation is enacted."[45] However, he continued by claiming, "We do not believe that the Congress intends that federal agencies be closed during periods of expired appropriations."[46] Consequently, in practice, day-to-day government operations need only be minimized to essential services, even though this will still lead to "widespread violations" of the Antideficiency Act.[47]

Attorney General Benjamin Civiletti concurred with Staats's judgment but went further, arguing that the intent of Congress notwithstanding, the plain meaning of the law simply did not allow the government to stay open.[48] Reading the Antideficiency Act to allow any unauthorized spending not explicitly covered by an exception would undermine statutory law and the authority of Congress.[49] As the statute mentions exceptions for "contract or obligation authorized by law" and "cases of emergency involving the safety of human life or the protection of property," these, along with expenses necessary to shut down the government, are the only spending that Civiletti allowed during funding lapses.[50] All other government functions should be prohibited.[51] Civiletti concluded by threatening violators with prosecution to ensure compliance by the entire government.[52]

While there were disagreements, Civiletti's position became established precedent.[53] Since 1980, federal government funding gaps lasting at least one full day occurred in calendar years 1981, 1982 (two occasions), 1983, 1984, 1986, 1987, 1990, 1995, 1995-1996, 2013, 2018, and 2018-2019 (three occasions), for a total of nine times.[54] There were also shorter funding gaps, such as nine overnight hours on February 8-9, 2018, and funding gaps that started and ended over federal holidays or the same weekend.[55] These funding gaps did not result in shutdowns because the government did not have time to shut itself down before funding resumed.[56]

43 Gov't Accountability Off., *supra* note 41, at 57 n.4; *see also* An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, "Money and Finance", Pub. L. 97-258, 96 Stat. 923 (1982) (codifying the relevant portions of the Antideficiency Act in force today, the Act itself having been slightly modified after Staats wrote his opinion).

44 *See* Interpretation of a Section of U.S.C. in the Antideficiency Act, B-197841, 1 (Comp. Gen. Mar. 3, 1980); *id.* at 2 (emphasizing that the incurring of any financial obligation on the federal government violates the law if such obligation is not authorized by statute, even if such obligations do not require the government to make any payments immediately but only creates the expectation that another party is entitled to payments from the government in the future).

45 *Id.* at 3.

46 *Id.*; *see id.* at 4, *see also* Hill, *supra* note 34, at 280 n.4 (quoting Staats arguing that based on Congress's "'general' practice" of retroactively ratifying past unauthorized appropriations, "Congress expects the various agencies of the government to operate and incur obligations during a period of expired appropriations").

47 Gov't Accountability Off., *supra* note 41, at 2 n.4; Interpretation of a Section of U.S.C. in the Antideficiency Act, B-197841, 4 (Comp. Gen. Mar. 3, 1980); *see also* Feld, *supra* note 37, at 977 n.4 (describing how, after Congress failed to pass an appropriations bill on time, the Government Accountability Office, then known as the General Accounting Office, was directed to minimize spending to those essential to day-to-day operations, with employees remaining on job and performing their duties).

48 Applicability of the Anti-Deficiency Act Upon a Lapse in Agency Appropriations, 43 Op. Att'y Gen. 24, 2 (1980).

49 *Id.* at 5.

50 43 Op. Att'y Gen., *supra* note 48, at 6; *see also* Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1, 11 (1981) (discussing what government functions constitute "cases of emergency," meaning that the government is allowed to ask employees to provide voluntary service without pay to carry out these functions).

51 43 Op. Att'y Gen., *supra* note 48, at 6.

52 *See id.* (stating that the Department of Justice will "take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged" and that officials who kept government agencies open in the past without appropriations will not be prosecuted, implying that future violators will be).

53 *See e.g.,* Kenneth D. Ackerman, *Government Shutdowns – Who Dreamed Up This Crazy Idea?*, Olsson Frank Weeda (Jan. 25, 2019), https://ofwlaw.com/government-shutdowns-who-dreamed-up-this-crazy-idea/ (last visited Dec. 2, 2023) (outlining criticisms of the practice of government shutdowns and noting that disagreements with Civiletti exist, although his view remains established precedent).

54 Desilver, *Spending Bills on Time*, *supra* note 8 n.1; Ackerman, *supra* note 53; *see* James V. Saturno, Cong. Res. Serv., RS20348, Federal Funding Gaps: A Brief Overview, 4 (2023), https://crsreports.congress.gov/product/pdf/RS/RS20348/45 [hereinafter Saturno, Federal Funding Gaps] (listing the start and end dates of appropriations funding gaps since fiscal year 1977); *see also* Hill, *supra* note 34, at 281 n.4 (discussing the lack of public notice or attention of government shutdowns prior to 1980).

55 Desilver, *Spending Bills on Time*, *supra* note 8 n.1; Ackerman, *supra* note 53.

56 Clinton T. Brass et al., Cong. Res. Serv., RL34680, Shutdown of

Of the longer funding gaps, some lasted over a month, such as the thirty-five days between December 22, 2018, and January 25, 2019.[57] These longer funding gaps invariably caused shutdowns.[58] These shutdown-inducing longer funding gaps include all but one funding gap since 1995.[59] In addition, since the modern federal budget process was instituted in 1974, Congress has only passed all 12 regular spending bills on time in 1977, 1989, 1995, and 1997; in other years, funding was provided through continuing resolutions or omnibus packages.[60] As then-Senator Barbara Boxer, Democrat of California, remarked, "Failing to keep the government open because of politics…is a failure of our government."[61]

II. SHUTDOWNS AS AN AMERICAN EXCEPTIONALISM

The concept of government shutdowns is largely unheard of outside of the contemporary United States. In presidential systems like Brazil, the executive generally has the power to continue normal government spending even during budget deadlocks.[62] In parliamentary systems like Belgium or Canada, the legislative and executive branches of government are typically controlled by the same party or coalition of parties, and there are no midterm elections that can make a governing party lose its majority in the legislature before the next general election.[63] Even in situations where the legislature refuses to pass a budget, the legislature can pass a motion of no confidence, removing the executive from power and triggering a new general election rather than a shutdown.[64] As Representative Brendan Boyle, Democrat of Pennsylvania, put it, "Not one other Western democracy has to deal with these things."[65]

This section will explore the constitutional principles and political processes that enable Belgium, Australia, and Northern Ireland to avoid government shutdowns. How the former Kingdom of Prussia avoided shutdowns in the late 19th century is also covered because the Prussian system of government, with its relatively more independent executive, is more similar to the presidential system in the United States. Each of these countries offers a potential approach to avoid shutdowns when the legislative and executive branches fail to agree on fiscal policy. However, it might not be possible to fully emulate the fiscal processes in any of these countries because constitutional changes may be necessary and because of the implications of making either the executive completely dependent on or independent of the legislature.

A. Belgium

Belgium consists of three main linguistic communities, the Dutch-, French-, and German-speaking communities, and each community has its own government institutions and political parties.[66] As a result, the Belgian

THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS, 2 (2023), https://crsreports.congress.gov/product/pdf/RL/RL34680/29; SATURNO, FEDERAL FUNDING GAPS, *supra* note 54, at 3.

57 Desilver, *Spending Bills on Time*, *supra* note 8 n.1.

58 *See* SATURNO, FEDERAL FUNDING GAPS, *supra* note 54, at 3 (suggesting that on the first day of a funding gap, a shutdown may be delayed if it is apparent that Congress is likely appropriate on the same day, implying that shutdowns may only be temporarily averted for short funding gaps, meaning that longer funding lapses would almost certainly lead to shutdowns); *see also* SATURNO, FEDERAL FUNDING GAPS, *supra* note 54, at 6 n.5 (giving five examples of funding gaps lasting longer than three days, in 1996, 2014, 2018, and 2019, that resulted in furloughed employees and cessation of activities not deemed to be excepted). *See generally* Brass et al., *supra* note 56, at 2 (introducing the distinction between funding gaps and shutdowns and when the former will lead to the latter).

59 *See* SATURNO, FEDERAL FUNDING GAPS, *supra* note 54, at 6 (implying that the most recent funding gaps, including all those that occurred since 1995, have caused disruptions associated with shutdowns); Desilver, *Spending Bills on Time*, *supra* note 8 n.1.

60 Desilver, *Spending Bills on Time*, *supra* note 8 n.1.

61 *Boxer, Casey Introduce Bill to Prevent Lawmakers from Being Paid During A Government Shutdown: Senators Urge Republican Leaders to Take Threat of a Government Shutdown Off the Table*, CONG. DOCUMENTS & PUBL'N, http://ccl.idm.oclc.org/login?url=https://www.proquest.com/other-sources/boxer-casey-introduce-bill-prevent-lawmakers/docview/852740709/se-2?accountid=10141 (last visited Dec. 2, 2023).

62 Robin Levinson King & Anthony Zurcher, *Why Government Shutdowns Seem to Only Happen in US*, BBC, Nov. 13, 2023, https://www.bbc.com/news/world-us-canada-66965637 (last visited Mar. 22, 2024).

63 *Id.*; *See also Why Don't Other Countries' Governments Shut Down?*, ECONOMIST MAG., Jan. 11, 2019, https://www.economist.com/democracy-in-america/2019/01/11/why-dont-other-countries-governments-shutdown (last visited Dec. 2, 2023).

64 King & Zurcher, *supra* note 62.

65 Evan Peng, *Why Shutdown "Dysfunction" is Uniquely American*, POLITICO PRO, Oct. 10, 2023, https://subscriber.politicopro.com/article/2023/10/why-shutdown-dysfunction-is-uniquely-american-00120386 (last visited Mar. 22, 2024).

66 Jenny Percival, *Belgium Divide Deepens After Flemish Separatists Win Election*, GUARDIAN, June 14, 2020, https://www.theguardian.com/world/2010/jun/14/belgium-election-result-flemish-triumph (last visited Mar. 22, 2024).

political climate is extremely fractious. Twelve parties were involved in talks that led to an unstable coalition government of five parties that lasted three years before collapsing in 2010 when one party withdrew support.[67] The 2010 general elections saw the New Flemish Alliance (NVA) becoming the largest party in the House of Representatives with 18% of the seats.[68] The NVA's platform sought independence or greater autonomy for the Dutch-speaking region of Flanders from the rest of Belgium.[69] This created tensions with the French-speaking and traditionally federalist parties. Protracted negotiations ensued as the major political parties attempted to form a coalition controlling a majority of seats in the House.[70] The impasse lasted 589 days, from April 26, 2010, to December 6, 2011, before a new government was formed.[71]

Pending the formation of a new government, Belgium was governed by a caretaker coalition with limited powers, including making decisions only on urgent matters.[72] It could not enact new policies or approve new taxes or budgets; rather, it was empowered only to carry on previously enacted policies.[73] Caretaker coalitions operated under a system of "provisional twelfths," whereby each month, the government could spend one-twelfth of the amount of money it spent the year before.[74] This rule, combined with the COVID-19 pandemic and the fact that Belgian political parties had not passed a new budget since 2017, caused Belgian government deficits to skyrocket.[75] However, while government spending was severely limited and many employees resigned, government agencies stayed open and offered basic services.[76] A shutdown is not part of Belgian politics because the government is always able to spend some money. Even without having a majority in the legislature, the government can spend an amount of money based on the previous year's spending levels.

B. Australia

Australia, along with the United Kingdom and many Commonwealth nations, adheres to the Westminster system. A government cannot remain in power without supply (i.e., public expenditure and taxation laws in place). In the United Kingdom, after the power of the House of Lords to reject money bills was removed, government budgets are guaranteed passage if the House of Commons passes them.[77] However, an executive government could not take office without the support of a majority of the House of Commons.[78] This makes it highly unlikely for a government to be unable to pass its budget because it requires a significant number of lawmakers from the governing party to defy the party line. In Australia, however, the situation is different. While the Senate cannot introduce or amend money bills, it, unlike the UK House of Lords, has the power to reject these bills.[79] This sets

67 Economist Mag., *supra* note 63; *See also Belgium Chambre des Représentants, Elections in 2010*, Inter-Parliamentary Union, http://archive.ipu.org/parline-e/reports/arc/2029_10.htm (last visited Dec. 2, 2023).

68 *Belgium Chambre des Représentants*, *Elections in 2010*, *supra* note 67.

69 *Id.*; *See also* Percival, *supra* note 66.

70 Economist Mag., *supra* note 63 n.7; *see also* Percival, *supra* note 66 (discussing then-ongoing talks between and public statements by King Albert of Belgium and leaders of the main political parties in Belgium regarding coalition talks).

71 Economist Mag., *supra* note 63 n.7.

72 Simon van Dorpe & Camilee Gijs, *Four Reasons Belgium Needs a Government*, POLITICO EU, Aug. 13, 2020, https://www.politico.eu/article/four-reasons-belgium-needs-a-government-budget-covid-19/ (last visited Mar. 22, 2024).

73 *See id.* (explaining that a caretaker Belgian executive can only make routine decisions and cannot increase public spending, which requires enacting new laws and policies).

74 *Id.*

75 *Id.*

76 *Id.*; Economist Mag., *supra* note 63 n.7.

77 *See* Parliament Act 1911, 1 & 2 Geo. 5 c. 13, § 1, cl. 1 (directing money bills to be sent to the king for royal assent one month after they are passed by the House of Commons even if the House of Lords has not passed these money bills); *see also* David Hamer, Can Responsible Government Survive in Australia?, 22 (Dep't of the Senate 2d ed. 2004), https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/hamer/contents (noting that after Parliament Act 1911, the UK House of Lords only has a "one month's 'suspensive veto'" instead of the authority to reject money bills, with the implication that the House of Commons retains full power over these bills); *see also* The Westminster System: 58th Seminar on Parliamentary Practice and Procedures at Westminster Summary Report of Discussions Sessions, 14 (Commonwealth Parliamentary Ass'n UK Branch 2009), https://www.parliament.uk/globalassets/documents/cpa/publications-reports/58th-seminar-on-parliamentary-practice-and-procedures-at-westminster-summary.pdf/ (describing the UK House of Lords as having "no power" over finance and taxation, implying that they are essentially controlled by the House of Commons).

78 *See* Hamer, *supra* note 77, at 5 n.8 (explaining that since 1742, British government ministers cannot effectively govern without "the confidence of a majority of the House of Commons").

79 *See* Australian Constitution, § 53 (stating that the Senate may not amend appropriations or taxation laws but may "return" them to the House of Representatives, which, combined with the provision that the Senate has equal power with the House except as otherwise provided, implies

up a potential for deadlock when a government can stay in office (with the support of the lower house, the House of Representatives) without supply (which is rejected by the Senate). This possibility was known to the constitutional convention in Sydney in 1897.[80] While this possibility always existed, the framers of the Australian Constitution believed that Westminster conventions would discourage such an occurrence.[81] As it turned out, even though the Senate had been controlled by opposition parties, it never refused to pass finance bills until 1975.

Gough Whitlam of the Australian Labor Party (ALP) became Prime Minister in 1972. Although the ALP had a majority in the House of Representatives, the opposition Liberal Party controlled the Senate and was determined to frustrate his agenda. The Leader of the Opposition Malcolm Fraser claimed that Labor's proposed spending programs were excessive and blocked them.[82] Fraser aimed to force new elections to the House of Representatives by blocking supply, but to achieve that end, he "act[ed] with great political ruthlessness and complete disregard for conventions."[83] Whitlam attempted to stay in power without a budget, arguing that a government was entitled to remain in power as long as it had a majority in the lower house.[84] Essentially, if he stayed in power without a budget, one constitutional principle would be violated, but if he was forced out, another constitutional principle would be contravened. While a temporary loss of supply would not affect government operations, if the deadlock persisted, employees would no longer be paid, and public services like health or education would no longer be funded.[85] This could create a situation analogous to a shutdown. Indeed, newspapers since then have used the term to describe the Australian constitutional crisis of 1975.[86]

On November 11, 1975, Governor-General Sir John Kerr intervened in the impasse. Earlier that day, Whitlam agreed to hold elections, just not for the House of Representatives which supported him, but for the Senate.[87] Kerr believed that although the prime minister has the support of the lower house to stay in office, this does not negate the requirement that the executive must also have a budget to continue in power, so he dismissed Whitlam from the premiership and appointed Fraser to his place.[88] Fraser passed Whitlam's proposed budget through the Senate, ensuring that his government had supply.[89] When the ALP majority in the House learned about it, it passed a motion of no confidence against the Fraser

that the Senate does have the power to reject appropriations bills, just like the House).

80 *See* Brian Galligan, *Interpreting the Constitution After 1975*, 56 The Australian Q. 142, 144 (1984), https://www.jstor.org/stable/20635271 (claiming that "most of the founders [of the Commonwealth of Australia] recognized that the two institutions [of a powerful American-style Senate and an executive government responsible to the House of Representatives] were strictly incompatible).

81 *See* Galligan, *supra* note 80, at 145 (quoting a founder of Australia as saying, "we [] have the good sense of the English-born race to carry us through" any potential conflicts between having a government responsible to the House and a powerful Senate); *see also* Colin Howard, *The Constitutional Crisis of 1975*, 48 The Australian Q. 5, 7 (1976), https://www.jstor.org/stable/20634825?seq=3 (suggesting the requirement that appropriation and taxation bills originate in the House reflect the "proper relationship" between the two Houses on these bills, and the question of whether the Senate can or should block these bills never arose because the Senate never attempted to do these things before 1974).

82 Jeffrey Archer & Graham Maddox, *The 1975 Constitutional Crisis in Australia*, 14 J. of Commonwealth and Comp. Pol. 141, 141 (1976), https://doi.org/10.1080/14662047608447256; Rick Noack, *Australia Tried Its Own Government Shutdown in 1975. The Queen Was Not Amused and It Never Happened Again*, The Seattle Times, Jan. 2, 2019, https://www.seattletimes.com/nation-world/australia-tried-its-own-government-shutdown-in-1975-the-queen-was-not-amused-and-it-never-happened-again/ (last visited Mar. 22, 2024); *see also* Howard, *supra* note 81 (describing the Senate as being controlled by the Leader of the Opposition, who refused to allow budget bills to pass unless the Prime Minister agrees to call a general election, which the Prime Minister refuses, hence making the government unable to enact its agenda).

83 Noack, *supra* note 81, at n.9.

84 Howard, *supra* note 81, at 9, n.9.

85 Noack, *supra* note 81, at n.9; *Separation of Powers: Well May We Say, "God Save the Queen,"* Australian Const. Center, http://www.australianconstitutioncentre.org.au/separation-of-powers-ndash-well-may-we-say-ldquogod-save-the-queenrdquo.html (last visited Dec. 2, 2023).

86 *See*, *e.g.*, Noack, *supra* note 81, at n.9; *see also* Max Fisher, *Australia Had a Government Shutdown Once. In the End, the Queen Fired Everyone in Parliament*, Wash. Post, Oct. 1, 2013, https://www.washingtonpost.com/news/worldviews/wp/2013/10/01/australia-had-a-government-shutdown-once-it-ended-with-the-queen-firing-everyone-in-parliament/ (last visited Mar. 22, 2024) (including examples of newspapers using the term "shutdown" to describe the budget deadlock in Australia in 1975).

87 Fisher, *supra* note 86; Noack, *supra* note 81, at n.9.

88 Fisher, *supra* note 86; Noack, *supra* note 81, at n.9; *Separation of Powers: Well May We Say, "God Save the Queen"*, *supra* note 85; *see also* Howard, *supra* note 81, at 10 n.9 (explaining that by dismissing Whitlam, Kerr adopted the "inconsistent principle" where in addition to having the confidence of the House, an executive, to stay in power, must also be able to pass money bills, which imply the support of both the House and the Senate).

89 Fisher, *supra* note 86; Noack, *supra* note 81, at n.9.

government, prompting Kerr to dissolve both the Senate and the House.[90] Fraser won a majority in the House of Representatives and continued as prime minister until 1983.[91] Kerr's unilateral decision to dismiss a prime minister with majority support in the House remains contentious, in part because Whitlam was perceived to have democratic legitimacy.[92] Nevertheless, Australia did not face a similar crisis again, and Australian governments have not failed to pass budgets.[93] Government shutdowns, excepting a close call in 1975, were not a prominent feature of Australian politics due to the strict convention that the executive branch must have a budget at all times, other constitutional conventions notwithstanding.

C. Northern Ireland

Northern Ireland, a constituent country in the United Kingdom, operates on the Westminster system as well. Unlike either the Australian Parliament or the UK Parliament, the Northern Ireland Assembly is unicameral, and government spending needs to be approved by only one house.[94] This means that there is no possibility for an Australia-style deadlock. The Northern Ireland Executive, however, differs from the executive government in Canberra or London in that the first minister and deputy first minister must be from the two largest parties in the Northern Ireland Assembly.[95] In practice, this forces Northern Ireland's unionist and nationalist communities to share power and govern together.[96] When the main nationalist and unionist parties fail to form a coalition, a government cannot stay in power and enact new policies, such as a new budget.[97]

Nevertheless, while leading parties frequently failed to form coalition governments, Northern Ireland has never experienced shutdowns. The UK Parliament retained legislative sovereignty over Northern Ireland, meaning it could pass any necessary laws for the country.[98] The UK Parliament theoretically has the power to make or unmake the Northern Ireland Assembly altogether.[99] This particular power was exercised by the UK Parliament when the Northern Ireland Assembly was suspended and direct rule from London was imposed between 2002 and 2007. When political parties deadlock, civil servants in Northern Ireland simply take orders from the

90 Fisher, *supra* note 86; Noack, *supra* note 81, at n.9; *Well May We Say,"God Save the Queen," supra* note 85; Howard, *supra* note 81, at 6, n.9.

91 Fisher, *supra* note 86; Noack, *supra* note 81, at n.9; *Well May We Say, "God Save the Queen," supra* note 85; *House of Representatives - Two Party Preferred Results 1949 – Present*, Australian Electoral Comm'n, https://www.aec.gov.au/elections/federal_elections/tpp-results.htm (last visited Dec. 2, 2023).

92 *See, e.g.*, Archer & Maddox, *supra* note 81, at 141 n.9 (describing the 1975 Australian constitutional crisis as "the most traumatic political upheaval" since Australia was founded); *Well May We Say, "God Save the Queen"*, *supra* note 85 n.9; Howard, *supra* note 81, at 18 n.9 (noting that the governor general acted "on his own personal discretion" in dismissing a prime minister despite the fact that Whitlam has "a reliable majority in the House"); *see also* Galligan, *supra* note 80, at 146 n.9 (referring to an argument that would have required the governor general to follow the advice of an executive government that has the support of the House and branding the Senate as "undemocratic").

93 Fisher, *supra* note 86; Noack, *supra* note 81, at n.9.

94 Northern Ireland Act 1998, c. 47, § 57 (UK).

95 Northern Ireland Act 1998, c. 47, § 16A (UK).

96 Jess Sargeant, *Northern Ireland: Functioning of Government Without Ministers*, Inst. for Gov't, https://www.instituteforgovernment.org.uk/article/explainer/northern-ireland-functioning-government-without-ministers (last visited Dec. 2, 2023) [hereinafter Sargeant, *Government Without Ministers*]; Jess Sargeant, *Direct Rule in Northern Ireland*, Inst. for Gov't, https://www.instituteforgovernment.org.uk/article/explainer/direct-rule-northern-ireland (last visited Dec. 2, 2023) [hereinafter Sargeant, *Direct Rule*].

97 *See*, *e.g.*, Sargeant, *Government Without Ministers*, *supra* note 96 (describing the period between 2017 and 2020 when the main unionist party withdrew from government, causing the entire Northern Ireland Executive to collapse and all ministers to lose their positions, and requiring the UK Parliament to set budgets because the Northern Ireland Assembly was unable to sit while there were no elected executive); *see also* Sargeant, *Direct Rule*, *supra* note 96 (introducing the concept of "direct rule" of Northern Ireland by the UK Parliament and explaining that it is necessary for the UK Parliament to pass budgets for Northern Ireland in the absence of a functioning Northern Ireland Executive controlling a majority in the Northern Ireland Assembly).

98 Northern Ireland Act 1998, c. 47, § 5, cl. 6 (UK).

99 *See* Sargeant, *Direct Rule*, *supra* note 96 (citing examples of the UK Parliament suspending the Northern Ireland Assembly on a number of occasions from 2000 to 2007, starting in February 2000 and with the longest suspension lasting from 2002 to 2007, during which elections to the Northern Ireland Assembly may continue to be held, but lawmakers cannot meet to pass legislation). *See generally* David Torrance, N. Ireland Off., CBP8638, *Northern Ireland: Direct Rule*, 12 (2002), https://researchbriefings.files.parliament.uk/documents/CBP-8638/CBP-8638.pdf; *id.* at 14 (discussing the scope of the powers of the UK Parliament, under the doctrine of Westminster parliamentary sovereignty and the fact that Northern Ireland remains a part of the United Kingdom, to legislate with regards to Northern Ireland as being generally unlimited, although there is a convention, maintained in part by the Good Friday Agreement reached at Belfast in 1998, that the UK Parliament may but normally should not take unilateral action such as suspending or abolishing the Northern Ireland Assembly, although the Assembly has never been abolished, and its predecessor, the Northern Ireland Parliament, was abolished in 1972).

UK government and continue working as usual, keeping public services open.[100] The UK Parliament was also able to directly approve budgets and spending for Northern Ireland. Consequently, shutdowns were avoided. Even without the imposition of direct rule, the UK Parliament could circumvent the Northern Ireland Assembly and directly pass laws to address budgetary issues and make necessary appropriations, enabling the Northern Ireland civil service to continue to function while political parties deadlocked between 2017 and 2020 and since 2022.[101]

D. Historical Case Study: Prussia

The Kingdom of Prussia in the early 1860s had a bicameral legislature and ministers who were responsible to the king and over whom the legislature had little power.[102] In theory, all spending and taxation was to be enacted by an annual budget or by special laws, and these laws could not take effect unless passed by both houses of the legislature.[103] In practice, the king remained personally powerful, and the proper legislative process for approving budgets was rarely followed. In summer 1862, the Prussian legislature failed to pass a budget,[104] prompting Chancellor Otto von Bismarck to prorogue the legislature and declare his intent to rule without a budget. Bismarck reasoned that the Constitution made no provisions for what should happen if the king and the legislature failed to agree on a budget.[105] In the event of disagreement, the will of the king would prevail because it would be a "misuse" of legislative power to "coerce the king's ministers" or to force a change in the law without the king's consent, which is essentially what happens if a government can no longer operate on a previous budget due to the failure to agree on a new budget.[106] The Prussian government continued to levy taxes and spend money based on the latest budget without further parliamentary approval.[107] This obviated the possibility of shutdowns since the government could draw money when the legislature deadlocked.

III. REPERCUSSIONS OF SHUTDOWNS

Federal spending is either discretionary or mandatory.[108] Discretionary spending totaled $2.1 trillion in fiscal year 2022, is provided through annual appropriations bills, and includes foreign affairs, transportation, administration of justice, administrative costs of various welfare programs, science, community development, some social services, and most of the U.S. military budget.[109] Mandatory spending totaled $4.1 trillion in fiscal year 2022, is not provided through annual appropriations bills, and includes many welfare programs such as Medicare, Medicaid, Social Security, unemployment benefits, retirement benefits, disability benefits, veterans' benefits, food stamps, family support programs, COVID-19 programs, and other military

100 Torrance, *supra* note 99, at 8 n.11; Sargeant, *Direct Rule*, *supra* note 96 n.11.

101 Sargeant, *Government Without Ministers*, *supra* note 96, at n.11; *see also* Sargeant, *Government Without Ministers*, *supra* note 96, at n.11 (describing the legislation passed by the UK Parliament to address budgetary issues and ensure that the civil service can continue to operate, carry out previously enacted government policy, and deliver public services as usual, while the main Northern Ireland political parties deadlock between 2017 and 2020 and since 2022, preventing the formation of a new Northern Ireland Executive and preventing the Northern Ireland Assembly from meeting despite not being suspended or abolished).

102 Erich Hahn, *Ministerial Responsibility and Impeachment in Prussia 1848-63*, 10 Cent. Eur. Hist. 3, 6 (1977), https://www.jstor.org/stable/4545786; Verfassungsurkunde [VS] [Constitution], art. 62 (1850) (Prussia); *see also* James Harvey Robinson, *A Brief Sketch of the Origin and Nature of the Prussian Constitution*, 5 Annals of the Am. Acad. of Pol. & Soc. Sci. 7, 23 (1894), https://doi.org/10.1177/000271629400500801 (discussing the Prussian legislature and people's lack of power to ensure that the king and his ministers are following the Constitution through means such as impeachment).

103 Verfassungsurkunde [VS] [Constitution], art. 62 (1850) (Prussia).

104 Hahn, *supra* note 102, at 23.

105 James Wycliffe Headlam, Bismarck and the Foundation of the German Empire, 169 (Knickerbocker Press 1899), https://tile.loc.gov/storage-services/public/gdcmassbookdig/bismarckfoundati00head/bismarckfoundati00head.pdf; *see also* Otto Pflanze, Bismarck and the Development of Germany: The Period of Unification, 1815-1871, 69 (Princeton Univ. Press 1963), https://www.jstor.org/stable/j.ctv173f0rp (discussing how the constitution "made no provision for settling serious disagreements between crown and parliament").

106 Pfanze, *supra* note 105, at 69 n.12.

107 Headlam, *supra* note 105, at 169 n.12, 170 (describing the Prussian legislature adopting a resolution to discuss holding ministers responsible for "illegally" spending money, implying that money was spent without a budget).

108 *How Much Has the U.S. Government Spent This Year?*, Fiscal Data, https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/ (last visited Dec. 2, 2023).

109 Dan Ready, Jorge Salazar, & Caitlin Verboon, Cong. Budget Off., The Federal Budget in Fiscal Year 2022: A Closer Look at Discretionary Spending (2023), https://www.cbo.gov/publication/58890; Brass et al., *supra* note 56, at 2 n.6.

and non-military spending.[110] Shutdowns do not affect mandatory spending, which makes up two-thirds of total federal spending, because they do not need to be authorized annually by Congress.[111] Of discretionary spending, which needs to be confirmed by Congress each year, shutdowns do not affect the spending that is authorized by law (because relevant appropriations bills are already passed) or that is deemed to be essential to protecting life and property, as outlined by Civiletti.[112]

It is difficult to precisely determine the impact of a shutdown in early 2024 when the November 2023 continuing resolution will expire. This is because it depends on what regular appropriations bills or continuing resolutions can make it through Congress and hence what does not get shut down. Although a relatively small fraction of spending is officially affected by a shutdown, full shutdowns, which occur when no appropriations acts or continuing resolutions are in place for longer than a few days, invariably bring severe repercussions. These harmful consequences are felt by the public, the economy, and the government. Likely due to the damage and disruption caused by shutdowns, shutdowns are seen unfavorably in opinion polls, so they could impose a political cost on the politicians seen as responsible for causing them. Combined, these harmful consequences of shutdowns present a compelling case for limiting the frequency of shutdowns.

A. Impact on the Public

A complete shutdown leads to most government services for the public being delayed or disrupted. All museums, national parks, and federal lands would be closed to the public, and park rangers would ensure that all visitors leave before a shutdown begins.[113] Then-President Barack Obama lamented, "Tourists will find every one of America's national parks and monuments, from Yosemite to the Smithsonian to the Statue of Liberty, immediately closed."[114] Tax and regulatory services within the Treasury would be impacted.[115] Many businesses would be unable to apply or obtain loans and permits at the Small Business Administration, but passport applications would continue with some delay.[116] The National Institute for Health would be unable to process grant applications, see its research being disrupted, and have to turn away around two hundred patients every week.[117] Health inspections by the Environmental Protection Agency, Occupational Health and Safety Administration, and the Food and Drug Administration would be affected, but meat, egg, and poultry inspections deemed essential to human safety would continue.[118] Transportation regulations and investigations by the Federal Aviation Administration or the National Transportation Safety Board would be disrupted, and there may be more delays in air travel.[119] Weather services, veteran support

110 Dan Ready, Jorge Salazar, & Caitlin Verboon, Cong. Budget Off., The Federal Budget in Fiscal Year 2022: A Closer Look at Mandatory Spending (2023), https://www.cbo.gov/publication/58889; Brass et al., *supra* note 56, at 2 n.6.

111 *See How Much Has the U.S. Government Spent This Year?*, *supra* note 108 (pointing out that mandatory spending is required by existing authorization laws, so unless these laws are amended or repealed, funding for these programs at predetermined levels must be allocated each year).

112 43 Op. Att'y Gen., *supra* note 48, at 6; *see also* An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, "Money and Finance", Pub. L. 97-258, 96 Stat. 923 (1982) (stating the Antideficiency Act's prohibition on spending money and accepting employees' voluntary services without authorization by law, as well as the exception to this rule for cases of emergencies).

113 Laura Meckler & Rebecca Ballhaus, *More Than 800000 Federal Workers Are Furloughed*, Wall St. J., Oct. 1, 2023, https://www.wsj.com/articles/SB10001424052702304373104579107480729687014; Wessel, *supra* note 27, at n.3; Drew Desilver, *Americans View This Shutdown Much as They Did Past Ones – Negatively and With Much Anxiety,* Pew Rsch.. Center, https://www.pewresearch.org/short-reads/2019/01/18/americans-view-this-shutdown-much-as-they-did-past-ones-negatively-and-with-much-anxiety/ (last visited Dec. 2, 2023) [hereinafter Desilver, Shutdown].

114 Meckler & Ballhaus, *supra* note 113.

115 *See Government Shutdowns Q&A: Everything You Should Know*, Comm. for a Responsible Fed. Budget, https://www.crfb.org/papers/government-shutdowns-qa-everything-you-should-know (last visited Dec. 2, 2023) (describing delays in tax refunds); *see also Four Reasons Why a Government Shutdown is Harmful*, Peter G. Peterson Found., https://www.pgpf.org/blog/2023/08/four-reasons-why-a-government-shutdown-is-harmful (last visited Dec. 2, 2023) (explaining how the Alcohol and Tobacco Tax and Trade Bureau of the Department of the Treasury is impacted, and certifications and approvals for craft breweries cannot be issued during shutdowns).

116 Wessel, *supra* note 27, at n.3; *Government Shutdowns Q&A: Everything You Should Know*; *supra* note 115.

117 Bobby Kogan & Jessica Vela, *5 Immediate Shutdown Effects*, Ctr. for Am. Progress, https://www.americanprogress.org/article/5-immediate-shutdown-effects/ (last visited Dec. 2, 2023); Meckler & Ballhaus, *supra* note 113; *Government Shutdowns Q&A: Everything You Should Know*, *supra* note 115.

118 *Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115; Kogan & Vela, *supra* note 117; Meckler & Ballhaus, supra note 113.

119 *Government Shutdowns Q&A: Everything You Should Know*,

services, and Social Security offices would be partially or completely unstaffed, but Social Security or Medicare payments would continue with some disruptions.[120] All these repercussions result from the federal government being unable to spend most discretionary spending and would persist until the government is funded again.

B. Impact on the Economy

Disruptions in government services would harm small businesses and economic growth. As stated earlier, the Small Business Administration would be unable to process loan applications. This would cost entrepreneurs to lose about $200 million per day.[121] Defense and pharmaceutical industries would see major reductions in revenue because the government is a major customer.[122] Shutdowns in 2013, 2017, and 2018-2019 reduced fourth-quarter GDP in 2013 by 0.3 percentage points, fourth-quarter real GDP growth in 2017 by $6.5 million per week, and both real fourth-quarter GDP in 2018 and first-quarter GDP in 2019 by a combined $11 billion, respectively.[123] For the 2018-2019 shutdown, although most of the $11 billion lost can be recovered after shutdowns, "about $3 billion will not be."[124] Overall, a shutdown is estimated to reduce GDP growth by 0.2 percentage points per week, and growth would only resume once it is over.[125]

C. Impact on the Federal Government

Government shutdowns are more expensive than normal government operations. In 2013, a shutdown cost $2 billion, while shutdowns between 2018 and 2019 cost $4 billion, including $3.7 billion in employees' back pay and $338 million on administrative costs, lost revenue, and late fees on interest payments.[126] Historically, unclear legal implications of and guidance regarding shutdowns created confusion and uncertainty within the government and the need to prepare and update contingency plans, both of which cost money.[127] In a 1980 shutdown, about $1.1 million was spent on "diverting top managers from their normal duties to the tasks of conceiving and developing plans and seeking formal and informal advice."[128] When Congress provides back pay to federal employees at the end of a shutdown (as further explained in the following paragraphs), the pay is not given out in exchange for any work performed, imposing further losses.[129]

---

supra note 115; *Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115.

120 *Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115, at n.14; *Government Shutdowns Q&A: Everything You Should Know*, *supra* note 115, at n.14; Wessel, *supra* note 27, at n.3; Kogan & Vela, *supra* note 117; *see* Meckler & Ballhaus, *supra* note 113 (quoting Senator Barbara Mikulski, Democrat of Maryland, decrying the looming disruptions to the weather service and the Social Security Administration in her state that will be affected by the then-upcoming 2013 shutdown, as well as President Barack Obama pointing out that veteran support centers will be unstaffed); *Boxer*, *Casey Introduce Bill to Prevent Lawmakers from Being Paid During A Government Shutdown: Senators Urge Republican Leaders to Take Threat of a Government Shutdown Off the Table*, *supra* note 61, at n. 6 (quoting Senator Boxer claiming that during shutdowns, Social Security checks and veterans' benefits would be disrupted); *see also* Feld, *supra* note 37, at 982 n.4 (summarizing the rationale used by Civiletti to justify continuing making Social Security and other entitlement programs payments during a funding gap).

121 *Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115, at n.14.

122 Moore, *supra* note 25, at n.3.

123 *Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115, at n.14; Wessel, *supra* note 27, at n.3; *Government Shutdowns Q&A: Everything You Should Know*; *supra* note 115, at n.14.

124 Wessel, *supra* note 27, at n.3; *accord Government Shutdowns Q&A: Everything You Should Know*; *supra* note 115, at n.14.

125 Wessel, *supra* note 27, at n.3.

126 Four Reasons Why a Government Shutdown is Harmful, supra note 115, at n.14.

127 Moore, *supra* note 25, at n.3; Gov't Accountability Off., supra note 41, at i n.4, ii-iii, v, 20, 22, 32-39, 45, 56 (recommending measures Congress could take to reduce the confusion and uncertainty faced by government agencies during funding gaps and explaining why these measures are necessary); 5 Op. O.L.C., *supra* note 50, at 1 (quoting Civiletti explaining that his legal opinions regarding funding gaps and shutdowns aim to reduce "administrative confusion" if Congress fails to enact appropriations bills or continuing resolutions); *Government Shutdowns Q&A: Everything You Should Know*; *supra* note 115, at n.14 (describing delays at several major airports due to the confusion among federal employees in the midst of the 2018-2019 shutdown, during which some Transportation Security Administration agents and air traffic controllers failed to report to work without pay); *id*. (noting that federal contractors sometimes include premiums in their bids because they are uncertain if they would still be paid if a shutdown occurs); *see also* Wessel, *supra* note 27, at n.3 (describing that even if a continuing resolution is passed in time to avert an upcoming shutdown, government agencies would still experience greater disruptions with planning and hiring because they cannot be sure that the continuing resolution would pass in time).

128 Gov't Accountability Off., *supra* note 41, at 19 n.4; *id*. at 28.

129 *See* Kogan & Vela, *supra* note 117, at n.14; Meckler & Ballhaus, *supra* note 113, at n.14 (implying that most direct federal employees who are furloughed and hence do not work during shutdowns are legally guaranteed back pay despite being "forced to be idle" during a shutdown, and this is part of the reason why shutdowns are more expensive than normal government operations); *Government Shutdowns Q&A: Everything You*

The inability to spend money means that salaries for government employees could not be paid while a funding gap persists. More than four million people, including 1.3 million active soldiers in the U.S. armed forces, are directly employed by the federal government.[130] Millions more are employed by various companies with federal contracts.[131] Almost all these workers, except a small minority whose salaries are provided through mandatory spending, cannot be paid during shutdowns, regardless of whether they are furloughed.[132] Some workers are required to continue working, but they do so without pay; these workers include some in-hospital medical care workers, power grid maintenance workers, air traffic controllers, law enforcement officers, prison guards and officials, border patrol agents, Transportation Security Administration agents, less than half of Center for Disease Control employees, two-thirds of Internal Revenue Service workers, most Justice Department employees, half of civilian Pentagon workers, and 1.3 million active-duty troops, as they are essential to public safety.[133] The fact that the military will serve without pay caused the White House to accuse House Republicans of "undermining our national security" during the late September 2023 budget standoff.[134] During the confusion within the government as shutdowns begin, some employees expected to work might not show up, further causing disruptions. This occurred when LaGuardia Airport in New York City stopped all flights after ten air traffic controllers failed to show up for work despite being required to do so during the 2018-2019 shutdown.[135]

Fewer workers would be affected in partial shutdowns, but as many as eight hundred thousand workers still went without pay during partial shutdowns in 2013 and in early 2019.[136] After shutdowns, workers directly employed by the federal government can expect back pay, but contractors can expect no such thing, rendering shutdowns extraordinarily harmful to these workers.[137] Delayed paychecks would also be disruptive because many federal workers work from paycheck to paycheck, so shutdowns may prevent them from re-

Should Know; *supra* note 115, at n.14 (noting that in 2013, $2.5 billion were paid to employees "for hours not worked during the shutdown"); *see also Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115, at n.14 (quoting a 2019 report saying that three shutdowns cost taxpayers "at least $3.7 billion in back pay to furloughed federal workers").

130 Kogan & Vela, *supra* note 117, at n.14; *Extreme Republican Shutdown Would Force Troops to Work Without Getting Paid and Undermine Our National Security*, White House, https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/26/extreme-republican-shutdown-would-force-troops-to-work-without-getting-paid-and-undermine-our-national-security/ (last visited Dec. 2, 2023); *see* Meckler & Ballhaus, *supra* note 113, at n.14 (stating that the federal government employs just under 2.9 million civilians); *see also Government Shutdowns Q&A: Everything You Should Know*; *supra* note 115, at n.14 (noting that there were 2.1 million non-postal federal employees in early 2018).

131 Kogan & Vela, *supra* note 117, at n.14.

132 Wessel, *supra* note 27, at n.3; Kogan & Vela, *supra* note 117, at n.14; *see* Gov't Accountability Off., *supra* note 41, at 15 n.4 (describing the use of "split paychecks" to pay employees if appropriations end at the middle of a pay period, one for pay earned before funding expires and one for back pay that were meant to be earned during the period after funding expired, because agencies cannot legally pay their employees on time if appropriations are not in place); *id*. at 53 (describing an implementation of split or "partial" paychecks in 1980); Interpretation of a Section of U.S.C. in the Antideficiency Act, B-197841, 2 (Comp. Gen. Mar. 3, 1980) (quoting Staats explaining how paying the salaries of employees during shutdowns cause the government to incur a new obligation and hence violate the Antideficiency Act); *Boxer*, *Casey Introduce Bill to Prevent Lawmakers from Being Paid During A Government Shutdown: Senators Urge Republican Leaders to Take Threat of a Government Shutdown Off the Table*, *supra* note 61 n.6 (quoting Senator Boxer claiming that troops would not receive a paycheck during shutdowns); *id*. at 36; *id*. at 44; *see* also *id*. at 45 (listing several proposed bills in the 96th Congress that would legally assure or guarantee that federal employees would receive their salaries on time during a shutdown, although it is unclear if any of them would pass before funding expired in 1980).

133 Meckler & Ballhaus, *supra* note 113, at n.14; *Government Shutdowns Q&A: Everything You Should Know*, *supra* note 115 n.14; Wessel, *supra* note 27 n.3; *Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115 n.14; *Extreme Republican Shutdown Would Force Troops to Work Without Getting Paid and Undermine Our National Security*, *supra* note 130 n.16; *see* also Kogan & Vela, *supra* note 117 n.14 (stating that the National Institute of Health's Clinical Center's contingency staffing plan during shutdowns only allows it to care for "existing patients"). *See* generally Brass et al., *supra* note 56, at 19 n.6 (stating the criteria used to determine which employees are "excepted" and hence required to work during shutdowns, with salaries only given after funding resumes).

134 *Extreme Republican Shutdown Would Force Troops to Work Without Getting Paid and Undermine Our National Security*, *supra* note 130, at n.16.

135 *Government Shutdowns Q&A: Everything You Should Know*, *supra* note 115, at n.14.

136 Meckler & Ballhaus, *supra* note 113, at n.14*; Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115, at n.14.

137 *Government Shutdowns Q&A: Everything You Should Know*, *supra* note 115, at n.14; *see* Moore, *supra* note 25, at n.3 (describing back pay for government contractors as "more ambiguous" rather than "legally guaranteed); *see also* Kogan & Vela, *supra* note 117, at n.14 (noting that federal contractors do not enjoy the protections of a 2019 law guaranteeing back pay for federal employees after shutdowns regardless of whether they are furloughed, so these contractors are "unlikely to be made whole").

ceiving money in time to pay for personal expenses.[138] Shutdowns would reduce job security and retention rates of federal employees, as the prospect of furloughs and delayed paychecks discouraged many workers from seeking employment in the government.[139] Shutdowns therefore would leave the federal government with a less talented workforce and make it more difficult to hire employees. This would hamstring the efficiency of government operations, thus imposing further costs.

Despite the disruptions felt by the federal workforce, the leaders of the three branches of government feel less impact despite bearing greater responsibility. Civiletti maintained that due to the "peculiar institutional powers and competency" granted by the Constitution to the president, the president must not be prevented from being paid to exercise "constitutionally assigned tasks."[140] By extension, judges and lawmakers in Congress, who also have essential constitutional duties, would be paid during shutdowns, although almost all congressional and judicial staffers would not be paid while some would be furloughed.[141] In addition, the salaries of judges or the president may not be altered during their continuation in office, and the salaries of lawmakers may not be altered during their term in office without a change in the law.[142] There is injustice in that the president and members of Congress are treated differently from rank-and-file employees.

D. Impact on Public Opinion

Public opinion polls suggest that Americans tend to view shutdowns negatively. A 2019 survey suggested that 58% of adults, including 79% of Democrats and 35% of Republicans, considered shutdowns a "very serious problem," and 61%, 60%, and 53% of adults disapproved of Trump's, congressional Republicans', and congressional Democrats' handling of the issue, respectively.[143] Polls between 1990 and 2019 consistently showed that the public considered shutdowns to be "a bad thing" that was harming the economy, even though a supermajority also thought they were unaffected.[144] Congress was more likely to be blamed than the president, and the party controlling the White House was less likely to be held responsible.[145] A September 2023 poll showed that 68% of Americans agreed that the mere threat of a shutdown decreases their trust in government, and 57% were concerned about a potential shutdown.[146] Notably, a majority of 54% believed that a shutdown would affect them personally, a major increase from 2013 when 78% responded that they were not inconvenienced by one.[147] In another departure from previous trends, the public was almost equally likely to blame either the Republicans in Congress or the Democrats in Congress and the White House for the spending impasse.[148] Almost 64% of the public, including at

138 Moore, *supra* note 25, at n.3; Kogan & Vela, *supra* note 117, at n.14.

139 *Four Reasons Why a Government Shutdown is Harmful*, *supra* note 115, at n.14.

140 5 Op. O.L.C., *supra* note 50, at 9-10; Wessel, *supra* note 27, at n.3.

141 Wessel, *supra* note 27, at n.3; *Government Shutdowns Q&A: Everything You Should Know*, *supra* note 115, at n.14; Brass et al., supra note 56, at 20 n.6; *id*. at 21; *see* 5 Op. O.L.C., *supra* note 50 (quoting Civiletti reasoning that for any initiative that is "grounded in his constitutional role and consistent with any statutes other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority"); *see also Boxer, Casey Introduce Bill to Prevent Lawmakers from Being Paid During A Government Shutdown: Senators Urge Republican Leaders to Take Threat of a Government Shutdown Off the Table*, *supra* note 61, at n. 6 (quoting Senator Boxer arguing that there is "inequity" in that members of Congress and the president are paid through mandatory spending during shutdowns while millions of federal employees are not).

142 U.S. Const. art. III, § 1; U.S. Const. art. II, § 1, cl. 7; *see* U.S. Const. art. I, § 6, cl. 1 (requiring the compensation received by U.S. senators and representatives to be "ascertained by law", which implies compensation may not be altered or withheld without Congress changing the law, and shutdowns are caused not by a change in the law but by a failure of Congress to pass laws); U.S. Const. amend. XXVII; Hill, *supra* note 34, at 274 n.4; *id*. at 275.

143 Desilver, *Shutdown*, *supra* 113, at n.14.

144 *See id*. (listing public opinion polling from 1990 to 2018 indicating public support or opposition to shutdowns and how many people believe they are or are not affected by it).

145 *See id*. (listing public opinion polling indicating whether people believe Congress, the president, Democrats, or Republicans are more responsible for shutdowns).

146 Paul Hitlin, *Republicans and Democrats Agree: The Threat of A Government Shutdown Is Bad*, P'ship for Pub. Serv., https://ourpublicservice.org/blog/republicans-and-democrats-agree/ (last visited Dec. 2, 2023).

147 *Id.*; Desilver, *Shutdown*, *supra* 113, at n.14.

148 *See* Patrick Murray, *National: Public Wants Budget Compromise to Avoid Government Shutdown*, Monmouth Univ., https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_092723/ (last visited Dec. 2, 2023) (suggesting that 48%, 47%, and 50% believed that President Biden, congressional Democrats, and congressional Republicans, respectively, are "not really" concerned about average Americans).

least one half of Democrats, Republicans, and Independents, supported compromise to avert a shutdown.[149]

Hence, Congress and the president have every reason to avoid shutdowns, which are inconvenient to the public, harmful to business, damaging to the economy, and disruptive to the government. Shutdowns increase inefficiencies and costs to the government and create hardships among federal employees, contractors, and soldiers. Public opinion is against shutdowns and attempting to induce one through an unwillingness to compromise, further encouraging bipartisanship and efforts to avoid one.

IV. POLICY RECOMMENDATIONS ON REDUCING THE FREQUENCY OF SHUTDOWNS

Given that the federal government frequently veers close to getting shut down despite having every reason to avoid that, it is necessary to encourage Congress to pass spending bills on time. Congress must be incentivized because separation of powers means that only Congress can appropriate money. The constitutional duty of the president is to "take care that the laws be faithfully executed," not to unilaterally enact spending legislation.[150] The judicial branch cannot order Congress to appropriate money, as the power of the judiciary extends only to "decid[ing] on the operation of" laws that conflict with each other and seeing that "the Constitution, and not … ordinary act, must govern the case to which they both apply."[151] Judicial review extends to striking down ordinary legislation when it conflicts with the Constitution, but to exercise this power, ordinary legislation must be enacted in the first place. Since the cause of shutdowns is the absence of spending legislation, courts are powerless to act. It is worth noting that the Constitution does not grant Congress the authority to withhold any appropriations whenever it wishes, as is implied in the requirement that the salaries of lawmakers, justices, and the president not be altered during their time in office.[152] A law that deprives some of these officials of their salary would conceivably be unconstitutional.[153] However, such an attempt could conceivably be overturned by the courts because Congress cannot achieve this end without amending mandatory spending legislation, and positive laws are subject to judicial review.[154] While Congress cannot withhold any appropriation, the Constitution does not explicitly require Congress to fund any amount of money to the government or prohibit funding gaps either; on the contrary, courts have often implied that the power of Congress in the matter of appropriations is absolute.[155] Neither the executive nor the judicial branches can compel Congress to pass spending legislation, since "all legislative powers … shall be vested in a Congress."[156]

149 *See id*. (noting that 50%, 63%, 76%, and 64% of Republicans, independents, Democrats, and all Americans, respectively, want members of Congress who best represent their own views on spending priorities to compromise rather than stick to spending principles and risk causing a shutdown).

150 U.S. Const. art. II, § 3.

151 Marbury v. Madison, 5 U.S. 137, 177 (1803); *id*. at 178; *see* The Federalist No. 78 (Alexander Hamilton) (arguing that the judiciary "has no influence over [] the purse, no direction either [] of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

152 Hill, *supra* note 34, at 274 n.4, 275; U.S. Const. amend. XXVII; U.S. Const. art. III, § 1; U.S. Const. art. II, § 1, cl. 7.

153 Hill, *supra* note 34, at 274 n.4, 275.

154 Brass et al., *supra* note 56, at 21, n.6; *see* Joint Resolution Making Continuing Appropriations for the Fiscal Year 1982, and for Other Purposes, Pub. L. 97-51, 95 Stat. 958, 966 (1981) (setting the salary of members of Congress, the Vice President, and other officials as part of mandatory appropriations); An Act Making Appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and Certain Independent Agencies, for the Fiscal Year Ending September 30, 2000, and for Other Purposes, Pub. L. 106-58, 113 Stat. 430, 478 (1999) (fixing the annual salary of the President, which implies that presidential salary is part of mandatory appropriations because the same amount is mandated to be paid every year without the need for further legislation); *see also Judicial Compensation*, U.S. Cts., https://www.uscourts.gov/judges-judgeships/judicial-compensation (last visited Dec. 2, 2023) (indicating salary levels for Supreme Court justices and their legal basis).

155 *See*, e.g., Hill, *supra* note 34, at 279 n.4 (including statements by courts that seem to place appropriations within the exclusive competence of Congress, possibly without any checks and balances); *see also* Feld, *supra* note 37, at 976 n. 4 (unequivocally stating that "public decisions over public funds rest in the legislative process").

156 U.S. Const. art I, § 1. *But* cf. League of Women Voters of Pa. v. Commonwealth, No. 159, slip. op., 5-7 (Pa. Sup. Ct. Feb. 19, 2018) (the Pennsylvania Supreme Court imposing a new congressional districting map after having struck down the map drawn by the State Assembly for being a gerrymander in violation of the state constitution and after the General Assembly and the governor failed to submit an acceptable time by the court-mandated deadline, which implies that the court is compelling new legislation by creating new maps, a duty which otherwise belongs to the legislature, although the court notes that such power is based on its interpretation of the state constitution, not the U.S. Constitution, which may or may not grant the federal judiciary comparable powers to act to compel

The only way to avoid shutdowns is to induce Congress to exercise its constitutional prerogative to spend.

Congress can be more effectively compelled to avert shutdowns by associating shutdowns with greater harm. The public reacts to budget deadlocks on the state level very unfavorably, similar to how spending impasses in Congress are perceived.[157] Shutdowns impose upon legislators political costs (in the form of greater difficulty in advancing other parts of their agenda, retaliation from voters and public interest groups, fundraising difficulties, and increased vulnerability in the next election) and private costs (in that more of their time is occupied on budgetary issues such that less time can be devoted to personal interests).[158] In states where the private and political costs of shutdowns are higher, state legislatures are less likely to fail to pass a budget on time, which reduces the frequency of shutdowns.[159] Similar logic may work on the federal level as well. By making the repercussions of shutdowns on the nation and on legislators personally more severe, the personal and political costs of shutdowns would be raised, which in turn incentivizes lawmakers to become more willing to compromise.

There are several ways through which the costs of shutdowns could be increased. The political costs could be increased through manipulating what parts of the government remain open and what gets shut down. Only spending that is authorized by existing law, necessary to help shut down the government, or concerned with "cases of emergency involving the safety of human life or the protection of property" are permissible during funding lapses.[160] There is, however, no specific criteria for what kinds of operations are concerned with "cases of emergency," and there is no comprehensive list of agencies that shut down or remain open during funding gaps. This means that the phrase "cases of emergency" could be interpreted in ways to affect the number of agencies that shut down and hence how severe shutdowns are. During the 2013 shutdown, for example, Mayor Vincent C. Gray of the District of Columbia used this fact to designate the entire D.C. government as essential, exempting it from the shutdown.[161]

The scope of excepted activities should be defined narrowly to raise the political costs of shutdowns. Needless to say, it would still be antidemocratic to reverse Gray's determination and shut down the D.C. government. The budget of the D.C. government, unlike that of other state or local governments, is subject to congressional approval.[162] The failure of Congress to appropriate causes shutdowns; however, only the D.C. local government but not local governments in U.S. states would be affected. This is even though only the District of Columbia has no voting representation in Congress. It would also be true to argue that "calamities" would result if all air traffic controllers or the entire military are unable to function due to shutdowns, and hence, they should still be exempted from shutdowns.[163] However, many other activities of the executive branch could be excluded from the range of excepted activities to increase the negative repercussions of shutdowns. This could cause the public to view shutdowns more unfavorably, thereby increasing political costs for lawmakers.

The private costs of shutdowns could be increased by denying members of Congress their salary and benefits if they fail to fulfill their duty of funding the government. As of December 2023, members of Congress are paid during shutdowns.[164] By making salaries dependent

appropriation for the federal government).

157 Hitlin, *supra* note 146, at 19 n.18; *see* Carl E. Klarner, Justin H, Philips, & Matt Muckler, *Overcoming Fiscal Gridlock: Institutions and Budget Bargaining*, 74 J. of Pol. 992, 994 (2012), https://www.jstor.org/stable/10.1017/s002238161200062x (claiming that public approval rating for incumbents in state governments and legislatures are lower if there is a fiscal deadlock, and voters are also less likely to vote for them). But see id. at 995 (pointing out that although politicians usually seek to avoid angering constituents, most officials do get re-elected even after budget deadlocks).

158 Klarner, Philips, & Muckler, *supra* note 157, at 995-996.

159 *Id*. at 1001.

160 5 Op. O.L.C., *supra* note 50, at 11; 43 Op. Att'y Gen., *supra* note 48, at 6.

161 Letter from Vincent C. Gray, Mayor, D.C., to Sylvia Matthews Burwell, Dir., Off. of Mgmt. & Budget (Sept. 25, 2013) (regarding District of Columbia Contingency Plan in the Event of a Lapse in Appropriations) (obtained by Mike DeBonis of the Washington Post), https://www.documentcloud.org/documents/799396-9-25-13-gray-ltr-to-omb-re-2013-shutdown.html.

162 Joseph V. Jaroscak, Cong. Res. Serv., R47156, FY2022 District of Columbia Budget and Appropriations, 2 (2022), https://crsreports.congress.gov/product/pdf/R/R47156/3.

163 Hill, *supra* note 34, at 277 n.4.

164 Wessel, *supra* note 27 n.3; Brass et al., *supra* note 56, at 20 n.6; *Boxer*, C*asey Introduce Bill to Prevent Lawmakers from Being Paid During A Government Shutdown: Senators Urge Republican Leaders to Take Threat*

upon legislators passing spending bills on time, salaries become financial incentives for passing legislation. Any amount of money can effectively motivate people to engage in a task such as negotiating and passing spending bills.[165] Conversely, if appropriations bills are not passed on time, the loss of salaries increase private costs to legislators, incentivizing Congress to ensure that spending laws are passed on time. Preventing lawmakers from receiving salaries during shutdowns is also necessary in the interest of equity or justice since legislators' inaction causes shutdowns, but if lawmakers continue to be paid during shutdowns, only other people would feel the consequences. As Senator Boxer put it, "If we can't resolve our differences, we should not receive a paycheck."[166]

Several bills to this effect have already been introduced. In 2011, Congress considered a bill that would have prevented members of Congress and the president from collecting their salary or any back-pay if the government experiences a funding lapse for a period lasting longer than 24 hours.[167] The Government Shutdown and Default Prevention Act, as it was known, passed the Senate but died in the House.[168] A less ambitious bill, which would withhold congressional salaries but allow lawmakers to collect them after they did pass a budget, passed, but it only applied in fiscal year 2014.[169] Ultimately, both houses of Congress each passed a budget resolution in 2013, and, although the Senate and the House failed to reconcile the two resolutions, this still represented the first time since 2009 when the Senate passed any budget resolution at all.[170] In 2023, more bills were proposed that would strip a lawmaker of at least part of their salary if a shutdown is in effect.[171]

These laws, despite purporting to reduce lawmakers' salary, may avoid the Twenty-Seventh Amendment's prohibition against "varying the compensation for the services of the Senators and Representatives … until an election of Representatives shall have intervened."[172] When the Ethics Reform Act of 1989 instituted cost-of-living adjustments that may alter the annual salary of lawmakers any year, its constitutionality was challenged. However, as the cost-of-living adjustments mandated by the act "does not 'take effect' at the earliest until after the new Congress has been seated," the act was upheld.[173] This implies that the Twenty-Seventh Amendment does not preclude all alterations of a lawmaker's salary before the next election. Rather, the rules for altering the salary merely need to be enacted before the next election to take place after the next election. As

of a Government Shutdown Off the Table, *supra* note 61, at n.6.

165 *See*, e.g., Mathias Pessiglione, *How the Brain Translates Money into Force*, 316 Sci. 904, 906 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2631941/ (suggesting that people are motivated to try harder at a task even if it is not known how many money would be rewarded to them for completing the task).

166 *Boxer, Casey Introduce Bill to Prevent Lawmakers from Being Paid During A Government Shutdown: Senators Urge Republican Leaders to Take Threat of a Government Shutdown Off the Table*, *supra* note 61, at n. 6.

167 *Id.*

168 *Senators Urge Members of Congress to Resolve Fiscal Issues Without Threatening the Economy and the American People*, Senator Bob Casey, https://www.casey.senate.gov/news/releases/casey-boxer-introduce-bill-to-prevent-lawmakers-from-being-paid-during-a-default-or-government-shutdown (last visited Dec. 2, 2023).

169 An Act To ensure the complete and timely payment of the obligations of the United States Government until May 19, 2013, and for other purposes, Pub. L. 113-3, 127 Stat. 51, 51 (2013); *id*. at 52.

170 Cong. Res. Serv., RL30297, Congressional Budget Resolutions: Historical Information, 4, 6 (2015); see also Concurrent resolution establishing the budget for the United States Government for fiscal year 2014 and setting forth appropriate budgetary levels for fiscal years 2015 through 2023, H.R. Con. Res. 25, 113th Congress (2013); *see also* Concurrent resolution setting forth the congressional budget for the United States Government for fiscal year 2014, revising the appropriate budgetary levels for fiscal year 2013, and setting forth the appropriate budgetary levels for fiscal years 2015 through 2023, S. Con. Res. 8, 113th Congress (2013) (listing the budget resolutions passed by Congress in 2013).

171 *See*, e.g., A Bill To reduce to annual rate of pay for Members of Congress if a Government shutdown occurs during a year, and for other purposes, H.R. 5587, 118th Congress, § 2 (2023); A Bill To provide that Members of Congress may not receive pay after October 1 of any fiscal year in which Congress has not approved a concurrent resolution on the budget and passed the regular appropriations bills, S. 219, 118th Congress, § 3 (2023); *see also* A Bill To provide that Members of Congress shall not be paid if Congress has not approved a concurrent resolution on the budget and passed the regular appropriations bills on a timely basis, H.R. 5653, 118th Congress, § 2 (2023) (listing proposed bills in 2023 that would withhold or reduce congressional salary if a government shutdown occurs).

172 U.S. Const. amend. XXVII.

173 Boehner v. Anderson, 30 F.3d 156, 162 (D.C. Cir. 1994). *Compare* U.S. Const. art. III, § 1 (stipulating that the salaries of Supreme Court justices may not be "diminished" but does not preclude increasing them), *and* U.S. Const. art. II, § 1, cl. 7 (stipulating that the salary of the president may not be increased or decreased during a term), *with* U.S. Const. amend. XXVII (stipulating that the Congress may only pass laws changing the salaries of future Congresses but not itself, but there is no requirement for the salaries of lawmakers to be constant throughout a Congress, and a law could change the salaries of lawmakers without waiting for the next election if the law provides for the change in salary to occur without Congress passing a new law).

a result, some bills provide that it would not take effect until after the next Congress has been seated in 2025.[174] Other bills stipulate that lawmakers of the 118th Congress would only see their salaries temporarily withheld from them until either spending bills are enacted or the Congress ends in 2025, but for succeeding congresses, any pay withheld due to shutdowns would not be recovered, not even after a shutdown is over.[175] Either way, since at least one election must occur before an act enacted during the 118th Congress would permanently cause lawmakers to receive less money for not passing spending bills on time, the Constitution would not be violated.

CONCLUSION

The U.S. Constitution grants Congress broad control over federal spending, but when Congress fails to approve spending for the entire executive government or certain agencies, a funding lapse ensues.[176] The Antideficiency Act prohibits federal agencies from incurring any monetary obligations without authorization from Congress, with exceptions for essential spending necessary to protect lives and property.[177] Hence, during funding lapses longer than a few hours, the government is unable to spend money toward most of its operations, leading to government shutdowns.[178] Shutdowns impose significant costs to the public, economy, and government.[179] These harms could be avoided if shutdowns do not happen.

Government shutdowns were unheard of before the 1980s.[180] In addition, they generally do not occur in other countries, as in other nations, the party in government would either need an effective majority in the country's legislature to stay in power or be able to spend money without prior approval by the legislature. [181]It is very difficult for the United States to emulate other countries because of the constitutional changes that would be required and the implications on separation of powers. The frequency of shutdowns may be reduced if the repercussions of shutdowns on the country and to lawmakers personally are made more severe.[182] Further, if lawmakers could be prevented from collecting their salaries, the incentive to pass spending bills is greater because money has a great ability to motivate behavior.[183] It is necessary to encourage Congress to pass spending bills because only Congress has the power to authorize spending.[184] Ultimately, the United States can address the problems of and avoid the harms posed by shutdowns.

174 *See*, e.g., A Bill To provide that Members of Congress may not receive pay after October 1 of any fiscal year in which Congress has not approved a concurrent resolution on the budget and passed the regular appropriations bills, S. 219, 118th Congress, § 6 (2023) (stipulating that the act, which strips lawmakers of their salaries if they fail to pass a budget resolution and all appropriations bills on time, would take effect on September 29, 2025, after the 119th Congress has been seated).

175 *See*, e.g., A Bill To reduce to annual rate of pay for Members of Congress if a Government shutdown occurs during a year, and for other purposes, H.R. 5587, 118th Congress, § 3 (2023) (providing that all lawmakers of the 118th Congress receive all salary that are withheld due to a failure to avoid a shutdown at the end of the 118th Congress). *But* see Hill, *supra* note 34, at 275 n.4 (arguing that withholding salaries but releasing them at another time still violates the Twenty-Seventh Amendment, which would make H.R. 5587's temporary withholding of salary to the 118th Congress unconstitutional).

176 *See supra* notes 27, 28, 29, 31, 32, 33, 34, 152, 155, 156, and accompanying text for earlier discussion on this topic.

177 *See supra* notes 35, 36, 42, 43, and accompanying text for earlier discussion on this topic.

178 *See supra* notes 48, 50, 51, 56, 58, and accompanying text for earlier discussion on this topic.

179 *See supra* notes 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, and accompanying text for earlier discussion on this topic.

180 *See supra* notes 39, 40, 54, 55, 57, 59, 62, 63, 64, and accompanying text for earlier discussion on this topic.

181 *See supra* notes 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107 and accompanying text for earlier discussion on this topic.

182 *See supra* notes 157, 158, 159, 168, 169 and accompanying text for earlier discussion on this topic.

183 *See supra* notes 164, 165 and accompanying text for earlier discussion on this topic.

184 *See supra* notes 150, 151, 153, 154 and accompanying text for earlier discussion on this topic.

PROTECTING LAGUINTAS CREEK:

AN ANALYSIS OF CALIFORNIA'S ENVIRONMENTAL LITIGATION FRAMEWORKS

INTRODUCTION

"We are not people protecting Nature, we are Nature protecting itself."
– Casey Camp-Horinek, Leader of the Ponca Tribe of Indians of Oklahoma[1]

Anthropocentrism:
a philosophical viewpoint arguing that human beings are the central or most significant entities in the world;[2] sees individual humans and the human species as more valuable than all other organisms[3]

Ecocentrism:
finds inherent (intrinsic) value in all of nature; goes beyond biocentrism (ethics that sees inherent value to all living things) by including environmental systems as wholes, and their abiotic aspects[4]

Prevailing environmental policies in California do not adequately address the climate crisis because they fail to take a holistic, ecocentric approach. Operating under an ethic of anthropocentrism, current policies center human interests without regard for ecosystem livelihood. Grounded in a case study of Lagunitas Creek (Marin County, CA), this paper will analyze prominent environmental policies, highlighting the Public Trust Doctrine and the Rights of Nature as two emerging legal frameworks that can be used in tandem for environmental litigation. The paper will further explore what a Rights of Nature resolution could look like to protect Lagunitas Creek.

This paper begins by contextualizing the Lagunitas Creek setting; starting at the headwaters, I will examine prominent facets of the creek throughout history. Then, I will outline three important environmental policies in California—the California Environmental Quality Act, the Clean Water Act, and the California Endangered Species Act—and analyze their relative strengths and weaknesses in protecting ecosystem vitality. I will move into an in-depth review of the Public Trust Doctrine as a potentially compelling way to litigate the conservation of Lagunitas Creek for future generations, as well as its mutually reinforcing benefits when combined with the Rights of Nature, before concluding that passing a Rights of Nature resolution is the best course of action for this particular case.

I. CONTEXTUALIZING LAGUINTAS CREEK

"For millennia we were careful stewards of the land; in return, the land took care of us. The bay, marshlands and streams provided an abundance of fish and shellfish."
– Coast Miwok Tribal Council[5]

The original caretakers of Tokelalume, now called Lagunitas Creek, were the Coast Miwok people, living in current-day Marin and Sonoma counties in Northern California. Oral histories trace the tribe's lineage back ten thousand years, highlighting how Coast Miwok peo-

1 Craig M. Kauffman & Pamela L. Martin, The Politics of Rights of Nature: Strategies for Building a More Sustainable Future 9 (2021).
2 Sarah E. Boslaugh, *Anthropocentrism*, Encyclopedia Britannica (2016), https://www.britannica.com/topic/anthropocentrism (last visited Nov. 28, 2023).
3 Paul Cryer, et. al., *Why ecocentrism is the key pathway to sustainability*, The Millennium All. for Humanity and the Biosphere (July 4, 2017), https://mahb.stanford.edu/blog/statement-ecocentrism/ (last visited Nov. 28, 2023).
4 *Id.*
5 *Our History*, Coast Miwok Tribal Council, https://www.coastmiwokofmarin.org/our-history.html (last visited Nov. 28, 2023).

ple today are profoundly interconnected with the land that is now Marin County. "We carefully tended, nurtured and gladed the many strands of oak throughout Marin that provided a key staple of our diet: acorns. We knew the yearly cycles of the plants, and exactly when, where and how to gather the wide variety of native berries, bulbs and tubers the land offered so there would be another good harvest when we returned to that location the following year."[6] The first contact with European colonizers occurred in 1579; however, the far more violent Spanish Catholic missions started almost two hundred years later. Despite ongoing attempted erasure — through slavery, murder, and disease — the Coast Miwok people today are reclaiming their self-determination and restoring their sacred traditions through Land Back. In July 2023, the Coast Miwok Tribal Council purchased 26 acres of land in Nicasio, marking the first moment of rematriation in the county.[7] For the sake of clarity and in accordance with public records, this paper will hereafter refer to the creek as Lagunitas Creek.

Lagunitas Creek Watershed covers 103 square miles and is the largest watershed in Marin. Lagunitas Creek itself runs for 24 miles, flowing northward from its headwaters on Mount Tamalpais to the Southeast end of Tomales Bay. Its major tributaries include San Geronimo Creek, Devil's Gulch, Nicasio Creek, and Olema Creek.[8] Lagunitas Creek runs through Samuel P. Taylor State Park and ends within the protected area of Point Reyes National Seashore. Because of this, the largest landowner within the watershed is the National Park Service. The second and third largest landowners in the watershed are the Marin Municipal Water District and the Marin County Open Space District, respectively.[9] As a county that prides itself on abundant natural beauty, recreational activities, and progressive approaches to environmental protection, Lagunitas Creek restoration has been a longtime focus for Marin residents. Even so, the creek has faced threats throughout history including pollution from urban runoff, agriculture, failing septic systems, and creekside development.[10] Lagunitas Creek is a Critical Coastal Area[11] and, in 2016, was labeled as impaired under the federal Clean Water Act by sedimentation, nutrients, and pathogens.[12]

Lagunitas Creek begins on the Northern slopes of Mount Tamalpais. Flowing down the mountain, the creek has three forks (East, Middle, and West) which join at Lake Lagunitas, a dammed reservoir that provides drinking water to residents in Central and Southern Marin.[13] Lake Lagunitas construction was completed in 1872, making it the oldest and smallest reservoir in the watershed.[14] Moving through Lake Lagunitas, the creek drains into three more dammed reservoirs: Bon Tempe Lake, Alpine Lake, and, eventually, Kent Lake. These reservoirs comprise a large portion of the drinking water supply system in Marin County and are owned and maintained by the Marin Municipal Water District. Also referred to as Marin Water, the entity was chartered in 1912 as the first municipal water district in California.[15] Marin Water boasts a commitment to ecological stewardship, endangered species protection, and watershed resiliency work in the face of increasing wildfire threat.[16] However the dams, which primarily serve to store surface water runoff during dry season, pose a significant risk to migration of endangered fish species. While the Lagunitas Creek Watershed is home to

6 *Id.*

7 Vanessa Rancaño, *How a Coast Miwok Group Is Buying Back a Piece of Their Ancestral Land in Marin*, KQED, 2023, https://www.kqed.org/news (last visited Mar. 26, 2024).

8 See generally Cal.'s Critical Coastal Areas Statewide Comm., Lagunitas Creek Critical Coastal Area Factsheet (2019), https://documents.coastal.ca.gov (last visited Nov. 28, 2023) (providing background information about Lagunitas Creek geography).

9 *Id.* at 1.

10 *Id.*

11 *See generally Water Quality Critical Coastal Areas Program*, Cal. Coastal Comm'n, https://www.coastal.ca.gov/water-quality/critical-coastal-areas/ (last visited Nov. 28, 2023) (discussing background information about critical coastal areas, including monitoring strategies and requirements).

12 Cal. St. Water Resources Control Bd., Final 2014/2016 California Integrated Report (Clean Water Act Section 303(d) List / 305(b) Report) (2014, 2016), https://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2014_2016.shtml.

13 *See generally Your Water,* Marin Mun. Water Dist., https://www.marinwater.org/YourWater. (discusses the water system in Marin County), (last visited Nov. 28, 2023).

14 Cal. Dep't of Water Res., Dams Within Jurisdiction of the State of California (Sept. 2022), https://water.ca.gov/-/media/DWR-Website (last visited Nov. 28, 2023).

15 Marin Municipal Water District, *supra* note 13, at *Mission and History*, https://www.marinwater.org/mission-and-history.

16 *See* Marin Mun. Water Dist., *supra* note 13, at *Watershed Resiliency*, https://www.marinwater.org/WatershedResiliency.

the largest spawning runs of endangered Coho Salmon on the Central California Coast,[17] almost all the creek's major tributaries are dammed. Following Kent Lake, Lagunitas Creek is joined by San Geronimo Creek shortly before it forms the Inkwells, two well-known natural swimming holes.[18] The Inkwells are polluted by septic runoff from homes built along the creek, causing dangerous levels of coliform, fecal coliform, and enterococcus bacteria.[19] Between 2012 and 2023, the Inkwells have received passing scores on water quality tests an average of only 33 percent of the time.[20] After the Inkwells, the creek moves through Samuel P. Taylor State Park, the site of the historic Samuel P. Taylor Paper Mill. Also called Pioneer Paper Mill, it was built in 1856 and was the first paper mill on the Pacific Coast.[21] The paper mill relied on the development of logging roads, which increased sediment load in the watershed.[22] In the 1900s, logging and cattle grazing the riparian corridor led to erosion along the creek bed and sedimentation from Lagunitas Creek into Tomales Bay.[23]

The section of Lagunitas Creek that flows through Samuel P. Taylor State Park has been the subject of habitat restoration projects for endangered Coho salmon and Steelhead Trout spawning. The Lagunitas Creek Floodplain and Riparian Restoration Project was carried out by the Salmon Protection and Watershed Network (SPAWN) in collaboration with the National Park Service. The project aimed to reverse the negative impacts of development projects on the creek, increasing the floodplain area on which salmon spawn.[24] The project removed 13,000 cubic yards of fill and concrete, including a cement retaining wall, while also installing woody debris throughout the creek.[25] These modifications made side channels, alcoves, and a floodplain, creating a livable habitat for Coho Salmon, Steelhead Trout, California Freshwater Shrimp, and other species.[26]

Following the state park, Lagunitas Creek flows through the town of Point Reyes Station and is joined by Olema Creek before emptying into Tomales Bay. Lagunitas Creek and its watershed comprise a vital ecosystem, hold cultural significance, supply most of the county's drinking water, and serve recreational and research purposes in Marin. Threats to Lagunitas Creek are mounting, as are restoration efforts. The next section will explore three prominent pieces of environmental legislation and their applications to Lagunitas Creek, emphasizing their relative abilities to address the aforementioned threats.

II. ENVIRONMENTAL LEGISLATION

While Lagunitas Creek is regulated by multiple state and federal laws, there are three pieces of legislation that prove particularly important. The California Environmental Quality Act, the Clean Water Act, and the California Endangered Species Act have been consequential in preserving the integrity of the creek ecosystem. All three of these policies, though, are anthropocentric in their approach to environmental protection: they regulate environmental impacts for the benefit of humans. As I will demonstrate later, these policies ignore the intrinsic worth of ecosystems and value human life above flora and fauna. Even so, these policies are the foundation of prevailing environmental protection efforts and have positively impacted Lagunitas Creek.

A. California Environmental Quality Act (CEQA)

17 *See* Tara Duggan, *Where to see native salmon splash, jump during their peak season in Bay Area creeks*, SF Chronicle, Jan. 3, 2023, https://www.sfchronicle.com/climate/article/coho-salmon-bay-area-17689333.php (last visited Nov. 28, 2023).

18 *See* Catie Hall, *The Inkwells*, Seven Wonders of Marin (May 6, 2009), https://sevenwondersofmarin.blogspot.com/2009/05/ink-wells.html (last visited Mar. 26, 2024).

19 *Inkwells*, Swim Guide (Nov. 2023), https://www.theswimguide.org/beach/2972 (last visited Mar. 26, 2024).

20 *Id.* at *Water Quality*.

21 *Pioneer Paper Mill*, Cal. St. Parks, Off. of Hist. Pres., https://ohp.parks.ca.gov/ListedResources/Detail/552 (last visited Mar. 26, 2024).

22 *See* Cal.'s Critical Coastal Areas Statewide Comm., *supra* note 8, at 1.

23 Tina M. Niemi & N. Timothy Hall, *Historical Changes in the Tidal Marsh of Tomales Bay and Olema Creek, Marin County, California*, 12 J. Coastal Rsch. 90, 93 (1996).

24 *Lagunitas Creek Floodplain & Riparian Restoration Project*, Turtle Island Restoration Network (2019), https://seaturtles.org/campaigns/lagunitas/ (last visited Nov. 28, 2023).

25 *Id.*

26 *See, e.g.,* Larry R. Brown & Peter B. Moyle, Status of Coho Salmon in California: Report to the National Marine Fisheries Service (1991), https://spfgtsn.krisweb.com/biblio/gen_nmfs_brownetal_1991.pdf (last visited Mar. 26, 2024).

The California Environmental Quality Act (CEQA) is the most significant land-use planning law in California. It has been integral in increasing public participati[27]on in development projects and identifying environmental impacts. The California Environmental Quality Act was signed into law in 1970 following the passage of the National Environmental Policy Act (NEPA) at the federal level.[28] CEQA mandates state and local agencies to conduct environmental impact assessments and engage in consultations with stakeholders while implementing development projects.[29]

As amended throughout the 1970s, CEQA also applies to private projects regulated by public agencies.[30] CEQA is considered one of the stronger state counterpart laws of NEPA because of the enforceability of its requirement to perform environmental reviews, mitigating harmful development projects. However, the law has also faced significant backlash both from economic developers and environmental activists.[31] While CEQA's goals are rooted in environmental conservation and defense against development pressures, the law's impact is mostly procedural and concentrated on individual project-based adverse impacts.

CEQA is meant to slow the development process and require more careful economic and environmental planning. CEQA establishes procedural requirements but gives local authorities agency in the degree of their enforcement.[32] There is no central agency responsible for CEQA implementation oversight, rather it is carried out by hundreds of local agencies, courts, and watchdog organizations. The decentralized nature of CEQA administration is also its major downfall in terms of ecosystem protection.[33]

First, environmental impact assessments often do not practically block the implementation of development projects. CEQA requires three procedural steps: (1) a public agency takes on a project to determine if CEQA review will be required, (2) the agency conducts an initial study where it can either "issue a negative declaration or conduct an Environmental Impact Report (EIR),"[34] and (3) the agency oversees the executions of the environmental impact review and report for each declared adverse impact. If a negative declaration is issued, CEQA requirements are dropped and the project is cleared for implementation. Further, if the project manager declares a commitment to mitigate significant adverse impacts, a case can be made for the agency to issue a "mitigated negative declaration,"[35] exempting the project from CEQA requirements so implementation can carry on without further review.

Second, CEQA's focus on project-specific impacts ignores the interconnectedness of entire ecosystems and the importance of holistic environmental protection. [36]CEQA has been proven to lead to positive environmental outcomes by forcing planners to weigh environmental consequences for specific projects.[37] However, by atomizing the environmental burden into discrete 'significant impacts,' CEQA ignores the interrelations within ecosystems.[38] Beyond the simple identification of a significant adverse environmental impact, less extreme environmental externalities not flagged by CEQA can lead to overall ecosystem harm. This is why some critics argue that the law falls short of its stated goal of environmental protection. CEQA is more of a bureaucratic planning law than a well-rounded ecosystem protection measure. CEQA was amended in 2014

27 *See, e.g.,* Sean Stuart Varner, *The California Environmental Quality Act (CEQA) after Two Decades: Relevant Problems and Ideas for Necessary Reform*, 19 Pepp. L. Rev. 1447 (1992).

28 Off. of the Attorney Gen., *California Environmental Quality Act* (CEQA), St. Cal. Dep't Justice, https://oag.ca.gov/environment/ceqa (last visited Nov. 28, 2023).

29 *See, e.g.*, *California Environmental Quality Act*, Cal. Dep't of Conservation, https://www.conservation.ca.gov/calgem/CEQA (last visited Nov. 28, 2023).

30 *See, e.g.*, Elisa Barbour & Michael Teitz, Pub. Pol'y Inst. Cal., CEQA Reform: Issues and Options 3 (2005) https://www.ppic.org/publication/ceqa-reform-issues-and-options/ (last visited Mar. 26, 2024).

31 *See generally*, Robert B. Olshansky, *Evaluation of the California Environmental Quality Act*, 20 Envtl. Mgmt. 11 (1996) (discussing criticisms and development of CEQA).

32 *See, e.g.*, Barbour, *supra* note 30, at 20.

33 *See, e.g.*, Olshansky, *supra* note 31, at 15.

34 Barbour, *supra* note 30, at 5.

35 *Id.*

36 *See, e.g.*, Heather Dadashi, *CEQA Tribal Cultural Resource Protection: Gaps in the Law and Implementation*, 39 UCLA J. Envtl. L. and Pol'y 231, 249 (2021).

37 *See, e.g.*, Olshansky, *supra* note 31.

38 *See, e.g.*, Dadashi, *supra* note 36, at 7.

with California Assembly Bill 52, which necessitates Tribal consultation and the evaluation of harmful impacts on tribal cultural resources, sacred spaces, and traditions. This has increased the influence of Tribal Ecological Knowledge and holistic environmental impact review; however, it is, again, mostly procedural.[39]

CEQA is anthropocentric in that it assumes ecosystem decline as an implied part of economic development, though necessarily mitigated by bureaucratic review processes. It only addresses environmental harm in the context of development projects once they are already underway.[40]

In the Lagunitas Creek case, CEQA has governed the environmental review process for various projects. For example, the Lagunitas Creek Floodplain and Riparian Restoration Project had to follow CEQA processes prior to implementation. The purpose of the project was "to restore floodplain processes and enhance riparian ecosystem function and habitat for Coho Salmon (*Onchorynchus kisutch*)."[41] Despite its purported purpose, the initial study showed that short-term adverse environmental impacts could occur during project implementation, and long-term negative effects could be felt if the project was not carried out as planned. Impacts on soil health and flood hazard were two of the myriad potential impacts in the environmental review; however, they were mitigated by the strong long-term positive declared impacts and additional precautions throughout the project. Environmental Science Associates, the group conducting the study, passed a mitigated negative declaration for the National Parks Service, California State Coastal Conservancy, and Salmon Protection and Watershed Network (SPAWN) to be able to continue implementing the project.[42] Land use projects, irrespective of their purpose, are required to follow the CEQA review process. The Lagunitas Creek Floodplain and Riparian Restoration Project is a key example of how CEQA simultaneously foregrounds environmental protection and slows down project implementation through extensive, bureaucratic requirements.

B. Clean Water Act

Whereas CEQA targets environmental quality more broadly through regulating development projects, the Clean Water Act specifically addresses water pollution. Established in 1972, the Clean Water Act allows the Environmental Protection Agency (EPA) to regulate pollution discharge in navigable waterways.[43] After its passage as an amended version of the Federal Water Pollution Control Act of 1948,[44] the Clean Water Act has continuously undergone modifications, particularly in terms of the scope of its jurisdiction.[45] The term navigable waterways is murky, however, the act defines it as "waters of the United States." In *Rapanos v. United States* (2006) a district court decision, later affirmed in the Sixth Circuit Court of Appeals, determined that wetlands are included under "waters of the United States" and are therefore subject to the Clean Water Act.[46] In 2015, the EPA further ruled to expand the definition of "waters of the United States" to include streams and wetlands that have a 'significant nexus' to traditional navigable waterways.[47]

The Clean Water Act aims to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" and wetlands.[48] The act does this by means of a permitting process: the EPA's National Pollutant Discharge Elimination System (NPDES).[49] The permitting system is run by the EPA and aims to identify point sources that discharge pollution into

39 *Id.*

40 *See generally* Olshansky, *supra* note 31 (discussing downsides of CEQA bureaucratic review process).

41 Envtl. Science Assoc., Lagunitas Creek Floodplain and Riparian Restoration Project: Environmental Assessment and Initial Study/Mitigated Declaration 1-3 (2018) https://scc.ca.gov/webmaster/ftp/pdf/notices/Lagunitas_Creek_EA-Initial_Study_CD.pdf (last visited Mar. 26, 2024).

42 *Id.*at 4-1.

43 *See, e.g.*, The Federalist Soc'y, *Waters of the United States: Interpreting the Clean Water Act*, YouTube (Dec. 17, 2018), https://www.youtube.com/watch?v=UpchKzvYelM.

44 Ann Powers, *Federal Water Pollution Control Act (1948)*, Encyclopedia.com (2019), https://www.encyclopedia.com/history (last visited Nov. 28, 2023).

45 *See, e.g., History of the Clean Water Act*, U.S. Envtl. Protection Agency (2021), https://www.epa.gov/laws-regulations/history-clean-water-act, (last visited Nov. 29, 2023).

46 Rapanos v. U.S., 547 U.S. 715 (2006).

47 The Federalist Soc'y, *supra* note 43.

48 *See, e.g., Clean Water Act (CWA)*, Bureau of Ocean Energy Mgmt., https://www.boem.gov/environment/environmental-assessment (last visited Nov. 29, 2023).

49 *Summary of the Clean Water Act*, U.S. Envtl. Protection Agency, https://www.epa.gov/laws-regulations/summary-clean-water-act (last visited Nov. 29, 2023).

waterways.[50] Water resources projects, infrastructure development, and mining projects all require a permit prior to implementation. According to the EPA website, "when you apply for a permit, you must first show that steps have been taken to avoid impacts to wetlands, streams and other aquatic resources; that potential impacts have been minimized; and that compensation will be provided for all remaining unavoidable impacts."[51] On a federal level, the Clean Water Act is arguably the most significant piece of water quality legislation.

As a consequence of its focus on water *quality*, the Clean Water Act fails to take into account the issue of water *quantity*, an increasingly critical aspect of environmental protection amidst worsening drought caused by the climate crisis. While the act aims to restore water quality for human uses, emphasizing drinking, fishing, and swimming, it does little to protect ecosystems from degradation. It is intended, indirectly, to facilitate ecosystem restoration in waterways, and requirements under the Clean Water Act have triggered an increase in environmental protection efforts.[52] Alone, however, it does not successfully integrate the issues of water quality and water quantity, making ecosystem protection nearly impossible at a large scale. This is why many critics of the Clean Water Act argue for the necessity of a more well-rounded legal framework to protect aquatic ecosystems, not simply eliminate pollution.[53]

Lagunitas Creek is one of the many waterways listed as impaired under the 2016 Clean Water Act. As reported by the California State Water Resources Control Board, it is impaired by sedimentation, siltation, nutrients, and pathogens. For all of these pollutants, the source is stated as 'unknown.'[54] The Clean Water Act requires the San Francisco Bay Regional Water Quality Control Board to establish a Total Maximum Daily Load (TMDL) for sediment in the Lagunitas Creek Watershed to limit impacts of erosion and sedimentation on the riparian habitat, fish spawning, and human recreation. The Lagunitas Creek Floodplain and Riparian Restoration Project is also occurring under the auspices of the Clean Water Act, as floodplain improvements will help meet the TMDL goal by decreasing sediment pollution in the waterway.[55]

C. Endangered Species Act

Like the Clean Water Act, the Endangered Species Act targets a specific aspect of ecosystem protection. Instead of waterways, though, it addresses critical plant and animal species. The federal Endangered Species Act was passed in 1973 and is the prevailing policy for protecting wildlife, fish, and plants listed as endangered.[56] A state-specific bill, the California Endangered Species Act, was established in 1984 and amended in 1997 after an earlier version of the law was repealed.[57] As California's primary nongame wildlife protection statute,[58] the California Endangered Species Act plays a crucial role in protecting biodiversity, by defending animal and plant species. It functions through a listing process conducted by the California Fish and Game Commission. Once a species is on the list, it may not be imported into or exported out of the state, 'taken,' possessed, purchased, or sold without authorization.[59] 'Taking' is defined by the Endangered Species Act as "harassing, harming, pursuing, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in any such conduct-of endangered and threatened species."[60]

50 *See, e.g., National Pollutant Discharge Elimination System (NPDES)*, U.S. Envtl. Protection Agency, https://www.epa.gov/npdes, (last visited Nov. 29, 2023).

51 *Permit Program under CWA Section 404*, U.S. Envtl. Protection Agency, https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404, (last visited Nov. 29, 2023).

52 *See, e.g.*, Holly Doremus & Dan Tarlock, *Can the Clean Water Act Succeed as an Ecosystem Protection Law?*, 4 Geo. Wash. J. of Energy & Envtl. L. 46 (2013).

53 *See, e.g.*, Erin Ryan, *How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and the Rights of Nature Movement*, 73 Case W. Res. L. Rev. 2 (2022).

54 Cal. St. Water Resources Control Bd., *supra* note 12.

55 Envtl. Science Assoc., *supra* note 41.

56 *See, e.g.*, *Endangered Species Act*, U.S. Fish & Wildlife Serv., https://www.fws.gov/law/endangered-species-act (last visited Nov. 29, 2023).

57 *See, e.g.*, *Threatened and Endangered Species Protected Under the California Endangered Species Act*, Cal. Fish & Wildlife Serv., https://wildlife.ca.gov/Conservation/CESA (last visited Nov. 29, 2023).

58 *See, e.g.*, Lynn E. Dwyer & Dennis D. Murphy, *Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act*, 35 Nat. Res. J. 735, 735 (1995).

59 Cal. Fish & Wildlife Serv., *supra* note 57.

60 Meredith N. Healy, *Fluid Standing: Incorporating the Indigenous Rights of Nature Concept into Collaborative Management of the Colorado River Ecosystem*, 30 Colo. Nat. Res. Energy & Envtl L. Rev. 327, 337 (2019).

The California Endangered Species Act also facilitates restoration project collaborations amongst government agencies, individual researchers, and organizations to protect endangered species habitats.[61] While its environmental conservation impacts have been significant, the act once again fails to protect ecosystems holistically. The Endangered Species Act promotes targeted restoration efforts for the specific areas of an ecosystem that comprise the habitat of a listed endangered species.[62] Nonetheless, the Endangered Species Act should be classified as less anthropocentric than CEQA and the Clean Water Act, because its efficacy is not measured by the beneficial use of humans. The act places humans as responsible for the impacts of development on vulnerable wildlife and plant populations; it further regulates impacts on endangered species for the purpose of mitigating extinction and ecosystem decline.

Lagunitas Creek is home to three endangered fish populations as listed by the State of California Natural Resources Agency Department of Fish and Wildlife: Coho Salmon, Steelhead Trout, and California Freshwater Shrimp.[63] "Lagunitas Creek supports the largest and southernmost spawning run of Coho Salmon in the Central California Coast Coho Salmon Evolutionary Significant Unit. As such, the California Department of Fish and Wildlife (CDFW) lists Lagunitas Creek as one of four high priority watersheds for restoration efforts aimed at improving habitat conditions for the recovery of the species."[64]

The classification of these species as endangered further contributed to the Lagunitas Creek Floodplain and Riparian Restoration Project. One of the main goals of the project was to restore the habitat and foster valuable spawning grounds for endangered salmon. This project exemplifies how prevailing environmental legislation can be combined for meaningful environmental protection; however, none of the three policies alone was enough to protect Lagunitas Creek.

III. PUBLIC TRUST DOCTRINE

"By the law of nature these things are common to mankind–the air, running water, the sea, and consequently the shores of the sea."
– Justinian Institute 2.1.1[65]

In contrast to contemporary environmental policies, which are mostly reactionary to economic and environmental crises, the public trust doctrine places responsibility on the state to conserve natural resource commons for current and future public benefit.[66] The California Constitution's public trust principles are summarized simply as, "preserving water for public welfare and in the public interest."[67] In other words, natural features should be shared amongst humans and protected under their status as publicly-held resources.

Land held in public trust is regulated by the state and cannot be converted for private use. [68]The Public Trust Doctrine, which has been mostly applied to navigable waterways, has transformed from a simple guarantee of public access to a framework for protecting trust resources from overuse and degradation.[69] Further, because citizens are the beneficiaries of trust resources, they can hold the state accountable, through legal action, for failure to maintain said resources.[70] The Public Trust Doctrine is sometimes criticized for reinforcing the anthropocentric view that environmental protection should occur to support human benefit. Despite this, it is a powerful tool for environmental defense that focuses on ecosystems holistically and can serve as an intermediary

61 Cal. Fish & Wildlife Serv., *supra* note 57.
62 *See* Healy, *supra* note 60, at 338.
63 *See, e.g.*, Cal. Dep't of Fish & Wildlife Biogeographic Data Branch, Cal. Nat. Diversity Database (CNDDB), State and Federally Listed Endangered and Threatened Animals of California (2024) https://nrm.dfg.ca.gov/FileHandler.ashx (last visited Mar. 26, 2024).
64 Cal. Dep't of Fish & Wildlife, Recovery Strategy for California Coho Salmon Progress Report 2004-2012, https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=165447&inline (last visited Mar. 26, 2024).
65 Translated In the Institutes of Justinian 167 (Thomas Collett Sandars trans., 4th ed. 1869).
66 *See, e.g.*, Erin Ryan, Holly Curry, & Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 Cardozo L. Rev. 2447, 2456 (2021).
67 *Id.*at 2470.
68 *See, e.g.*, Michael C. Blumm & Zachary A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on Its Future*, 44 Pub. Land & Res. L. Rev. 1 (2021).
69 *See, e.g.*, Ryan, *supra* note 66, at 2457.
70 *See, e.g.*, Ryan, *supra* note 53, at 485.

between prevailing legislation and the Rights of Nature.

The Public Trust Doctrine has its roots in early Roman and English common law. Initially, it was written into the *jus publicum* principle of the Roman common law doctrine and was summarized in the Institutes of Justinian in 535 AD.[71] In 1215, the Public Trust Doctrine was transferred into English common law and was written into the Magna Carta. There, the King was given designated ownership of all bodies of water but had an obligation to take care of them for public use.[72] The doctrine was spread to the United States through British colonization and appears in documents as early as the Declaration of Independence.[73] It was first recognized in United States state courts in the early 1800s.[74] In 1821, the New Jersey Supreme Court ruled in *Arnold v. Mundy* that the land beneath navigable waterways is common property held in public trust, protecting public use for fishing.[75] Following that, an 1892 Supreme Court case instituted the scope of the doctrine across the nation, ruling against Illinois Central Railroad, and affirmed that "the State holds the title to the lands under navigable waters… in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[76]

In 1970, Joseph Sax published an article that is widely considered the first contemporary legal analysis of the applicability of Public Trust principles to natural resource management.[77] In the article, Sax argued for the doctrine as a means of regulating the actions of natural resource agencies.[78] The 1983 California State Supreme Court Decision in *National Audubon Society v. Superior Court* was another landmark case, setting the precedent of Public Trust Enforcement in California. Colloquially called the 'Mono Lake' case, the decision expanded public trust values to "include recreational and aesthetic values and the importance of the lake to wildlife."[79] The court ruled that the State Water Board had acted against these values when diverting water from the lake to Los Angeles. Although it took eleven years after the decision, the California State Water Resources Control Board eventually mandated a water level for the lake, in order to protect the public trust values, including the lake ecosystem.[80]

"The public trust...is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands..."
– Supreme Court of California, 1983[81]

The Public Trust Doctrine is still a common law doctrine. This means that it is enforced through the court system, heavily dependent on precedent, and not necessarily codified into law.[82] The scope of the Public Trust Doctrine varies from state to state, but it has been institutionalized in some cases.[83] Pennsylvania, for example, has public trust written into its state constitution, including the expansion of public trust principles from navigable waterways to all natural resources within the state.[84] California has public trust language in its constitution, statutes, and regulatory law. In Article Ten, the California Constitution "codifies the doctrine in relation to water resources, including the sovereign ownership doctrine as it applies to tidelands and rights of public access to all navigable waters."[85] In its constitutional language, California declares the Public Trust Doctrine for the protection of reasonable beneficial

71 *Id.*
72 *See, e.g., Public Trust Doctrine*, Mono Lake Comm'n (2023), https://www.monolake.org/learn/aboutmonolake/savingmonolake/publictrust/ (last visited Nov. 29, 2023).
73 Marin Mun. Water Dist., Lagunitas Creek Stewardship Plan (2011), https://www.marinwater.org/sites/default/files/2020-09/Lagunitas%20Stewardship%20Plan.pdf (last visited Mar. 28, 2024).
74 *See, e.g.*, Ryan, *supra* note 66, at 2458.
75 *See, e.g.*, *The Public Trust Doctrine*, Cal. Water Impact Network, https://www.c-win.org/the-public-trust (last visited Nov. 29, 2023).
76 *See, e.g.*, Ryan, *supra* note 53, at 485.
77 *See, e.g.*, Blumm, *supra* note 68.
78 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).
79 *The Public Trust Doctrine at Mono Lake*, Mono Basin Clearinghouse (2020), https://www.monobasinresearch.org/timelines/publictrust.php (last visited Nov. 29, 2023).
80 *Id.*
81 National Audubon Society v. The Superior Court of Alpine County, S.F. No. 24368 (Supreme Court of California 1983).
82 *See, e.g.*, The Robbins Collection, Berkeley L. Sch., The Common Law and Civil Traditions https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf (last visited Mar. 28, 2024).
83 *See, e.g.*, Ryan, *supra* note 66, at 2462.
84 *See, e.g.*, Ryan, *supra* note 53, at 487.
85 Ryan, *supra* note 66, at 2464.

uses, regarding navigation, and in terms of protection of endangered species under the Endangered Species Act.[86] The Public Trust Doctrine also appears in multiple sections of the California Water Code, protecting ecological, scenic, and recreational uses, as well as the Fish and Game Code.[87] Ultimately, the doctrine still operates as a common law principle in California.

Various litigants have argued on Public Trust grounds for greater protections for Lagunitas Creek. In 1995 the State Water Resources Control Board adopted WR 95-17 amending the water rights of the Marin Municipal Water District and two other entities. "The purpose of the amendments [was] to protect fishery resources in the Lagunitas Creek watershed and to prevent the unauthorized diversion and use of water."[88] In a later order, WR 96-1, the Marin Municipal Water District, the Sierra Club Marin Group, the Tomales Bay Association, and an individual, Mr. Willis Evans, filed a petition for consideration regarding the amendments to Marin Municipal Water District rights. In his petition, Willis Evans argued that the adjusted flow requirements were insufficient to maintain public trust fish resources in Lagunitas Creek. The State Water Resources Control Board determined, however, that the petition did not cite significant evidence to demonstrate that requirements under the Public Trust Doctrine were not fulfilled. So, all of the filed petitions were denied.[89]

This exemplifies a failure of the Public Trust Doctrine in the Lagunitas Creek case, but it points to the potential of using the doctrine in the future. Based on precedent and constitutional codes in California, there is hope that the state will rule in favor of further instream flow protections for fish going forward. The State Water Resources Control Board stated that there was "no memorandum of points and authorities in support of the legal argument that the SWRCB has not met its obligation under the public trust doctrine."[90] A future case that mended these faults may result in a ruling in favor of public trust resource protection.

The failure also represents the necessity for the Public Trust Doctrine to work in tandem with other legal frameworks in order to guarantee the protection of entire ecosystems. Despite its status as an anthropocentric principle, the Public Trust Doctrine makes strides in protecting ecosystems holistically. In comparison to the Clean Water Act, for example, the Public Trust Doctrine addresses the need to regulate water quantity in order to protect ecosystem biodiversity.[91]

A historical understanding of the Public Trust Doctrine, including its application to Lagunitas Creek, shows that the doctrine can be a powerful tool for litigating environmental protection. It is enforceable and has a strong precedent, especially in California. From its origins, the doctrine has been adapted to address ecosystem conservation and natural resource management as a whole. Because of this historical framework and the doctrine's anthropocentric nature, it should not be solely relied on for environmental protection. That is where the Rights of Nature, a legal framework newly emerging in the United States, comes into play.

IV. RIGHTS OF NATURE

"If the law is to help solve problems of climate change and mass extinction, legal systems need to be restructured to reflect the fact that Nature comprises holistic, dynamic, multidimensional, complex, adaptive systems and that human societies are among these systems."[92]

The Rights of Nature legal framework views humans as part of Nature, elements of an interconnected ecosystem that are of equal value to other living organisms.[93] Compared to the dominant conceptualization of humans as above Nature, able to control and manipulate it for

86 Marin Mun. Water Dist., *supra* note 73.
87 *See e.g.,* Ryan, *supra* note 66, at 2471.
88 California State Water Resources Control Board Order WR 96-1 (1996). https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1996/wro96-01.pdf (last visited Mar. 28, 2024).
89 *Id.*
90 *Id.*
91 *See e.g.,* Ryan, *supra* note 53.
92 Kauffman, *supra* note 1, at 5.
93 Stefan Knauss, *Conceptualizing Human Stewardship in the Anthropocene: The Rights of Nature in Ecuador, New Zealand and India*, 31 J. Agri. and Envtl. Ethics 703 (2018).

their own benefit, the Rights of Nature represents a shifting paradigm about human relationships with Nature. In stark contrast to the aforementioned legislation and the Public Trust Doctrine, it is entirely ecocentric in its claim that Nature has inherent value.[94] Environmental protection litigation under the Rights of Nature, therefore, moves away from property rights principles and argues that Nature has an unequivocal right to exist irrespective of its benefit to, or use by, humans.[95]

It is widely agreed that the Rights of Nature originate in the traditions of Indigenous communities around the world.[96] Traditional Ecological Knowledge, or 'Indigenous Science,' is based on an understanding of land stewardship and developing symbiotic relationships between humans and the natural environment.[97] It has been passed down through generations and developed over thousands of years of interconnected relationships between Indigenous peoples and the land they inhabit.

"For many indigenous nations, the advocacy for a healthy environment is deeply intertwined with the protection of traditional, historical, and cultural lifeways and practices. This connection between the environment and indigenous lifeways has been in place since time immemorial and will continue to be an important and sacred connection well into the future."[98]

The development of agriculture and the domestication of animals began to shift relationships with the natural world, in colonial societies. The idea that humans are separate from, and above, Nature emerged, and natural features were viewed as natural resources to be extracted for the benefit of human life. This distancing was exacerbated by the scientific and industrial revolutions.[99] In many Indigenous communities, however, the understanding of nonlinear and interdependent relationships has been maintained as a way of life. There is a stronger sense of responsibility to land, caretaking, and stewardship in Indigenous communities and Tribal nations, which is why the Rights of Nature movement originated, and has gained traction, there.[100]

There are two main avenues for establishing the Rights of Nature legally: the Nature's rights model and the legal personhood model.[101] The Nature's rights model speaks broadly about the right of all ecosystems under legal jurisdiction to exist, maintain natural cycles, and to be restored when damage has been done. It is reactionary and commonly used as a defense tool once violations have already taken place. The model also allows any individual to speak on behalf of an ecosystem when its rights have been infringed upon, or are likely to occur.[102] The second avenue, a legal personhood model, designates personhood status to a specific ecosystem, rather than Nature as a whole. It extends the legal rights of a person, or corporation, to a specific natural feature. Under this model, dedicated guardians or stewards are elected to speak for the ecosystem, giving the ecosystem a voice in legal decision-making processes.[103] There are wide variations in the implementation of these two models across the globe, two key examples being in Ecuador and New Zealand.

Ecuador was the first country to adopt the Rights of Nature into its Constitution with a set of amendments in 2008.[104] In contrast to the neoliberal policies that usually motivate sustainable development goals, Ecuador pledged to promote *sumak kawsay* (loosely translated to 'good living') or the idea of living in harmony with Nature.[105] This grew from the concept of Pacha Mama, or Mother Earth, and a fundamental sense of respect for and responsibility to Nature. Chapter 7, Article 71 of Ecuador's constitution reads:

94 *See, e.g.*, Matthew Miller, *Environmental Personhood and Standing for Nature: Examining the Colorado River Case*, 17 U. N.H. L. Rev. 355, (2019).

95 *See, e.g.*, Will Kenton, *What Are Property Rights, and Why Do They Matter?*, Investopedia (May 22, 2022), https://www.investopedia.com/terms/p/property_rights.asp (last visited Nov. 29, 2023).

96 *See e.g.,* Ryan, *supra* note 66, at 2502.

97 *See, e.g.*, Fulvio Mazzocchi, *Western science and traditional knowledge: Despite their variations, different forms of knowledge can learn from each other*, 7 EMBO Reps. 463 (2006).

98 Geneva E. B. Thompson, *Codifying the Rights of Nature: The Growing Indigenous Movement*, 59 Judge's J. 2, 12 (2020).

99 *See, e.g.*, Kauffman, *supra* note 1, at 5.

100 *See, e.g.*, Thompson, *supra* note 98.

101 *See, e.g.*, Kauffman, *supra* note 1, at 15.

102 *Id.*

103 *Id.* at 16.

104 *See, e.g.*, Craig M. Kauffman & Pamela L. Martin, *How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms*, 12 Transnat'l Envtl. L. 366 (2023).

105 *Id.* at 370.

"Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate."[106]

Ecuador's constitution is arguably the strongest example of the Rights of Nature in law. Since 2008, 55 court cases have cited the Rights of Nature, further normalizing the doctrine through legal practice.[107] Specific criteria for Rights of Nature violations are written into law as well as the doctrine's connection to other constitutional rights, making enforcement more tangible.[108]

New Zealand is a key example of the legal personhood model of the Rights of Nature implementation. Indigenous Maōri understandings of Nature do not resonate with the language of ownership or rights. Instead, they emphasize the responsibility of humans to defend Nature.[109] In 2017, New Zealand granted personhood status to the Whanganui River (Te Awa Tupua) watershed which declares "that the river is a living whole, from the mountains to the sea, incorporating all its physical and metaphysical elements."[110] The legislation also created the office of Te Pu Tupua, with two elected representatives who act as legal guardians or representatives of the river. The country has also given personhood status to Te Urewera National Park and Mount Taranaki.[111]

V. RIGHTS OF NATURE IN THE UNITED STATES

In spite of its establishment on a global scale, the Rights of Nature doctrine is just beginning to gain momentum in the United States legal context. The Rights of Nature challenges many of the fundamental, dominant beliefs held in the United States about ownership, property rights, and beneficial use. This was demonstrated by the first appearance of Rights of Nature in the 1972 Supreme Court Case *Sierra Club v. Morton*.[112] In this case, the Sierra Club argued against a proposed Disney ski resort that would have detrimental effects on the surrounding environment in Mineral King Valley, Sequoia National Forest.[113] The judge ruled against the Sierra Club, citing the Administrative Procedure Act as the reason that Nature does not have its own standing.[114] Even so, the case was revolutionary because it argued in defense of the area's "aesthetics and ecology" without directly citing human benefit.[115] It is also notable for the powerful dissenting opinion led by Justice Douglas that referenced Christopher Stone's newly published article *Should Trees Have Standing?* In his paper, Stone argued "that legal rights should be conferred on forests, oceans, rivers, and the natural environment as a whole… [N]atural objects should have legal guardians and that environmental groups were well poised to serve in that role."[116] The article and accompanying dissenting opinion are widely regarded as the first arguments for the Rights of Nature in the United States.

A microcosm of what has occurred internationally, the Rights of Nature have had increasing success in Tribal law in recent years, but have failed to gain traction in most municipalities. There have been many attempts, with few successes, but I will highlight two success stories: the Klamath River and the Boulder Creek Watershed.

In 2019, the Yurok Tribe passed a resolution declaring the rights of the Klamath River. The Tribe has long lived off of the river, relying on it for sustenance and spiritual traditions. Since colonization, the health of the

106 Constitution of the Republic of Ecuador 2008, art. 71, *translated* in Pol. Database Am., Geo. U. Last updated Jan. 31, 2011, https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html (last visited Mar. 28, 2024).
107 Kauffman, *supra* note 104.
108 *Id.*
109 *See, e.g.*, Kauffman, *supra* note 1, at 72.
110 Nick Perry, *New Zealand river's personhood status offers hope to Māori,* Assoc. Press, Aug. 14, 2022, https://apnews.com/article/religion-sacred-rivers-new-zealand-86d34a78f5fc662ccd554dd7f578d217(last visited Nov. 29, 2023).
111 *See, e.g.*, Ryan, *supra* note 66, at 2518.
112 Sierra Club v. Morton, 405 U.S. 727 (1972).
113 *See, e.g.*, Ryan, *supra* note 66, at 2503.
114 *Sierra Club*, 405 U.S., 741.
115 *See, e.g.*, Ryan, *supra* note 66, at 2504.
116 *Id.*

Klamath has rapidly declined due to damming, development projects, mining, logging, and extractive fishing industries. Written into Tribal law, the resolution "establishes the Rights of the Klamath River to exist, flourish, and naturally evolve; to have a clean and healthy environment free from pollutants; to have a stable climate free from human-caused climate change impacts; and to be free from contamination by genetically engineered organisms."[117] In this case, the Tribe used the legal personhood model to protect the river, giving it a voice in causes of action. The document also resolved to establish an ordinance further granting the Klamath River ecosystem the rights of a person.[118]

Rights of Nature successes outside of Tribal law are few and far between. However, the Boulder Creek Watershed resolution in Netherland, Colorado provides a glimmer of hope. In 2021, the town's Board of Trustees passed the first Rights of Nature resolution for a watershed in Colorado.[119] It states:

"The Creek and its encompassing Watershed, and the living and other things existing naturally therein, exist and function as an integrated and interdependent system of natural communities and are therefore understood, respected, and recognized in this Resolution as a living entity, possessing fundamental and inalienable rights."[120]

With a special emphasis on the rights of Boulder Creek, the resolution guarantees protection for the watershed to thrive, declaring: "The Watershed and its living and non-living natural components and communities — including forests and wildlife — possess, at minimum, fundamental and inalienable rights to exist, maintain integral health, regenerate, evolve, and be restored."[121]

The resolution further outlines a system for appointing legal guardians to speak on behalf of the Creek and Watershed in legal disputes:

The town should "study, develop, and implement mechanisms through which the Creek and Watershed meaningfully engage in public decision-making processes, such as by establishing a legal guardianship body that serves as the fiduciary of the Creek and Watershed, or through such other means as are determined effective and appropriate by the Town."[122]

Returning to Lagunitas Creek, a resolution using similar language is evidently the best course of action for protecting the creek ecosystem. A resolution for Lagunitas Creek could follow the mold of Boulder Creek but ought to be adapted according to the specific threats facing the creek, notably its status as a critical habitat for endangered Coho Salmon and Steelhead Trout.

The Rights of Nature is the only legal framework that fully challenges the anthropocentric ethic underlying all prevailing environmental legislation in the United States. Granting rights to entire ecosystems recognizes their inherent value independent from human use, as well as the intrinsic link between human societies and their natural environments. Attempts to litigate Lagunitas Creek under CEQA, the Clean Water Act, the Endangered Species Act, and the Public Trust Doctrine, have been meaningful, but do not go far enough. It is imperative to introduce a Rights of Nature Resolution for the Lagunitas Creek Watershed to the Marin County Board of Supervisors.[123]

CONCLUSIONS AND PATHWAYS FOR-

117 Anna V. Smith, *The Klamath River now has the legal rights of a person,* High Country News, Sept. 24, 2019, https://www.hcn.org/issues/51.18/tribal-affairs-the-klamath-river-now-has-the-legal-rights-of-a-person (last visited Nov. 29, 2023).

118 *See, e.g.*, Jay A. Martin, *The Klamath River has the "Legal Rights of a Person" a Yurok Tribe Resolution Establishing Rights Of The Klamath River*, Siskiyou News, Oct. 26, 2023, https://www.siskiyou.news/2023/10/26/ (last visited Nov. 29, 2023).

119 Gary Wockner, *Colorado River Update: Victory — Rights of Nature Established for Boulder Creek in Nederland, Colorado*, Save the Colo. (July 12, 2021), https://savethecolorado.org/colorado-river-update (last visited Nov. 29, 2023).

120 Town of Nederland, Boulder Cnty. Res. 2021-11 (Colo. 2021) (Save the Colo.), https://savethecolorado.org/resolution-2021-11-rights-of-nature-nederland/ (last visited Mar. 28, 2024).

121 *Id.*

122 *Id.*

123 *See generally*, *Board of Supervisors*, Cnty. of Marin, https://www.marincounty.org/depts/bs (last visited Mar. 28, 2024) (providing general information on Board of Supervisors landing page).

Since the 1970s, there has been an increased focus on environmental legislation, as CEQA, the Clean Water Act, and the Endangered Species Act make clear; however, environmental degradation has worsened dramatically within that time period. In fact, "the world has seen an average 68 percent drop in mammal, bird, fish, reptile, and amphibian populations since 1970" mostly resulting from habitat destruction.[124] Anthropocentric legislation is evidently failing to address environmental impacts at the same pace as development, industrialization, and globalization. Prevailing environmental policies simply increase control and further bureaucratize environmental impacts.[125] The Clean Water Act "only legalizes pollution, rather than preventing it."[126] Western environmental law, including the Public Trust Doctrine, does not abide by the 'law of the natural world,' which determines that humans are animals and the world is "a dynamic and fluid interconnected community."[127] Environmental policies that ignore the relational dynamics of the natural world cannot effectively mitigate the climate crisis. So, it is imperative to reimagine the ideological basis of environmental jurisprudence.

A case study of Lagunitas Creek reveals the need to move beyond status quo environmental legislation in California and raises further questions about enforceability. A Rights of Nature Resolution, in practice, would require collaboration between multiple individuals and organizations, including the Coast Miwok Tribal Council, SPAWN, Marin Municipal Water District, and the National Parks Service. Tribal co-stewardship of watershed areas within federally owned lands should be explored as a strategy that increases the moral authority of enforcers.[128] Ultimately, the Public Trust Doctrine, the Rights of Nature, and non-legal mechanisms must be mobilized to protect Lagunitas Creek's vibrant ecosystem.

124 *A Warning Sign: where biodiversity loss is happening around the world*, World Wildlife Mag., Summer 2021, https://www.worldwildlife.org/magazine/issues/summer-2021 (last visited Nov. 29, 2023).

125 Olshansky, *supra* note 31.

126 Ryan, *supra* note 66, at 2501.

127 Kauffman, *supra* note 1, at 5.

128 *Tribal Co-Management of Federal Lands*, U.S. Dep't Interior (Mar. 8, 2022), https://www.doi.gov/ocl/tribal-co-management-federal-lands (last visited Dec. 1, 2023).

INTRA-DISTRICT FUNDING DISPARITIES:

UNEQUAL STUDENT OUTCOMES HAVE DRASTIC CONSEQUENCES

INTRODUCTION

Education finance is an often overlooked and inadequately discussed aspect of United States domestic policy. Funding discrepancies at all levels of government, from local to federal, pose increasing challenges to the resolution of education disparities. In the aftermath of the COVID-19 pandemic, intra-district education inequalities, particularly in areas with predominantly low-income and minority populations, have become increasingly conspicuous.[1] Although there is a robust literature concerning the effects of inter-district funding discrepancies, this paper concentrates on intra-district funding discrepancies—an emerging area of discussion in education finance scholarship and lawmaking.

In this paper, I will delve into both longstanding and more recent funding controversies within the Los Angeles area, elucidating the statistical correlation between students attending underfunding schools and their engagement with the carceral state.

It is imperative to confront education funding inequities through financial reforms that foster equity and bridge the gap between white and minority students. By scrutinizing intra-district funding disparities within the Los Angeles Unified Schools District and juxtaposing them with incarceration rates in Los Angeles County, the school-to-prison pipeline becomes clear. Thus, mitigating the causes of the statistical link between students from underfunded schools and involvement with the carceral state by ameliorating intra-district funding disparities is necessary to make a positive impact on student outcomes.

Section I delves into the concept of "ripeness" in education finance litigation, providing legal and textual background to the argument that there is a pressing need for increased scholarly attention and discourse on intra-district funding discrepancies. Section II highlights the qualitative and quantitative issues of intra-district funding disparities, specifically how these disparities contribute to a detrimental cycle within underfunded schools. Section III examines the *Rodriguez v. Los Angeles Unified Schools District* (LAUSD)[2] case, providing a tangible illustration of intra-district funding controversies. Combined with *Keshara Shaw et. al. v. Los Angeles Unified Schools District* (LAUSD)[3] in Section IV, these two cases collectively demonstrate the nuanced context of intra-district funding discrepancies in the Los Angeles area. Quantitative data on incarceration rates analyzed in Los Angeles County in Section V establish a statistical link between underfunded schools and students' involvement with the carceral state. Finally, Section VI advocates for a shift in focus among lawmakers and education policy advocates toward addressing intra-district funding disparities. The argument posits that such attention will significantly enhance overall student outcomes within LAUSD.

To effectively tackle these funding discrepancies, scholars in education policy and funding must examine how school districts allocate funds to specific schools, ensure equitable teacher salaries, and oversee the collection and distribution of funding revenues. This scholarly exploration into intra-district funding disparities serves as a foundational platform upon which subsequent court cases

1 Owings & Kaplan, *The Alpha Omega Syndrome: Is Intra-District funding the Next Ripeness Factor?*, 36 J. of Educ. Fin. 172 (2010).

2 Rodriguez v. L.A. Unified Sch. Dist, B192039, slip op. at 1 (Cal. Court of Appeal, Second Dist., Second Div. July 2007).

3 Keshara Shaw et. al. v. L.A. Unified Sch. Dist., B315814, slip op. at 2 (Cal. Court of Appeals, Second Dist., Second Div. Sept. 2023).

and policies can be built to rectify the statistical correlation between underperforming students in underfunded schools and their involvement with the carceral state.

I. EDUCATION FINANCE LITIGATION: THE "RIPENESS" FACTOR

The "ripeness" factor in the context of education finance litigation significantly strengthens the argument for addressing intra-district funding discrepancies. The "ripeness" factor is pivotal in establishing the credibility of the claim that intra-district funding disparities indeed exist and adversely affect students. Essentially, this term determines whether an issue is ready for legal intervention, as it assesses whether a case has matured into a controversy worthy of adjudication, as mandated by Article III of the United States Constitution. Ripeness determines whether an issue should be addressed in the legal field and "refers to the readiness of a case for litigation. Article III of the U.S. Constitution requires an appellate court to consider whether a case has matured into a controversy worthy of adjudication before it can hear it."[4]

The two-part test used to determine the ripeness of a case becomes a crucial component in supporting the argument that intra-district funding discrepancies merit attention and action in the legal realm: "intra-district inequity controversy may be deemed 'ripe' for judicial action because it successfully meets the two-part test."[5] Firstly, it presents a question of law–specifically, equal protection under the state's constitution–rather than a question of fact. Secondly, "withholding judicial consideration substantially harms the educational opportunities and life outcomes of affected students in schools receiving fewer resources to support their equitable and adequate education."[6] In essence, by understanding and leveraging the "ripeness" factor in education finance litigation, the argument gains credence and legitimacy, reinforcing the urgency and importance of addressing intra-district funding disparities as a frontier for equity initiatives in education finance.

Significant research substantiates the negative social effects of underfunded schools and funding discrepancies. Scholars argue that "disparities within districts are linked to local patterns of racial and class stratification and concentration and have negative consequences for student achievement."[7] This notion that "negative consequences for student achievement" directly correlates with increased involvement with the carceral state underscores the critical importance of ensuring equitable student achievement and outcomes for all children. This causal link between these two social issues emphasizes the urgency of addressing intra-district funding disparities. Implementing policies that foster equity within specific districts becomes paramount in minimizing disparities in outcomes of students later in life, particularly in racially and socioeconomically diverse areas such as Los Angeles County.

The inequitable distribution of funds results in inequitable teaching opportunities and disparate learning conditions. This problem "represents a lack of vertical equity and equal opportunity in the distribution of teacher resources."[8] Inequitable teacher resources imply that students' learning opportunities are unequal from the outset, even within the same school district. The combination of poor funding, less experienced teachers, and low student achievement sets in motion a detrimental cycle: the conditions within the school fail to improve, and, instead, continuously worsen. Redirecting the focus of lawmakers to intra-district funding disparities, as opposed to inter-district funding disparities, holds the potential to reform state-by-state education systems comprehensively. This approach avoids relying solely on averages across school districts and enables a more nuanced understanding and targeted resolution of the specific challenges faced by each district. In doing so, it paves the way for creating greater equity in all aspects of education.

II. QUALITATIVE AND QUANTITATIVE INTRA-DISTRCT FUNDING DISCREPANCIES

4 *See* Owings & Kaplan, *supra* note 1, at 163.
5 *Id.* at 164.
6 *Id.*
7 *Id.* at 172.
8 *Id.*

Intra-district funding disparities extend beyond the mere shortage of monetary resources in underfunded schools compared to their more greatly funded counterparts. The repercussions of poor funding are not limited to financial constraints but also manifest in the tarnished reputation of performance associated with underfunded schools. This tarnished image can dissuade more competent and experienced teachers from choosing to work in such schools, illuminating that attracting top talent is not solely contingent upon salary considerations.

There is both "a 'salary gap' and teacher 'experience gap' between teachers in affluent schools and teachers in low-income schools."[9] These salary gaps are large within districts themselves: "the Center for Reinventing Public Education ([CPRE] 2005) found gaps between the average teacher salaries between the highest and lowest poverty schools in San Jose Unified School District, over $4000… and in Sacramento, California, over $4800 (CPRE 2005; Roza 2006)."[10] The average salary gap between high-poverty and low-poverty schools is $3800.[11]

This average clearly demonstrates intra-district funding disparities are a problem for the entire state. Perceptions of funding disparities may contribute to competent teachers preferring positions in high-achieving, low-poverty schools due to real or perceived differences in available resources.[12] This perception establishes a culture wherein the least-experienced teachers often find themselves working in schools with the highest number of low-income and minority students, creating a cycle where new teachers typically start their career in high-poverty schools.[13] These funding disparities have a racial component as well. As schools become larger, generally the "spending per pupil decreases–and high-poverty schools tend to be larger and enroll more minority students than low-poverty schools–suggesting economies of scale in providing education."[14] These economies of scale are all but guaranteeing a discrepancy in student outcome after they leave the education system. Majority-minority schools within a given district receive less funding, thereby decreasing overall school performance, therefore deterring top talent from accepting job posts at these schools–for both monetary and personal reasons–which then increases the gap in performance between these underfunded schools and the sufficiently funded, predominately white, schools.

Funding disparities become a death spiral for schools within a district that are not adequately resourced. This means that addressing intra-district funding discrepancies may have implications beyond monetary ones. With the equitization of pupil-by-pupil spending, the education outcomes of the children within the district will also become more equal. These outcomes could raise the reputation of previously underfunded and underperforming schools, attracting the experienced and competent teachers that may not have considered working in these types of schools previously.

III. *RODRIGUEZ V. LOS ANGELES UNIFIED SCHOOL DISTRICT* (LAUSD)

In 1992, the *Rodriguez v. Los Angeles Unified Schools District* (LAUSD) case brought crucial attention to the issue of intra-district equity within the education system. This landmark case specifically honed in on the distribution of teachers across schools, with plaintiffs contending that poor and minority students in LAUSD were being denied equal protection under the California State constitution.[15] The core allegation was that schools serving higher proportions of poor and minority students had less experienced and less educated teachers.[16] While there were initial strides in equalizing non-categorical per-pupil spending in 90% of schools and reducing per-pupil spending in schools with expenditures well above the district average, high-poverty schools continued to grapple with persistent challenges.[17] One of the enduring issues highlighted by this case was the ongoing disparity in the experience levels of teachers.[18] This historical legal battle underscores the

9 *Id.* at 174.
10 *Id.*
11 *See id.*
12 *See id.*
13 *See id.*
14 *Id.* at 175.
15 *See id.* at 168.
16 *See id.*
17 *See id.*
18 Rodriguez v. L.A. Unified Sch. Dist, B192039, slip op. at 1 (Cal.

complexities and longstanding nature of intra-district funding discrepancies. Despite efforts to address certain financial imbalances within the education system, the Rodriguez case illuminates the enduring struggles faced by high-poverty schools in ensuring equitable access to highly qualified educators. This precedent remains relevant in ongoing discussions about the need for comprehensive reforms to rectify the systemic issues contributing to intra-district funding disparities.

Following the Rodriguez case, a consent decree in 1992 sought to address disparities, teacher experience, and training among LAUSD schools.[19] The goals of this decree were outlined in a brief by the California Court of Appeals, Second District, Second Division, emphasizing the significance of equalizing basic norm resources at each school.[20] Despite these efforts, subsequent challenges emerged, including budgetary shortfalls impacting the supplemental funding program initiated in 1997.[21] An allocation of $11 million per year since 2002 was deemed insufficient, as appellants argued that LAUSD should have been allocating around $30 million annually to bring below-average schools up to the norm.[22] This financial discrepancy highlights the ongoing struggle to adequately address intra-district funding disparities.

Moreover, issues arose regarding the oversight and utilization of allocated funds. Discovery revealed that schools were not adequately informed about how to use funds to address the challenges related to inexperienced or less qualified teachers.[23] Consequently, at least 15% of the supplemental funds were misspent.[24] This underscores a crucial aspect of the need for a more comprehensive approach to intra-district funding. LAUSD faced difficulties in remedying the disparities between schools with equalization funding and lacked the oversight necessary to ensure the proper use of allocated funds.[25] The challenges experienced by LAUSD in implementing and sustaining equitable funding practices demonstrate the complexity of the issue and the need for ongoing attention to address systemic disparities effectively.

Rodriguez v. Los Angeles Unified Schools District is a clear illustration of the growing ripeness of intra-district funding litigation. Within the overarching argument in this paper, the concept of "ripeness" concerning intra-district funding disparities holds immense importance as it tangibly showcases the necessity of addressing such disparities to establish equity among schools. If our public education system is fundamentally built upon the principles of equal opportunity and equal outcome, then intra-district funding disparities cannot go unaddressed. The Rodriguez case exemplifies the urgency of addressing disparities within a district, making a compelling case for the inclusion of intra-district funding in the broader discourse of educational equity. It underscores that true equity necessitates not only considering the overall distribution of funds across districts but also scrutinizing how these funds are allocated within individual districts to ensure equal opportunities for all students.

In a similar vein, *Keshara Shaw et. al. v. Los Angeles Unified Schools District* (LAUSD) further emphasizes that intra-district funding disparities are not always linked to the monetary funds allocated to each school.[26] The Shaw case sheds light on the nuanced interplay between funding and the socio-economic status (SES) of students within a district. It underscores the need for equal opportunity initiatives that genuinely create equity to address and encompass the diverse socio-economic backgrounds of students across schools within a given district.

These legal cases collectively strengthen the argument that the focus on intra-district funding disparities is not only relevant but imperative for fostering a truly equitable education system. They highlight that efforts to rectify educational inequities must extend beyond the macro-level distribution of funds to the micro-level intricacies within districts. In doing so, we move closer to a system that aligns with the principles of equal opportunity and ensures that all students, regardless of their school's lo-

Court of Appeal, Second Dist., Second Div. July 2007).

19 *See Rodriguez* slip op. at 1.

20 *See id.* at 2.

21 *See id.*

22 *See id.*

23 *See id.*

24 Rodriguez v. L.A. Unified Sch. Dist, B192039, slip op. at 2 (Cal. Court of Appeal, Second Dist., Second Div. July 2007)..

25 *See id.*

26 Keshara Shaw et. al. v. L.A. Unified Sch. Dist., B315814, slip op. at 2 (Cal. Court of Appeals, Second Dist., Second Div. Sept. 2023).

cation or socio-economic background, have the resources and support needed to achieve academic success.

IV. *KESHARA SHAW ET. AL. V. LOS ANGELES UNIFIED SCHOOLS DISTRICT* (LAUSD)

The case of *Keshara Shaw et al. v. Los Angeles Unified School Districts* (LAUSD) demonstrates the subtle yet impactful nature of intra-district funding disparities, particularly in the context of the COVID-19 pandemic.[27] Plaintiffs in this case allege that Distance Learning policies implemented in response to the pandemic discriminated against students with lower socioeconomic status (SES).[28] This case serves as a compelling argument for addressing intra-district funding disparities beyond the conventional financial allocation models.

Distance Learning amplifies existing inequalities by exposing a lack of access to essential resources such as adequate technology, WiFi connections, and stable home environments with supportive parents. These factors contribute to a concealed layer of disadvantage that may not be directly perpetuated by traditional funding policies within a district, but that nonetheless exacerbates educational inequalities. The Shaw case sheds light on how seemingly neutral policies can disproportionately impact students with lower SES, revealing underlying disparities that are not immediately apparent in conventional financial considerations.[29]

By examining cases like *Keshara Shaw et al. v. LAUSD*, it becomes evident that addressing funding disparities requires a nuanced understanding that extends beyond traditional financial allocations. The disparities brought to the forefront by Distance Learning underscore the importance of considering the broader socio-economic context and the varied needs of students within a district. This case emphasizes the need for policies that not only ensure financial equality but also address the multifaceted challenges faced by students, especially during times of crisis such as the COVID-19 pandemic. In doing so, education systems can strive towards a more inclusive and equitable approach that considers the diverse circumstances of all students within a district.

In addition to the covert disparities exposed by cases like *Keshara Shaw et al. v. LAUSD*, legislative measures like Senate Bill 98 (SB98) play a crucial role in shaping the educational landscape.[30] SB98 introduces eight causes of action, each addressing different dimensions of educational inequalities. These causes of action encompass issues ranging from wealth and racial discrimination to violations of constitutional clauses and codes.[31] Notably, the eighth cause of action highlights the failure to provide basic educational equality. This aspect of SB98 underscores the explicit link between funding disparities and the right to equal protection under the California Constitution.[32] The inclusion of this cause of action reflects an acknowledgment of the profound impact that funding inequalities can have on students' access to quality education, highlighting the imperative to address these disparities to ensure equal educational opportunities for all.

The comprehensive and multi-faceted nature of the legal claims outlined in SB98 demonstrates the complexity of the issues associated with intra-district funding disparities. By addressing the various causes of action outlined in SB98, policymakers can work towards a more nuanced and equitable education system. This approach recognizes the diverse challenges faced by students within a district, reinforcing the need for a comprehensive strategy that goes beyond mere financial considerations. SB98 provides a legal framework that encourages a holistic examination of the factors contributing to educational inequalities, signaling a step towards a more equitable educational landscape in California.

V. INCARCERATION RATES IN LOS ANGELES COUNTY

The immense scale of the Los Angeles County jail system underscores the pressing need to address education funding disparities within the county. Los Angeles

27 *Id.*
28 *See id.*
29 *See id.* at 40.

30 Education finance: education omnibus budget trailer bill, SB-98 Cal., § 313.3-56836.24 (2020).
31 *Id.*
32 *See id.*

County's jail system is the largest in the United States, holding more inmates than all jails in the 37 U.S. states with the smallest jail populations.[33] In 2019, approximately 2% of all U.S. county jail inmates were under the custody of Los Angeles County jails, reflecting the significant impact of incarceration within the region.[34] Los Angeles County alone comprises 2.8% of the total population of the United States, demonstrating how high the rate of incarceration is in the county. Examining the 2021-2022 County of Los Angeles budget provides insights into the substantial financial investment in the Sheriff's Department, which operates and operates the county jails.[35] With a total budget of $3.37 billion, approximately 24% of this budget, amounting to $842.6 million, was allocated to the jail system.[36] These significant financial allocations highlight the need to critically examine the factors contributing to the high incarceration rates in Los Angeles County and the potential connections to intra-district funding disparities.

The substantial funding directed towards the jail system warrants a critical examination of the root causes behind the high rates of incarceration. Understanding the potential links between incarceration rates and education funding disparities is essential for developing targeted interventions that address the underlying issues contributing to the cycle of involvement with the carceral state. By addressing education funding disparities, policymakers can work towards creating more equitable opportunities for students, potentially reducing the factors that contribute to the overrepresentation of individuals from disadvantaged communities within the county's jail system. This holistic approach may lead to more effective and lasting solutions that address both the immediate challenges faced by individuals and the systemic issues contributing to incarceration rates in Los Angeles County.

The alarming statistics on arrests and jail incarceration rates in Los Angeles County further emphasize the urgency of reforming intra-district funding. In 2021, there were 202,350 arrests in the county, with 26% of those individuals ending up in the county jail system.[37] Although this represents a lower arrest and jail incarceration rate than in pre-pandemic 2019, the racial demographics of the jail population in the last quarter of 2021 reveal concerning disparities.[38] African Americans, constituting about 8% of the overall county population, made up 29% of the jail population, illustrating a disproportionately high representation.[39] This overrepresentation of certain racial groups in the county jail system is not unique to Los Angeles County; it is a national issue. Additionally, data from 2016 demonstrates the vulnerability of juveniles with incomes below the poverty line, with 24.5% of them being incarcerated in Los Angeles County.[40]

These stark realities underscore the interconnectedness between education funding disparities, socio-economic factors, and the perpetuation of the school-to-prison pipeline. The disparities in arrest and incarceration rates, especially among minority and poor populations, highlight the need for comprehensive reform to break this damaging cycle. Addressing intra-district funding disparities is a crucial component of this reform, as it directly influences the educational opportunities and resources available to students, impacting their trajectories and thereby their susceptibility to involvement with the carceral state. Holistic measures that consider the root causes of these disparities are essential to fostering a more equitable and just society, ultimately mitigating the impact of the school-to-prison pipeline and promoting positive outcomes for all individuals in Los Angeles County.

VI. NECESSITY OF MITIGATING THE SCHOOL-TO-PRISON PIPELINE

The Shaw et. al. case exemplifies that while parents play a crucial role in advocating for the interests of students, the responsibility for fostering equity within school districts also lies with policy actors and litigators. The concept of "ripeness" in the context of intra-district finance disparity signifies a landmark moment in the policy landscape for intra-district edu-

33 LA Almanac, *Los Angeles County Jail System By the Numbers*, https://www.laalmanac.com/crime/cr25b.php (last visited Nov. 22, 2023).
34 *Id.*
35 *See id.*
36 *See id.*
37 *See id.*
38 *See id.*
39 *See id.*
40 *See id.*

cation finance reform. Addressing these inequities becomes imperative to mitigate the school-to-prison pipeline, a consequence of disparate outcomes in schools.

Political actors, especially in states like California, bear significant responsibility in tackling education funding challenges. As previously noted, substantial financial resources are allocated to the California carceral system, amounting to hundreds of millions of dollars annually.[41] Redirecting these funds toward an equity-driven education model holds the potential to alleviate the carceral system itself. The premise here is that improved funding in schools leads to enhanced outcomes for students, thereby reducing the likelihood of students becoming entangled in the criminal justice system.

This perspective emphasizes the need for a proactive approach to education finance reform—one that transcends mere reaction to legal challenges and is driven by a commitment to equity. Policymakers and legislators wield the power to shape a more just and equitable educational landscape by directing resources toward schools and districts that need them the most. By fostering an environment where all students have access to quality education, political actors can contribute significantly to breaking the cycle of the school-to-prison pipeline and promoting positive life outcomes for individuals.

The Shaw et. al. case and Rodriguez cases and the concept of "ripeness" underscore the collective responsibility of parents, policymakers, and litigators in shaping a more equitable education system. Addressing funding disparities is not solely a legal or policy matter, but a fundamental step toward creating a fair and just society. Redirecting financial resources from the carceral system to education pathways via methods grounded in equity can lead to improved student outcomes and contribute to the reduction of the necessity of a substantial carceral state and criminal justice system.

41 *See supra* note 35.



Photo courtesy of Pomona College.