INTERSTATE WATER RIGHTS: TAKE NO DROP FOR GRANTED

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During the past 100 years, water rights have been equitably apportioned among states by the Supreme Court and, increasingly, divvied up by interstate water compacts. Despite these rulings and interstate agreements, when water flows across state lines individual upstream users may nonetheless draw on waters allocated to downstream users on the other side of the border, satisfying their needs out of the lower state's water allocation. And upstream states that lack a rightful claim to sufficient water—as they increasingly do in modern drought conditions—have every incentive to let their citizens do just that.

To deter this behavior, states have turned to the Supreme Court, assuming the role of civil plaintiffs in suits against other states. The Court—most recently in its decision in Kansas v. Nebraska*—has embraced monetary remedies as a means to deter upstream users from seizing more water than the states' compacts allow. Such deterrence comes at a cost, however: even when an upstream state is able to use water more efficiently than its downstream neighbor, it is penalized for doing so. At the same time, the tools of deterrence are of little help to water users on the losing end of a breach, as any recovery goes to the state, rather than to the individuals who suffered losses as a result of the water shortage.*

This paper proposes a new framework for resolving interstate water disputes: by applying the law of eminent domain to interstate water takings, the Court could promote more efficient interstate water use during a time of widespread drought, while vindicating the usufructory rights of downstream states' citizens.

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Introduction

In the American West, a brown lake laps at the edges of a mudflat littered with dead fish, the grim shoreline far below its previous height.[1] Nearby, an empty riverbed cuts through a sandy landscape.[2] Nearly everywhere, it seems, water is in short supply.[3] California's particular plight is well-known—state regulators have mandated that cities slash their water use,[4] while Central Valley growers face a devastating threat[5]—but the drought extends inland to the Colorado River Basin and the Great Plains.[6] According to one bioclimatologist, "[M]ore area in the West has persistently been in drought during the past 15 years than in any other 15-year period since the 1150s and 1160s."[7] What's more, even relatively wet states east of the Mississippi River are likely to feel the

1. *See* Todd C. Frankel, *California's Largest Lake Is Slipping Away Amid an Epic Drought*, Wash. Post (May 28, 2015), https://perma.cc/7C3J-SAJQ.

2. Frank Morris, *Drought Brings Misery to Arkansas River Basin*, NPR (July 17, 2012), https://perma.cc/6T3B-525W.

3. *See, e.g.*, Phuong Le, *Washington Farmers, Wildlife Managers Brace for Drought, Low River Flows*, Fox News (May 31, 2015), https://perma.cc/C4J7-9GPZ (noting that nearly one-fifth of Washington State's rivers and streams are at "record low levels"); Brandon Loomis & Mark Henle, *As the River Runs Dry: The Southwest's Water Crisis*, The Ariz. Republic (Feb. 27, 2015), https://perma.cc/M7T5-WYH9; Kirk Siegler, *As Lake Mead Levels Drop, the West Braces for Bigger Drought Impact*, NPR (Apr. 17, 2015), https://perma.cc/X8UK-PCZL (describing falling water levels in a major reservoir).

4. Ian James, *California Adopts Major Cutbacks to Slash Water Use*, The Desert Sun (May 6, 2015), https://perma.cc/URP2-QM2E.

5. Peter Hecht, *Way of Life Withers in California's Parched Citrus Belt*, The Sacramento Bee (May 16, 2015), https://perma.cc/UKX2-MQRM.

6. Cynthia Barnett, *It's Not Just a "California Drought,"* L.A. Times (May 21, 2015), https://perma.cc/XP74-HCEU ("[V]ast swaths of four Great Basin states . . . have been baking in extreme or exceptional drought. That's actually rather brief in comparison with the 15-year water shortage punishing the Colorado River basin. Drought has persisted, too, in the southern Great Plains. . . . Dryness stretches throughout the American West.").

7. Doyle Rice, *California's 100-year Drought*, USA Today (Sept. 3, 2014), https://perma.cc/LK4N-YFQJ (citing Cook et al., *North American Drought: Reconstructions, Causes, and Consequences*, 81 Earth Sci. Rev. 93, 107–08 (2007)).

pinch of water shortfalls in the near future.[8] When asked, state water managers in forty states told the Government Accountability Office ("GAO") that they expect to face a water shortage in the next decade.[9] Longer-term, the outlook is even more troubling. According to one recent study, large regions of the United States are heading into a period of unprecedented dryness.[10] The study's authors predict that "at least one decades-long megadrought" will desiccate American land in this century.[11]

These shortages are not just a challenge for individual water users or for state planners, but also for the law itself. Historically, the ready availability of river water made interstate water divisions palatable and facilitated the codification of interstate compacts memorializing those agreements.[12] As climate change and population growth have spurred the proliferation of water shortages,[13] the Supreme Court's approach to resolving interstate water disputes has become increasingly outdated.

The Court's current approach, as most recently applied and explained in its decision in *Kansas v. Nebraska*,[14] is designed to push reluctant upriver states to deliver promised water to downstream states, largely by ordering non-compliant upriver states to pay significant damages.[15] To that end, in *Kansas v. Nebraska* the Court for the first time ordered the defendant state to pay damages in excess of the plaintiff state's loss.[16] The Court justified its order based on "the higher value of water on Nebraska's farmland than on Kansas's," which, it elaborated, "means that Nebraska can take water that under the Compact

8. U.S. Gov't Accountability Office, GAO-14-430, Freshwater Supply Concerns Continue, and Uncertainties Complicate Planning 31 (2014), https://perma.cc/98M8-H8FM [hereinafter Freshwater] (noting that according to the 2009 National Climate Assessment, states in the Southeast, like states in the West, "are projected to experience decreases in freshwater availability due to increasing temperatures and changing patterns of precipitation").

9. *Id.* at 28.

10. Emily Underwood, *Models Predict Longer, Deeper U.S. Droughts*, 347 Sci. 707, 707 (2015).

11. *Id.*

12. For example, the Republican River Compact, discussed in great detail throughout this Article, was ratified at a time when "much of the Republican River basin's various water resources were undeveloped"—that is to say, "[a]vailable surface water within the basin was not fully appropriated upon ratification of the Compact." Aaron M. Popelka, *The Republican River Dispute: An Analysis of the Parties' Compact Interpretation and Final Settlement Stipulation*, 83 Neb. L. Rev. 596, 600 (2004).

13. Freshwater, *supra* note 8, at 14 (noting that both population growth and climate change are key issues affecting the availability of freshwater).

14. 135 S. Ct. 1042 (2015).

15. *See id.* at 1052 (noting the Court's self-professed special duty to "stop[ ] . . . inequitable taking of water," which has historically been fulfilled both by exercising its equitable power to apportion interstate streams between states, so as to encourage states to enter into water compacts, and by enforcing those compacts thereafter).

16. *Id.* at 1053–54, 1058–59.

should go to Kansas, pay Kansas actual damages, and still come out ahead."[17] This was, the Court suggested, not an efficiency to be embraced, but rather "a recipe for breach."[18]

The result of the Court's approach, when it is successful in securing compliance with pre-existing apportionments, is to preserve, insofar as possible, states' settled expectations with regard to the availability of water. Increasingly, however, nature itself is upsetting those expectations. In light of the very real water-management challenges facing the United States today and in the generations to come, the Court's approach requires a fundamental revision for two reasons: First, in an era in which drought is likely to substantially change the ecology of vast swaths of the country, the efficient use of diminished water flows should be a priority over rigid adherence to prior agreements.[19] Although the Court has no power to rewrite those agreements, it has staked out a broad authority "to devise fair solutions" to conflicts arising under interstate compacts, so long as they are consistent with the governing compact.[20] Damage awards need not penalize efficient water use to fall under that umbrella. Second, the Court's present approach to damage awards does nothing to ensure that downstream users actually injured by the excessive water use of upstream, out-of-state users receive adequate (or any) compensation for their personal losses. Following the Court's decision in *Kansas v. Nebraska*, for example, the vast majority of damages awarded were diverted to the office of the Kansas Attorney General.[21] Because compensation is not routed to injured users, the efficiency gains accruing from breaches of interstate compacts are not shared appropriately.[22]

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17. *Id.* at 1057.

18. *Id.*

19. The Court itself, in earlier decisions, repeatedly emphasized the virtue of efficiency in prior decisions. *See, e.g.*, Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) ("Apportionment calls for the exercise of an informed judgment on a consideration of many factors. . . . But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, *the practical effect of wasteful uses on downstream areas*, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors." (emphasis added)); Colorado v. New Mexico, 459 U.S. 176, 185 (1982) (noting that the Court's approach to equitable apportionment between states takes into account only efficient uses of water).

20. Kansas v. Nebraska, 135 S. Ct. at 1052.

21. Of the $5.5 million award made to Kansas, $4.5 million was diverted to the state Attorney General's office as reimbursement for the costs of litigation; the remaining $1 million was remitted to the legislature. Press Release, Office of the Att'y Gen. of Kan., Supreme Court Finds Nebraska Liable for 'Reckless' Water Use (Feb. 24, 2015), https://perma.cc/K3SZ-6STY.

22. Although the Court has not appropriately accounted for individual suffering in its recent cases, it has previously emphasized that the possibility of injury to existing water users may factor into its equitable apportionment calculus, Nebraska v. Wyoming, 325 U.S. at 609, as

This Article proposes that in future suits the Court ought to treat a defendant state's overuse of water not as a contract violation requiring remediation, but as a constitutional taking of downstream users' property requiring the payment of just compensation.[23] This formula would have two advantages. First, it would encourage more efficient water use, both by downstream users, whose investments in efficiency would be protected by the just compensation formula, and by upstream users, whose state could be expected to tolerate excessive diversions only when the expected benefit of the diversion is greater than its expected cost.[24] Second, it would direct compensation to those downstream owners actually injured by the taking, based upon the value of the water taken from them. In other words, the suggested corrective measure would help to stretch diminished water flows while humanely accounting for the impacts of takings on vulnerable downstream rights holders.

This Article proceeds in three parts: Part I offers a brief history of the development of interstate and personal water rights. Part II indicates how the takings law has adapted to the particular context of water rights. Finally, Part III argues that interstate disputes concerning water compact violations are best viewed through the takings lens.

I. Water Law

Water rights, like most property rights, are governed primarily by state law. This Part provides an overview of the two major systems under which intrastate water rights may be claimed—that is, the means by which an individual can develop a property right in water—and what drove the states to select one or the other. It then addresses the means of allocating interstate water rights, and how such allocations affect individual property rights in water. Finally, it identifies the various kinds of disputes that have historically arisen out of competing claims to interstate water sources, and discusses modern trends that demonstrate that some new means of resolving those disputes is now necessary.

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well as into decisions concerning whether the Court should undertake to apportion water at all, Colorado v. Kansas, 320 U.S. 383, 394 (1943).

23. At least, they should do so in situations in which the compact does not specify an appropriate remedy in advance. *See* Charles Punia, Kansas v. Nebraska & Colorado*: Keeping Equity Afloat in the Republican River Dispute*, 10 Duke J. Const. L. & Pub. Pol'y Sidebar 1, 7 (2014) (noting that where a compact "specifies the appropriate remedy, then the Court should afford that remedy"). Moreover, even when the contract specifies appropriate remedies, states may still have recourse to *parens patriae* takings actions. *Cf.* Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) (embracing the argument that a federal regulatory scheme requiring that raisin handlers tender a portion of their raisins to the government in exchange for certain compensation constituted a taking under the Fifth Amendment, notwithstanding the existence of the compensation scheme).

24. *See infra* Part III.C.1 (discussing the principle of efficient breach).

A. Intrastate Water Allocations

There are two primary intrastate water regimes in the United States: riparian systems and systems of prior appropriation.

Riparian systems, which dominate the Eastern Seaboard, with its relatively plentiful and relatively stable surface waters, grant to "an owner of land abutting a waterbody . . . certain rights, including: (i) the right to the continued flow of the water in largely the same quantity and quality; and (ii) the right to make reasonable use of the water, subject to the equal rights of other riparians on the same waterbody."[25]

Systems of prior appropriation, by contrast, allocate rights to water based not on their user's proximity to it, but on the date on which he or she laid claim to it.[26] Under prior appropriation systems, the first user of water has the highest right to it.[27] In other words:

> The appropriation doctrine allocates water to users during times of shortage according to time priority, that is, the dates their appropriations were established. When the water supply is insufficient to satisfy all appropriations, water officials deny water to appropriations in inverse order of priority, thus ensuring that the more senior appropriations are satisfied.[28]

The hierarchy of use rights extends to all those who divert water from a particular water body, without regard to state boundaries.[29] No state, however, can convey to its users the right to divert any water in excess of that state's share of interstate water.[30] Separate legal frameworks have been developed to allocate the amount of water available to each state.

Under both riparian law and systems of prior appropriation, a water right is primarily viewed as "usufructory," meaning a right holder is entitled to use some share of water in a given time frame from a given source, rather than that the right holder has title to some particular amount of water actually in existence.[31] Nonetheless, such a right may be the subject of a Fifth or Fourteenth Amendment takings claim because "it entitles its owner to take physical possession of tangible water molecules and use them."[32]

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25. Robert W. Adler, Robin K. Craig & Noah D. Hall, Modern Water Law: Private Property, Public Rights, and Environmental Protections 23 (2013).
26. *Id.*
27. *Id.*
28. Douglas L. Grant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 Envtl. L. 1331, 1355 (2006).
29. 78 Am. Jur. 2d *Waters* § 375 (2016).
30. *Id.*
31. *Id.* at 1363–64.
32. *Id.* at 1364.

B. Interstate Water Allocations

Interstate waters can be apportioned in one of three ways: (1) by an act of Congress passed without direct state involvement, (2) by equitable apportionment via litigation in the Supreme Court, or (3) by an interstate compact.[33] The first of these three methods is highly uncommon. Historically, there are only two instances in which Congress, acting alone, apportioned interstate waters.[34] Thus, the vast majority of divisions have come in the form of equitable apportionment or interstate compact.

Equitable apportionment of interstate waters rests on the principle of "equality of right."[35] As the Supreme Court has written: "Each state stands on the same level with all the rest . . . and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them."[36]

In apportioning water, the Supreme Court has stated that it will consider factors including: the protection of established water uses (i.e., rights established by prior appropriation), the geography and climate of the states in which the water is to be apportioned, and "the damage to upstream areas as compared to the benefits to downstream areas if limitation is imposed on the former."[37] However, those factors are "not an exhaustive catalogue."[38] Indeed, the Court has consistently emphasized that the doctrine of equitable apportionment is a "flexible doctrine" that must account for "all relevant factors" in each individual case.[39]

Because equitably apportioning water is a difficult and fact-intensive undertaking, the Supreme Court will apportion water only when a petitioning state can demonstrate that another state has "appropriated more than her equitable share of the flow" of shared water and that such appropriation has "work[ed] serious injuries to her substantial interests."[40] In setting a high bar for equitable apportionment, the Supreme Court has implicitly encouraged interstate compacting. It has also explicitly stated its preference for such agreements:

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33. Joe Norris, Montana v. Wyoming*: Is Water Conservation Drowning the Yellowstone River Compact?*, 15 U. DENV. WATER L. REV. 189, 190 (2011).

34. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 174 (2003) (noting the rarity of such divisions, by pointing to two exceptional congressional acts which apportioned interstate waters: the Boulder Canyon Project Act and the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990).

35. Kansas v. Colorado, 206 U.S. 46, 100 (1907).

36. *Id.* at 97–98.

37. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

38. *Id.*

39. Colorado v. New Mexico, 459 U.S. 176, 183 (1982).

40. Colorado v. Kansas, 320 U.S. 383, 391–92 (1943).

> [T]hese controversies between States over the waters of interstate streams involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution.[41]

Accordingly, water compacts have, in modern times, proven to be the favored method of division.[42] Approximately 175 interstate compacts have been adopted as federal law.[43] Of those, two dozen are water compacts, and most of those are compacts among western states.[44] Such compacts allow for state compromises on issues of water distribution,[45] have often been incentivized by federal carrots or prompted by threatened federal regulation of interstate resources,[46] and reflect the view that "a river basin can be managed effectively only as a unit."[47]

As with any other interstate compact, a water compact is a "contract[ ] that is binding on the member states and their citizens."[48] Constitutionally, such compacts must be approved not only by the signatory states, but also by Congress.[49] Once approved, a compact is "transform[ed] . . . into a law of the United States."[50] In addition, compacts are "characterized by their perma-

41. Nebraska v. Wyoming, 325 U.S. at 616.

42. Norris, *supra* note 33, at 190.

43. Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 4 (1997).

44. Grant, *supra* note 34, at 105.

45. Norris, *supra* note 33, at 190.

46. It has been suggested that the federal government has "forced states to enter a compact before it would agree to fund federal water projects with interstate features." L. Elizabeth Sarine, *The Supreme Court's Problematic Deference to Special Masters in Interstate Water Disputes*, 39 ECOLOGY L.Q. 535, 545 (2012). Examples of compacts in which the promise of federal water projects has served to induce interstate agreement include the Arkansas River Compact, the Republican River Compact, and the Yellowstone River Compact. *Id.* In other cases, however, "threatened federal action spurs . . . compacts." Hasday, *supra* note 43, at 10–11. That is, "[m]any compacts, especially those in the river basin category, result from the activities of private economic groups with special interests in the resources involved. . . . They use the compact device to block stronger national action or control because they feel more competent to deal with states than the national government." *Id.* at 36 n.145 (quoting PARRIS N. GLENDENING & MAVIS MANN REEVES, PRAGMATIC FEDERALISM 282–83 (1977)).

47. Hasday, *supra* note 43, at 5.

48. *Id.* at 2.

49. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.").

50. Texas v. New Mexico, 462 U.S. 554, 564 (1983) (citation omitted).

nence."[51] No state may "unilaterally nullify, revoke, or amend" a compact without the consent of Congress.[52]

Interstate compacts are said to "offer the possibility of avoiding the costs, risks, and delays of judicial equitable apportionment."[53] At the same time, they have been criticized for failing to fulfill that promise.[54] Interstate water cases can "languish[ ] in the court system . . . bouncing back and forth between the Special Master and the Supreme Court."[55] Indeed, the dispute adjudicated by the Court in its *Kansas v. Nebraska* decision lasted half a decade and cost the state of Kansas millions of dollars to litigate.[56]

Although both equitable apportionment and interstate compacts purport to settle interstate water allocation, individual apportionments and interstate compacts have each given rise to substantial post-division dispute.

C. Interstate Water Disputes

The Supreme Court's original jurisdiction extends not only to "a properly framed suit to apportion the waters of an interstate stream between States through which it flows," but also to "a suit to enforce a prior apportionment," and to "a suit by one State to enforce its compact with another State or to declare rights under a compact."[57] The Court has, over time, adjudicated cases falling within each category. There is, however, a sharp distinction between the Court's early equitable apportionment jurisprudence and its more recent decisions following disputes arising out of prior apportionments and under interstate compacts. Specifically, though the Court's early jurisprudence counted both individual justice and the efficiency of water use as important factors in its allocation of water, the Court's later cases have largely ignored such concerns.[58]

In the Court's equitable apportionment cases, the Court paid homage to the importance of water to the lives and livelihoods of state citizens. Speaking eloquently about the importance of water to such individuals, the Court wrote that: "A river is more than an amenity, it is a treasure. It offers a necessity of life

51. Grant, *supra* note 34, at 108.

52. Hasday, *supra* note 43, at 3.

53. H. David Gold, *Supreme Court Struggles with Damage Assessment in Water Dispute as Interstate Compact Breaks Down*, 29 ECOLOGY L.Q. 427, 429 (2002).

54. *Id.*

55. *Id.*

56. Press Release, Office of the Att'y Gen. of Kan., Supreme Court Finds Nebraska Liable for 'Reckless' Water Use (Feb. 24, 2015), https://perma.cc/DT38-BJRU.

57. Texas v. New Mexico, 462 U.S. 554, 567 (1983); *see also* U.S. CONST. art. III, § 2, cl. 1 ("[T]he judicial Power shall extend . . . to Controversies between two or more States . . . ."); 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more original states.").

58. *See, e.g.*, *infra* notes 68–70 and accompanying text.

that must be rationed among those who have power over it."[59] At the same time, the Court noted that the general welfare of the states was bound up with the individual interests of their citizens. In *Wyoming v. Colorado*, for example, the Court noted:

> As respects Wyoming, the welfare, prosperity, and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that state. Thus the interests of the state are indissolubly linked with the rights of the appropriators.[60]

What's more, the Court recognized that individual rights might appropriately be required to yield to the greater good—that is, to promote efficient water use—especially where the deprivation of individual water rights would not diminish the general welfare of a particular state. For example, in *Kansas v. Colorado* the Court ventured that:

> [I]f there be many thousands of acres in Colorado destitute of vegetation, which, by the taking of water from the Arkansas river, and in no other way, can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect . . . of giving to Kansas territory, although not in the Arkansas valley, a benefit from water as great as that which would inure from keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit from the flow of the Arkansas through Kansas has territorially changed.[61]

In more recent cases involving prior equitable apportionment decrees and previously negotiated water compacts—most of which were many decades old before giving rise to disputes[62]—the Court has ceded its concerns for individual justice and efficient use in favor of applying simple principles of contract interpretation.[63] Although, certainly, such interpretation must remain at the center of interstate disputes, there is and must be room in the Court's equitable jurisprudence to account for those previously central values of justice and efficiency.

Indeed, given changed environmental conditions, accounting for these values is critical. Today's disputes are born out of enormous changes in water use and availability that have placed tremendous stress on existing allocations. The

59. New Jersey v. New York, 283 U.S. 336, 342 (1931).

60. Wyoming v. Colorado, 259 U.S. 419, 468 (1922), *vacated*, 353 U.S. 953 (1957) (on joint motion of the parties).

61. Kansas v. Colorado, 206 U.S. 46, 101 (1907).

62. *See, e.g.*, Nebraska v. Wyoming, 507 U.S. 584 (1993) (a fifty-year-old decree); Texas v. New Mexico, 462 U.S. 554 (1983) (a thirty-year-old compact).

63. *See infra* notes 68–72.

water that once flowed freely across state borders in accordance with the terms of existing decrees and compacts is now subject to competing demands from "booming cities, agriculture, industry, environmental protection, fisheries, power generation, navigation, and a host of other human and non-human uses" that will only continue to grow.[64] At the same time, the amount of water available to meet those needs is diminishing with each year of drought.[65]

However, precedent and logic limit what tools are available to accommodate these changes. The Court rightly notes that a compact "must be construed . . . in accordance with its terms."[66] In compact cases, the aggregate share of water assigned to each state has previously been settled. Although disputants may quibble around the margins, the core of the case is and must be parsing the agreement among the relevant parties.[67] But interpretation is not the only significant element of such a case. There is room, at the damages stage, for consideration of the principles of individual justice and efficiency that the Court once prioritized.

The Court has decreed that a "suitable remedy" for breach of an interstate water compact may include either "water or money."[68] It has, however, also noted that each remedy fails, to some degree, as a means of offering recompense to those individual users harmed by past deprivations.[69] In *Texas v. New Mexico*, the Court wrote:

> It might be said that those users who have suffered the water shortages caused by New Mexico's underdeliveries over the years, rather than the State, should be the recipients of damages, and that they would be difficult if not impossible to identify. But repayment of water would also likely fail to benefit those who were deprived in the past.[70]

64. Josh Clemons, *Interstate Water Disputes: A Road Map for the States*, 12 SE. ENVTL. L.J. 115, 115 (2004).

65. *See* FRESHWATER, *supra* note 8, at 31 (noting that according to the 2009 National Climate Assessment, states in the Southeast, like states in the West, "are projected to experience decreases in freshwater availability due to increasing temperatures and changing patterns of precipitation").

66. Texas v. New Mexico, 482 U.S. 124, 128 (1987). Because a compact is federal law the Court also turns to common tools of statutory interpretation when the literal text of the compact fails to illuminate the issue at hand, including the legislative history of the agreement, the purpose of it, and the drafters' intent. *See* Oklahoma v. New Mexico, 501 U.S. 221, 230–38 (1991).

67. *See, e.g.*, Kansas v. Nebraska, 135 S. Ct. 1042, 1050 (2015) (noting that the parties previously disputed whether the Republican River Compact allocated groundwater in addition to stream water, or only stream water).

68. Texas v. New Mexico, 482 U.S. at 130.

69. *Id.* at 131–32.

70. *Id.*

Yet, the Court's declaration papers over the ways in which different types of damages might impact individual water users, and fails to sufficiently justify either the statement that affected users would be "difficult . . . to identify"[71] or that such difficulties would outweigh the benefits of undertaking the search. Rather than tackle such questions, the Court has turned its attention away from individual justice and how best to distribute an increasingly scarce resource and toward the purportedly simpler goal of forcing a defendant state to comply with the delivery terms of the existing agreement, notwithstanding changed conditions, a goal which has also led the Court to turn a blind eye to the value of efficient use. Indeed, the Court's order in *Kansas v. Nebraska* that Nebraska disgorge to Kansas some portion of the gains it achieved by using excess interstate water more efficiently on its land than Kansas would have on its own was explicitly directed at "stabiliz[ing] the compact and deter[ring] future breaches."[72]

D. Time for Change?

As the nation has become drier and the demand for water has increased, experts have begun to call for changes both to the system of individual intrastate water allocations and to the interstate division of water. For example, officials responsible for water administration and conservation have called on states to reform laws that require rights holders to "use it or lose it"—that is, to use the full measure of their water right or risk losing the unused portion—an approach that incentivizes waste and penalizes efficiency.[73] On an interstate level, scholars have proposed facilitating water markets in order to prevent water from "remaining stuck in its initial allocation" when it could more efficiently be used elsewhere.[74] Some states have even begun to think through new legal methods for transferring the state's particular rights in water, as allocated by previous agreements.[75]

There is precedent for such systemic changes. Indeed, the conditions prompting the current rethinking of water law are the same as those which pushed western states to adopt systems of prior appropriation over riparian law

71. *Id.* at 132.

72. Kansas v. Nebraska, 135 S. Ct. at 1057.

73. Abraham Lustgarten, *Use It or Lose It: Across the West, Exercising One's Right to Waste Water*, ProPublica (June 10, 2015), https://perma.cc/JZ2W-KVCD.

74. Max Michon-Rollens, *Turning Off the Valves: Why* Tarrant v. Herrmann *Unnecessarily Threatens Interstate Water Markets*, 41 Ecology L.Q. 403, 414 (2014).

75. *See* Patricia Mulroy, *Beyond the Divisions: A Compact that Unites*, 28 J. Land Res. & Envtl. L. 105, 109 (2008) ("In 2001, in what was previously considered an impossible move under the Law of the River, Nevada and Arizona created the first interstate banking agreement. Under the banking agreement, the Arizona Water Banking Authority agreed to recharge and store unused Colorado River water in its groundwater aquifer for Nevada.").

in the first instance: too many people and not enough water.[76] The Supreme Court of Colorado, when it recognized prior appropriation in 1882, went so far as to expunge any historical ties to riparian law in the state—and any corresponding property interests premised thereon—in order to promote the state's development of water resources and to protect the significantly greater property interests that depended upon that development. The court wrote:

> It is contended . . . that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine . . . priority of appropriation . . . was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. . . . Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of . . . superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.[77]

Nor is judicial willingness to modify the legal approach to the ownership of water an artifact of the past. Recently, the Supreme Court of Texas noted that legislative regulation of groundwater was necessary "to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."[78] And, although the court was more solicitous of existing claims to individual rights in groundwater than had been the Supreme Court of Colorado to existing riparian claims, it left open the question of whether the state government was required to compensate a landowner who was forbidden by state regulations from withdrawing groundwater under his land.[79]

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76. At the time the doctrine of prior appropriation was developing, the land immediately appurtenant to local water sources was quickly being claimed, and riparian law would have prohibited the diversion of water to the farther-flung homes and fields of newcomers. ADLER ET AL., *supra* note 25, at 77. Today, there is much consternation about how to address growing water needs and shrinking modern resources. *See supra* notes 64–65.

77. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882).

78. Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 818 (Tex. 2012).

79. *Id.* at 838 (adopting federal Fifth Amendment precedent in evaluating potential takings under the Texas Constitution and noting that under that precedent further factual development was required to determine whether compensation was owed to the landowner). Pumping water from the ground may "affect the flow and levels of water in surface waterbodies." ADLER ET AL., *supra* note 25, at 176.

Yet even as the above instances illustrate that change is possible, they also demonstrate one reason that any effort to harmonize water administration and promote efficiency across state lines is an uphill battle. Insofar as such efforts prioritize efficient use and, accordingly, a reshuffling of water rights between the rights of less efficient users in one state and the rights of more efficient users in another, they raise the prospect of widespread takings claims. In both Colorado and in Texas, the changes in state law described above arguably extinguished previously existing property rights, requiring each state's courts to grapple not only with the question of reform, but also with the question of possible compensation for those dispossessed by it.

II. Takings Law

As discussed above, the possibility of widespread takings claims usually serves to hobble efforts to update the legal framework surrounding interstate water ownership. But, rather than shrinking from takings claims, states and the Court might choose to embrace eminent domain as a means of introducing flexibility into interstate compacts and of promoting efficient water use. This Part first describes the types of takings cognizable under the Fifth and Fourteenth Amendments. It then reviews the law concerning when and for what purposes the government may exercise the power of eminent domain. Finally, it reviews the compensation that is owed when the government legitimately exercises that power.

The Fifth Amendment prohibits the federal government from taking "private property . . . for public use, without just compensation."[80] The Fourteenth Amendment likewise prohibits the states from taking private property without paying just compensation, as do many state constitutions.[81] The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[82] Takings cases may proceed in one of two ways: either the government may seek condemnation of property rights in advance of a taking, or the owners of a property right may bring an inverse condemnation suit, alleging that the government has wrongfully taken property in the absence

80. U.S. Const. amend. V.

81. U.S. Const. amend. XIV, § 1; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987) (noting that the Fifth Amendment's prohibition is "applied to the states through the Fourteenth Amendment"); David Schultz, *Economic Development and Eminent Domain After* Kelo*: Property Rights and "Public Use" Under State Constitutions*, 11 Alb. L. Envtl. Outlook J. 41, 44 (2006) ("[S]tate courts often rul[e] that their own constitutions provide more protection for property rights than the United States Constitution.").

82. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis in original).

of a public purpose or without just compensation.[83] Although the condemnation proceeding is preferable, in that it involves property owners in advance of a loss, thereby facilitating negotiation, the latter is still a valuable tool by which property owners can vindicate their rights.

A. Types of Takings

Under the federal Constitution, there are two basic categories of takings: regulatory takings and physical takings. A regulatory taking occurs when the government limits how an owner may use his or her property.[84] In the case of a regulatory taking, the government owes a property owner compensation only if the government action runs afoul of the fact-dependent *Penn Central* balancing test,[85] or if regulation deprives the property owner of "all economically beneficial or productive use" of property.[86] A physical taking occurs when the government dispossesses an owner of property.[87] In the case of a physical taking, the government has a categorical duty to provide just compensation to the property owner.[88]

As briefly discussed above, the usufructory nature of water complicates the takings analysis somewhat, making it appear at first glance difficult to determine which type of taking is at play, even if it is clear that a taking is involved. Fortunately, in a trio of cases, the Supreme Court has clarified that when the government "physically divert[s] . . . water, or cause[s] water to be diverted away from . . . property," this constitutes a physical taking.[89] First, in *Interna-*

83. *See* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291 (1958).

84. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 528 (2005) ("[G]overnment regulation of private property may, in some instances, be so onerous that its effect is tantamount to direct appropriation or ouster.").

85. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978) (noting that the fact-dependent test boils down to the question whether, in the "particular circumstances" of a given case "some people alone . . . bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

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

87. *Lingle*, 544 U.S. at 537 ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.").

88. *Id.* at 538.

89. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1290 (Fed. Cir. 2008) (characterizing Supreme Court precedent). This statement applies to takings of the water itself; when water is diverted over an individual's land, that individual may or may not have a takings claim against the government for a flowage easement, if the individual can show that the government has permanently inundated his or her land, or that the government has acquired a flowage easement over his or her land—that is, that government action has subjected the property to "additional flooding, above what would occur if the government had not acted." Tyler J. Sniff, *The Waters of Takings Law Should Be Muddy: Why Prospectively Temporary Government-Induced Flooding Could Be a Per Se Taking and the Role for* Penn Central *Balancing*, 22 FED. CIR. B.J. 53, 61 (2012) (quoting United States v. Sponenbarger, 308 U.S. 256, 266 (1939)).

tional Paper Co. v. United States, the Court held that the government owed compensation to the leaseholder of a water right following a government order requisitioning "the total quantity and output of the electrical power which [was] capable of being produced" by a private power company, including power capable of being produced by the leaseholder's water.[90] Second, in *United States v. Gerlach Live Stock Co.*, the Court held that the federal government's construction of a dam that would deprive lower-lying landowners of seasonal floodwaters caused a "taking of [the landowners'] annual inundations."[91] Third, in *Dugan v. Rank*, the Court held that the same dam caused a "partial taking" of water rights by "impairing . . . the full natural flow of the river."[92]

In light of this case law, it is clear that when upstream users appropriate the water of downstream users across state lines, those appropriations—if attributable to the upstream state—constitute a physical taking.

B. Public Purpose Requirement

Where a physical taking has occurred, a dispossessed owner may challenge it as made for other than a public purpose. In relation to water, as in relation to other property rights, "no state is permitted to exercise or authorize the exercise of the power of eminent domain except for a public use within its own borders."[93] The Supreme Court, differentiating a "public use" from a private one, has said that:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking.[94]

The Court has interpreted "use by the public" to require only that the taking have been accomplished with the aim of serving a public purpose. In the water context specifically, the Court has identified the use of water for irrigation purposes as one possible public purpose.[95]

The Court, on that basis, has upheld takings in aid of a comprehensive irrigation scheme, notwithstanding the fact that the scheme would ultimately benefit particular landowners, or the fact that such landowners might ultimately

90. Int'l Paper Co. v. United States, 282 U.S. 399, 404–06 (1931).

91. United States v. Gerlach Live Stock Co., 339 U.S. 725, 730 (1950).

92. Dugan v. Rank, 372 U.S. 609, 620 (1963).

93. Adams v. Greenwich Water Co., 83 A.2d 177, 182 (Conn. 1951).

94. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

95. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 160–62 (1896).

use the water for purposes other than irrigation.[96] Indeed, even in the absence of a comprehensive scheme, the Court has approved of some takings in aid of irrigation. For example, the Court upheld as constitutional a taking made in accordance with a state statute allowing an individual "to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone."[97] Although the Court noted that the constitutionality of such a taking with regards to its "public purpose" would depend upon case-specific facts, including the character of the land and the necessity of irrigation, the Court stated that it would generally defer to the state's judgment as to a condemnation statute's public purpose.[98]

These water-takings cases are quite old. Nonetheless, nothing in the Court's more recent precedents indicates that a modern attempt to seize water via eminent domain would be any more likely to run afoul of the public purpose limitation as currently understood, provided that any taking of state water rights is conducted in accordance with state law.[99]

C. Compensation Requirement

Assuming that a taking is made for a public purpose, the question remains whether and what compensation must be paid for whatever is taken. This section reviews, first, the prerequisites to compensation and, second, the measure of the compensation to be paid.

1. Prerequisites to Compensation

Compensation will be paid to a Fifth or Fourteenth Amendment claimant for a government taking only if: (1) "the claimant has identified a cognizable . . . property interest that is asserted to be the subject of the taking," and (2) if

96. *See id.*

97. Clark v. Nash, 198 U.S. 361, 368 (1905).

98. *See id.* at 369–70.

99. *Kelo*, 545 U.S. at 480 (noting that the Court continues to "embrace[ ] the broad[ ] . . . interpretation of public use as 'public purpose'"). Although state law may restrict the parties who have the power to condemn property, a taking by a private party may be said to have been made by the state itself, and thus fall within the state's sovereign power, so long as "the private party's action is approved by the government—and if the government also encourages, coerces, induces, demands, or in some way requires the private action." Jan G. Laitos & Teresa Helms Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 WM. & MARY BILL RTS. J. 1181, 1197 (2012). The action of private parties is routinely attributed to states themselves in interstate water cases for the purposes of resolving disputes, and the logic of state responsibility is transferable to the takings context. *See infra* notes 177–179 and accompanying text (describing the logic and history of such attribution).

"the government's action amounted to a compensable taking of that property interest."[100]

In determining whether a party has a "cognizable property interest" for purposes of the Takings Clause, courts turn to "existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, [that] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking."[101]

The existence of a water right generally depends upon the law of the state in which the right is claimed.[102] In practice, determining the scope of any such right can involve fine-grained distinctions of state law. To take one example, the Federal Circuit recently held that, although a federal government action had required a physical diversion of water that had the effect of "reducing [a California petitioner's] water supply,"[103] the government was not required to compensate the petitioner for that diversion because it did not impinge on the amount of water that the petitioner put to beneficial use.[104] California law, the court explained, limits appropriative water rights "to the beneficial use of the water involved."[105]

Nonetheless, there are a few general principles that hold true across state lines: Only individual rights are compensable; rights held in common with the public are not.[106] Moreover, the individual right must have been perfected, either in accord with riparian law or a state's system of prior appropriation, as noted above.[107]

2. The Measure of Compensation to Be Paid

Compensation for a governmental taking is typically "the difference in market value of the . . . land before and after the interference or partial taking" of water appurtenant to the land.[108] The value of the loss, therefore, is the value

100. Klamath Irrigation Dist. v. United States, 635 F.3d 505, 511 (Fed. Cir. 2011).

101. *Id.* (citations omitted).

102. Mildenberger v. United States, 643 F.3d 938, 948 (Fed. Cir. 2011) ("Property interests rely on the law of the state where the property is located.").

103. Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1346 (Fed. Cir. 2013) (citations omitted).

104. *Id.* at 1355, 1360.

105. *Id.* at 1354 (citations omitted).

106. *Mildenberger*, 643 F.3d at 948 ("Rights shared with the public are not compensable if taken . . .").

107. Even a perfected right, however, is limited by other doctrines, including the federal navigation servitude, the public trust doctrine, and the beneficial use doctrine. Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 4 (2002). Those limitations inhere in an individual's title to a water right, and government action within the bounds of those doctrines is not a taking. Grant, *supra* note 28, at 1371.

108. Dugan v. Rank, 372 U.S. 609, 624–25 (1963).

of the water "to the condemnee and not the value to the condemnor."[109] Thus, in Kansas, for example, a government appropriator "taking an irrigation right pays for the difference between irrigated and dry land crop production."[110] Or, if dry land crop production is not feasible, the difference in value between irrigated land and "dryland cockleburs"—land that is "virtually worthless."[111]

State laws largely codify the differential value compensation formula. For example, in Oregon a condemnor of rights to water power is required to pay "the fair value of the property taken, plus . . . reasonable damages . . . as may be caused by the severance" of the right taken from the appurtenant property.[112]

To the extent that the value of water seized is greater on the condemnee's property than on the condemnor's, payment of just compensation will naturally deter inefficient seizures—that is, those seizures in which the water is worth less to the condemnor than it will be forced to pay in just compensation.[113] The deterrent effect is, in fact, proportional to the relative efficiency of the parties. To the extent a condemnee uses water more efficiently, and thereby increases its value, the just compensation owed for a taking of that water increases.

III. Interstate Takings of Water Rights

If interstate water rights may be shifted through governmental takings, such takings could be a substantial corrective to the dated and inefficient distributions of interstate water codified in interstate compacts. As noted above, the predominant means by which interstate water is allocated today—the interstate compact—ties the hands of both states and the Supreme Court. Takings jurisprudence can free them.

The theoretical advantage of a takings-based approach to compact violations is evident when contrasted with the Court's current interpretive approach, in which the remedy phase of an interstate dispute is viewed as a means of enforcement, rather than as a tool of efficiency or justice. While focusing on the enforcement of compact terms, the Court has severely limited its consideration of both efficiency and individual justice—considerations that once dominated the Court's equitable apportionment jurisprudence. Indeed, even to the extent compact terms allow for flexibility, the Court has demonstrated a penchant for narrowly interpreting them, to the detriment of novel efforts to promote efficient water use. For example, in the recent case of *Tarrant Regional Water District v. Herrmann*, the Supreme Court held that state anti-export laws, which

109. John C. Peck & Kent Weatherby, *Condemnation of Water and Water Rights in Kansas*, 42 U. Kan. L. Rev. 827, 858 (1994).

110. *Id.*

111. *Id.* at 859–60.

112. *Id.* at 874 (quoting Or. Rev. Stat. § 537.95(1) (1988)).

113. Omri Ben-Shahar & Ariel Porat, Fault in American Contract Law 62 (2010) (noting that the "economic justification for expectation damages" is to "optimally deter inefficient breaches").

prevented efficient cross-border water transfers, remained in force notwithstanding an interstate water compact governing distributions between the relevant states.[114] The best tool for liberating the Court from this narrow approach lies outside the compact framework in the Takings Clause of the Constitution and in its own eminent domain jurisprudence.

The practical advantage of the takings-based approach is evident when contrasted with the approach the Court took in the recent case of *Kansas v. Nebraska*. The dispute in *Kansas v. Nebraska* arose under the Republican River Compact, which was approved by Kansas, Nebraska, and Colorado, and which has governed the allocation of the "virgin water supply originating in" the Republican River Basin for more than 70 years.[115] Though the Compact was negotiated in the shadow of natural disasters, including the devastation of the Dust Bowl,[116] it failed to adequately anticipate mounting demand for the river's water.

The insufficient availability of that water ate away at the foundations of the Compact for more than a decade, leading to a series of disputes.[117] Most recently, in *Kansas v. Nebraska*, Kansas complained to the Supreme Court that Nebraska was using water above and beyond that allocated to it by the Compact and was thereby depriving Kansas's citizens of their share of the downstream flow.[118]

Ruling on Kansas's complaint, the Supreme Court determined that the state of Nebraska wrongfully denied Kansas 70,869 acre-feet of water drawn

114. Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2125–29 (2013); *see also* Theresa Romanosky & Jennifer Cornejo, *Water Resources: Implications of the Supreme Court Decision in* Tarrant, ABA WATER RES. COMM. NEWSL., Mar. 2014, at 7 (describing the *Tarrant* case).

115. Popelka, *supra* note 12, at 607 (noting that the Compact was approved by Congress in 1943).

116. The Dust Bowl and a subsequent flood devastated portions of Kansas and Nebraska in the years just before negotiations commenced. In the early 1930s, a doctor in Nebraska described the prevailing weather conditions in his diary: "Wind forty miles an hour and hot as hell. Two Kansas farms go by every minute." MARC REISNER, CADILLAC DESERT 149 (1993). Then, in 1935, torrential rain sent "an eight-foot wall of water blasting through the length of the river valley." *Water Development*, REPUBLICAN RIVER BASIN WATER AND DROUGHT PORTAL, https://perma.cc/9EWQ-N6YY.

117. In 1998, Kansas filed suit against Nebraska, alleging that increased groundwater pumping in that state exceeded its apportionment of water under the Compact. Kansas v. Nebraska, 135 S. Ct. 1042, 1049–50 (2015) (describing the complaint). Though the states reached a settlement agreement, they soon sought arbitration and, later, Supreme Court adjudication of each state's rights and responsibilities thereunder. *Id.* at 1050–51.

118. Motion for Leave to File Petition, Petition, and Brief in Support at 10–11, Kansas v. Nebraska, 131 S. Ct. 378 (2010) (No. 126, Orig.) ("In terms of municipal water use in Kansas, the amount of Nebraska's violation is more than the annual consumptive use of a city of half a million people. . . . Kansas and its water users have been damaged by Nebraska's violation of the Compact and the [Settlement] Decree . . . .").

from the Republican River[119] Because Nebraska failed to take action to prevent its users from taking more water than they were allotted, the Court further determined that "Nebraska recklessly gambled with Kansas's rights."[120] As a result, Kansas suffered a $3.7 million loss, which Nebraska agreed to repay.[121] In addition, as previously noted, the Court also ordered Nebraska to disgorge $1.8 million of profit from its use of the water, "a small portion of the amount by which [its] gain exceed[ed] Kansas's loss."[122]

Both the Court-ordered compensatory damage award and the disgorgement award were, to different degrees, arbitrary numbers reflecting the opinions of experts, rather than specific damages claims from the water's end users.[123] They were, in addition, insufficient to achieve the Court's purported goal of deterring a future breach of the compact.[124] Moreover, the awards disserved both the people of Kansas, by failing to offer appropriate relief to injured individuals, and the people of the United States, by discouraging efficient use of the nation's waters.

The approach of *Kansas v. Nebraska* is not the only approach, however. Although not a perfect solution, a takings-based approach is a functional response to breaches of interstate compacts. In addition, in the absence of unlikely democratic reforms to outdated compact allocations,[125] such an approach would fit far better within the judiciary's traditional competency than review of a Special Master's complex and unguided damages calculations.[126]

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119. Kansas v. Nebraska, 135 S. Ct. at 1053; *see also id.* at 1051 n.2 ("An acre-foot of water is pretty much what it sounds like. If you took an acre of land and covered it evenly with water one foot deep, you would have an acre-foot of water.").

120. *Id.* at 1056.

121. *Id.* at 1053.

122. *Id.* at 1053–54, 1058–59.

123. *See* Report of the Special Master at 138–39, Kansas v. Nebraska, 135 S. Ct. 1042 (No. 126, Orig.), https://perma.cc/SR4R-ALSM (noting that the formula employed by the Special Master in determining one portion of the award to Kansas was based on three expert opinions, which were "quite complex and contain many interim, technical steps"); *id.* at 166 (noting that the experts' opinions were insufficient to estimate damages for a separate time period during the breach, and employing an alternative formula for the calculation of damages incurred during that time period); *see also infra* notes 159–162 and accompanying text (describing the calculation of damages in *Kansas v. Nebraska* in greater detail).

124. *See infra* notes 216–220 and accompanying text (describing how Nebraska was required to disgorge less than the full amount of what it gained through its breach).

125. The creation of "joint management institutions that provide ongoing expert administration for the changing dynamic of water resource crises" would be one example of a democratic solution. *See* Jenny Huang, *Finding Flow: The Need for a Dynamic Approach to Water Allocation*, 81 N.Y.U. L. Rev. 734, 734 (2006). Yet, the history of compact negotiations suggests that arriving at any new paradigm would be difficult, and even the proponent of "joint management institutions" acknowledges that any change would face significant hurdles. *Id.* at 758–60.

126. Indeed, the Court's practice of deferring to Special Masters in this manner has engendered separate criticism and has been termed "judicial abdication" in the realm of interstate water disputes. Sarine, *supra* note 46, at 535.

As will be discussed more below, a *parens patriae* just compensation claim, backed by solid data, would have imposed no penalty for Nebraska's efficient breach and could have secured on behalf of each injured Kansan a damage award of approximately $34 for each acre left dry by Nebraska's overreach, which the Court could have ordered Kansas to distribute directly into the people's hands.[127]

To understand how such an action would improve upon the current approach, this Part first outlines in greater specificity how states and the Court might employ a takings-based approach to future interstate compact violations. Second, it illustrates how such an approach follows logically from the Court's recent jurisprudence. Third, it highlights the advantages of a takings-based approach to interstate water seizures—namely, that such an approach may enable efficient breach of outdated interstate water divisions and will promote individual justice.

A. Using the Takings-Based Approach

A takings-based approach to interstate compact violations would require only a slight modification of the litigation template that the states and the Supreme Court currently follow in adjudicating conflicts over interstate water. As noted above, the Court has original jurisdiction over disputes arising from interstate compact violations by virtue of the fact that such disputes are necessarily "controversies between two or more states" regarding state interests.[128] The Court, however, has also noted that its "original jurisdiction . . . might be invoked by the state as *parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens."[129] This is true even if the state itself has "no pecuniary interest in the controversy,"[130] so long as a sufficient number of citizens are injured and so long as the state alleges an independent, quasi-sovereign interest in the outcome of the litigation.[131] Interstate water disputes have

127. Report of the Special Master at 167, Kansas v. Nebraska, 135 S. Ct. 1042 (No. 126, Orig.), https://perma.cc/U73V-ZYX5 (noting that the Court had at its disposal "a fairly comprehensive survey . . . indicat[ing] that irrigated crop land in north central Kansas leased in 2005-2006 for approximately $33.50 [per acre] on average more than crop land that was not irrigated.").

128. *See supra* note 57 and accompanying text (describing the Court's jurisdiction).

129. Kansas v. Colorado, 206 U.S. 46, 100 (1907) (quoting Missouri v. Illinois, 180 U.S. 208 (1902)).

130. *Id.*

131. The Supreme Court has stated that a state pursing a *parens patriae* action "must articulate an interest apart from the interests of particular private parties" and that it "must express a quasi-sovereign interest." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). Quasi-sovereign interests include an "interest in the health and well-being—both physical and economic—of its residents in general." *Id.* at 608. As one scholar has put it: "[P]rivate interests can rise to the level of a quasi-sovereign state interest when sufficiently aggregated. . . . The Court has not sought to specify the necessary proportion, but the cases

long been prosecuted as *parens patriae* actions, and have been found to meet the appropriate criteria.[132] This history opens the door to an action by a state for damages incurred by its citizens as a result of interstate takings.[133]

Moreover, those physical takings are individually compensable. Neither the Court's equitable apportionment jurisprudence nor the existence of an interstate compact divests individuals of their rights in a state's equitable share of an interstate stream.[134] When an upstream state exceeds its equitable apportionment, the Court may find that it is seizing upon the "cognizable property interest[s]" of downstream users.[135] Moreover, the general existence of a compact does not deprive individuals of their ability to bring a takings claim.[136] Rather, to the extent that a state has conveyed to its private citizens such water rights, those rights may be considered vested and they may be vindicated in an inverse condemnation suit.[137] And nothing in the Court's jurisprudence suggests that a state would be prevented from collecting just compensation awards and distributing them directly to its injured citizens.[138] Indeed, the Court has suggested

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make clear that the affected population need not account for all or even most of the state's residents." Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 495 (2012). The Supreme Court has articulated a substantially similar test as to the circumstances in which the federal government may file a lawsuit that "operates to confer a benefit on private citizens"—for example, when it seeks to vindicate a sovereign interest or to protect constitutional rights. 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3651 (4th ed. 2008).

132. *See, e.g.*, Kansas v. Colorado, 185 U.S. 125, 142–45 (1902) ("[T]he State of Kansas file[d] her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and [sought] relief in respect of being deprived of the waters of the river . . . .").

133. Because of the states' long-acknowledged interests in water, such a suit would be distinct from that presented to the Ninth Circuit in *California v. Frito-Lay, Inc.*, where the court denied that a state, as *parens patriae*, may sue exclusively "for recovery of money damages for injuries suffered by individuals" without alleging injury to a quasi-sovereign interest. 474 F.2d 774 (1973).

134. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938) (noting that such rights are "indefeasible so far as concerns [the issuing state], its citizens, and any other person claiming water rights there").

135. *See* Klamath Irrigation Dist. v. United States, 635 F.3d 505, 511 (Fed. Cir. 2011).

136. Although "[t]akings claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than its sovereign capacity," Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001), individuals who assert water rights in water allocated to their state via compact may assert a claim for just compensation if their water is taken, *Klamath Irrigation Dist.*, 635 F.3d at 519 (noting the existence of takings claims in that context and providing direction as to their adjudication).

137. *Hinderlider*, 304 U.S. at 102, 108 (noting, however, that states cannot convey any rights in water outside their equitable portion).

138. Although the Court has never directly reached the question whether a state may collect individual damages on behalf of citizens in a common law *parens patriae* action, in statutory *parens patriae* actions, it has denied that ability on statutory grounds. *See, e.g.*, Hawaii v.

that a state acting as *parens patriae* is "free to spend damages" in any way it determines to be "in the public interest."[139]

Damages may make their way to individual citizens in one of two ways: First, although states "have no obligation to distribute damages" stemming from a *parens patriae* action absent a specific statute to the contrary, the court may order damages to be distributed as it sees fit, including to injured citizens.[140] Second, states themselves may order the individual distribution of damages.[141] In the latter case, political reality suggests that damages explicitly premised on individual harms are more likely to make their way into the pockets of injured individuals than those collected on the basis of a more general allegation of harm. Indeed, a number of state legislatures, in conveying *parens patriae* authority to sue, have also sought to ensure that, where possible, damages resulting from *parens patriae* suits find their way into citizens' hands.[142]

Although they lack any specific application in the water context, such statutes are evidence of the political incentive to ensure that citizens are compensated for individual injuries following *parens patriae* victories. Indeed, following *parens patriae* antitrust suits, states have seen fit to establish distribution mechanisms for even minor awards to injured consumers, such as through coupons or refund payments.[143] Where states have failed to pass along such awards to con-

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Standard Oil, 405 U.S. 251 (1972) (holding that the Clayton Act did not authorize the state to collect damages for injuries to its citizens that implicated the state's quasi-sovereign interest in the functionality of its economy); *see also* Susan Beth Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 368–74 (1999) (collecting cases). Allegation of a quasi-sovereign interest rather than the measure of damages appears to be the critical issue in successful prosecution of a *parens patriae* action. *See supra* note 128–132 and accompanying text (describing the history and requirements of *parens partriae* actions).

139. Texas v. New Mexico, 482 U.S. 124, 132 n.7 (1987).

140. Miriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 665–66 & nn.193–94 (2013).

141. Jeffrey Stinson, *When States Win Lawsuits, Where Does the Money Go?*, STATELINE (Feb. 19, 2015), https://perma.cc/A4DH-CGYM ("In many states, attorneys general have some say in where the money goes [when a state obtains a settlement or damage award], though legislatures often have final word when it's not earmarked by law or when it's impractical to identify and reimburse damaged parties.").

142. *See* Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A* Parens Patriae *Primer*, 86 ILL. B.J. 684, 687 & n.43 (1998) (collecting *parens patriae* cases in which "courts have authorized individual relief"); *see also, e.g.*, State v. Andrews, 533 A.2d 282, 284–85 (Md. 1987) (noting that the Maryland Consumer Protection Act, which conveys to the Office of the Attorney General the authority to sue as *parens patriae* for consumer protection violations, also aims to provide a means of achieving restitution to injured consumers); In re Volpert, 175 B.R. 247, 255, 257 (N.D. Ill. 1994) (noting that, under Illinois law, "the State has standing to sue to collect on behalf of its injured citizens . . . and the debts due to them are therefore due to be paid to the State for the benefits of those persons.").

143. *See, e.g.*, New York v. Nintendo of Am., Inc., 775 F. Supp. 676, 679 (S.D.N.Y. 1991) (noting that settlement agreements between state plaintiffs and the defendant provided for

sumers following *parens patriae* suits, the justification is often that doing so would be "futil[e]" given the small size of the awards and the cost of distribution.[144] The temptation to channel damages to *cy pres* awards—that is, to court-approved purposes rather than to individuals[145]—would be significantly lower in the water-rights context, as the "just compensation" owed for water takings is likely to be of much more significant value, simply due to the nature of the violation.[146] The harm in prior appropriation states will be concentrated among those water users whose rights are most junior, rather than spread across all water users in a given state, as they might be spread across all consumers in an antitrust action.[147]

As outlined above, a takings-based approach to interstate water disputes is a viable option through which the Court could secure compensation to those persons most directly injured by compact violations. And, as the next section demonstrates, that approach is also a logical outgrowth of two prominent threads of the Court's recent jurisprudence.

B. Applying the Takings Approach at the Court—The Logical Next Step

Supreme Court decisions concerning the breach of interstate compacts have, over time, come to rely on damages as a means of balancing the scales between disputant states, notwithstanding that those awards have only roughly and insufficiently approximated justice. At the same time, the Court's state sovereign immunity jurisprudence has cleared the way for the award of damages to citizens wrongly deprived of water. The promise of a takings-based approach—

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the payment of damages in the form of coupons to injured consumers as well as damages payable to the state for specific public purposes); In re Minolta Camera Prods. Antitrust Litig., 668 F. Supp. 456, 457–58 (D. Md. 1987) (noting that settlement agreements between state plaintiffs and the defendant established a procedure for paying refunds to injured consumers).

144. Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 436 (1997) (citing New York v. Dairylea Coop., Inc., 1985 WL 1825, at *2 (S.D.N.Y. June 26, 1985) (noting that "a distribution per person . . . would, after administrative expenses, be so small as to be no greater than or perhaps less than the cost to each applicant of the postage and the preparation of sworn claim forms to obtain it" and therefore ordering *cy pres* distribution of damages)).

145. *See, e.g.*, Farmer, *supra* note 138, at 364.

146. *See supra* Part II.C.2 (describing the measure of just compensation in water-seizure cases). Other objections to the distribution of individual awards—such as the fact that consumers may lack proof of injury—are equally unavailing in the property context, where individuals' rights are documented. *See, e.g.*, Farmer, *supra* note 138, at 399–400 (noting that, in certain circumstances, absence of proof of injury can make it impossible to notify injured parties and can also enable fraudulent claimants).

147. *See supra* notes 26–32 and accompanying text (describing the hierarchy of usufructory rights in systems of prior appropriation).

and the opportunity to pursue it—arises at the confluence of these two jurisprudential streams.

1. The Development of Damages Jurisprudence in Interstate Compact Cases

The last three decades have made clear that the Supreme Court's damages analysis in interstate compact cases has the flexibility to accommodate an improved approach to these difficult issues. The Supreme Court has stated that when controversies are presented in the context of an interstate compact, its goal is to arrive at a "fair and equitable solution that is consistent with the Compact terms."[148] Historically, however, such solutions did not encompass the payment of money damages.[149]

Change came with the Court's decision in *Texas v. New Mexico*, in which it stated that "the lack of specific provision for a remedy in case of breach does not, in our view, mandate repayment in water and preclude damages."[150] The Court proceeded to allow for the possibility of money damages, rather than "repayment in water."[151] And change came again last year in *Kansas v. Nebraska*, when the Court awarded the unprecedented remedy of disgorgement.[152]

The Court's embrace of monetary damages as a means of remedying interstate water disputes has increased the options available to state plaintiffs seeking redress for wrongful diversions, but the existing cases have failed to adequately identify the measure of an equitable damage award. In *Texas v. New Mexico* and since, the Court has repeatedly emphasized the difficulty of calculating damage awards flowing from the breach of interstate compacts.[153] For example, one Justice commenting on the Court's decision in *Kansas v. Colorado* noted that "despite 15 years of litigation over the Compact, and resort to a great deal of data, expert testimony, complicated methodologies, and sophisticated analyses on the subject," the amount of damages owed was still "to be determined."[154] Similarly, in *Kansas v. Nebraska*, the Court acknowledged the special difficulties of calculating a disgorgement award, writing that "we cannot be sure why the Master selected the exact number he did—why, that is, he arrived at $1.8 mil-

148. Texas v. New Mexico, 482 U.S. 124, 134 (1987).

149. Kansas v. Colorado, 533 U.S. 1, 23 (2001) (O'Connor, J., concurring in part and dissenting in part) ("[U]ntil 1987, we had never even suggested that monetary damages could be recovered from a State as a remedy for its violation of an interstate compact apportioning the flow of an interstate stream.").

150. Texas v. New Mexico, 482 U.S. at 130.

151. *Id.* at 129–32 (noting that "New Mexico submits that . . . it should be afforded the option of paying money damages rather than paying in kind").

152. Kansas v. Nebraska, 135 S. Ct. 1042, 1059 (2015).

153. *See* Texas v. New Mexico, 482 U.S. at 132–33 (remanding the issue of monetary damages to the Special Master for further consideration); *infra* notes 154–155 and accompanying text.

154. Kansas v. Colorado, 533 U.S. at 23 (O'Connor, J., concurring in part and dissenting in part).

lion, rather than a little more or a little less."[155] Though this fact apparently did not trouble a majority of the Court, the award was criticized in a dissent as "an arbitrary amount" that was "not based on any measure of Nebraska's profits from breaching the Compact."[156]

The award of just compensation for the inverse condemnation of water would provide a measurable, predictable formula for the award of damages in interstate water disputes: the aggregate diminished value of land owned by injured rights holders.[157] Although arriving at a final damage award in interstate water cases is likely always to be a complex affair, the simplicity of the just compensation formula is striking in comparison to the damage calculations in recent cases. For example, the Court's calculation in *Kansas v. Colorado* referenced claims for the increased costs of pumping more groundwater over a larger area, crop losses in areas where groundwater pumping could not replace lost surface water, and "secondary or indirect economic losses to the Kansas economy resulting from the increased costs of pumping and crop production."[158]

Likewise, in *Kansas v. Nebraska*, each state proposed to the Court a complex method for calculating the compensatory damages owed to Kansas. Kansas argued that its first-order losses—the direct impact of Nebraska's breach on Kansas's agricultural output—should be calculated by reference to "the size of the reduction in its harvest and the resulting diminution in gross state product" and Nebraska argued that the loss should be calculated by reference to the "value of the lost water itself based on sale and lease transactions of irrigated land, and some transactions for the sale and lease of water."[159]

Ultimately, the Special Master embraced Kansas's loss analysis as to losses incurred during the second half of the breach, but determined that Nebraska's loss analysis was more reliable as to losses incurred during the first half of the breach.[160] The Special Master explained that above-average rainfall during the earlier half of the breach and Kansas's "overestimation of required water and yields during that time" rendered Kansas's method less reliable as to that period.[161] The Special Master went on to explain that, though "[t]he average price one would pay for access to water, prospectively, is not necessarily the value that

155. Kansas v. Nebraska, 135 S. Ct. at 1059.

156. *Id.* at 1070 (Thomas, J., concurring in part and dissenting in part).

157. *See supra* notes 108–112 and accompanying text (describing the measure of just compensation).

158. Third Report of the Special Master at 3, Kansas v. Colorado, 533 U.S. 1 (No. 105, Orig.), https://perma.cc/75MN-TJ9B.

159. Report of the Special Master at 136, Kansas v. Nebraska, 135 S. Ct. 1042 (No. 126, Orig.), https://perma.cc/8SGC-NJJE.

160. *Id.* at 166 (specifically, the Special Master applied Kansas's loss analysis, with some adjustments, to losses accrued in 2006 and Nebraska's formula, again with some adjustments, to losses accrued in 2005).

161. *Id.*

a particular marginal amount of water would turn out to have in a given year," the average differential between the cost of leasing irrigated land and the cost of leasing non-irrigated land during the period of the breach can be an acceptable "proxy for the on-farm direct value" of the water seized.[162]

A just compensation award calculated with reference exclusively to individual harm would eliminate many of those difficult-to-calculate variables, while still allowing the Court to account for varying circumstances. Indeed, by simply limiting the approaches proposed by Kansas and Nebraska to the primary impacts of a breach on water users,[163] a just compensation calculus would reduce the complications associated with award damages in interstate water disputes.[164] Although secondary effects claims would not be out-of-bounds—and, indeed, would fall within the state's traditional quasi-sovereign claim to injury—the Court would be free to disregard such requests in the exercise of its equitable discretion and in consideration of efficiency concerns.[165]

Still, it could be argued that the adoption of a takings-based framework for compensation would create administrative difficulties for the Court deriving not from one-off calculations, but from the possibility of repeat inverse condemnation actions. Indeed, in the past the Court has taken steps to avoid ongoing involvement in interstate disputes, such as those that might arise from repeat interstate takings. For example, the Court has "expressly refused to make indefinite appointments of quasi-administrative officials to control the division of interstate waters on a day-to-day basis, even with the consent of the states involved."[166] This refusal is premised on the belief that "[c]ontinuing supervision . . . of water decrees would test the limits of proper judicial functions."[167]

Yet, continuing supervision would no more be required following an award of just compensation than following any other damage award. The Court could take a wait-and-see approach to the likelihood of future conflicts, dealing with conflicts only as they arise, as it did in the multiple iterations of the *Kansas v. Nebraska* dispute.[168] Or, it could establish a formula for the calculation of just

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162. *Id.* at 167–68.

163. In *Kansas v. Nebraska*, the Special Master inquired also as to the secondary effects of lost farm revenue. Third Report of the Special Master at 3, Kansas v. Colorado, 533 U.S. 1 (No. 105, Orig.), https://perma.cc/75MN-TJ9B.

164. *See supra* notes 108–111 and accompanying text (noting formulas for calculating just compensation owed following physical takings of water).

165. Kansas v. Nebraska, 135 S. Ct. at 1051–53 (describing the Court's broad equitable authority "to devise fair solutions to . . . state-parties' disputes"); *see also infra* Part III.C.1 (discussing the principle of efficient breach).

166. Texas v. New Mexico, 462 U.S. 554, 566 (1983).

167. *Id.*

168. Kansas v. Nebraska, 135 S. Ct. at 1048 (noting that the most recent decision by the Court in the dispute was "the second . . . in little more than a decade" that the states involved brought to the Court).

compensation for any future takings of the same nature as those brought for present adjudication.

2. State Sovereign Immunity

The above analysis is only valuable insofar as the state would be an acceptable defendant, a status that hinges on the application of sovereign immunity. As a general rule, individuals cannot sue states for damages; likewise, one state cannot sue another state for damages on behalf of individuals.[169] The bar to such suits is jurisdictional. Thus, for example, the Supreme Court in one case determined it lacked jurisdiction to adjudicate North Dakota's plea for money damages following Minnesota's alleged flooding of North Dakotan farms.[170] The Court explained: "[A state's] prayer for injunction is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state."[171]

The general rule as laid down in *North Dakota v. Minnesota*, however, is likely subject to two relevant exceptions: first, for claims related to water rights and, second, for just compensation claims. This section addresses each in turn, demonstrating that they create the needed means to avoid the shield of sovereign immunity.

As to the former, the Supreme Court has previously described a water right as a special kind of right that is "indissolubly linked" with the interests of the state itself.[172] The special nature of water rights may create an exception to state sovereign immunity for a *parens patriae* suit for just compensation stemming from a state's violation of individual water rights.

As to the latter, the doctrine of state sovereign immunity would, if taken to its logical conclusion, nullify individuals' rights to secure just compensation from states for the taking of private property.[173] In preservation of that right,

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169. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by citizens of another state." U.S. CONST. amend. XI. On the basis of the Eleventh Amendment, states as *parens patriae* are generally prohibited from enforcing "individual claims of its citizens as their trustee against a sister state." North Dakota v. Minnesota, 263 U.S. 365, 375–76 (1923); *see also* New Hampshire v. Louisiana, 108 U.S. 76, 88 (1883) (noting the effect of the Eleventh Amendment).

170. North Dakota v. Minnesota, 263 U.S. at 375–76.

171. *Id.*

172. Wyoming v. Colorado, 259 U.S. 419, 468 (1922), *vacated in* 353 U.S. 953 (1957) (on joint motion of the parties).

173. As has been recognized, "takings cases often expand the instances in which a property owner can sue the government to recover just compensation for a taking of property. . . . [while] the state sovereign immunity cases make it easier for state governments to rely on sovereign immunity to shield them from suit." Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 494 (2006).

the Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* rejected the argument that the Fifth and Fourteenth Amendments merely limit government takings.[174] To the contrary, the Court asserted, "the Constitution . . . furnish[es] a basis for a court to award money damages against the government . . . for interference with property rights amounting to a taking."[175] On this basis, it can be argued that "the Just Compensation Clause trumps sovereign immunity."[176]

Just as states have historically been deemed appropriate *parens patriae* plaintiffs in interstate water disputes, so too does the Court's jurisprudence clearly establish that upstream states are appropriate *parens patriae* defendants.[177] The Court has reasoned that even where private parties divert water from downstream out-of-state residents, "a State whose laws or administrative officials permit such action may be regarded as doing the acts itself and its conduct may be regarded as wrongful in relation to the other State."[178] And, if a state may be seen as "doing the acts itself," then those acts may rightly be treated as inverse condemnations—actions by the upstream state that deprive downstream individuals of their property rights in water. Indeed, such diver-

174. 482 U.S. 304, 316 n.9 (1987) (rejecting the argument that "the prohibitory nature of the Fifth Amendment combined with the principles of sovereign immunity . . . establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision").

175. *Id.*

176. Berger, *supra* note 173, at 494–95 (2006). Some scholars, however, have critiqued the Court's statement in *First English* as dicta or as otherwise infirm. *See id.* at 495 ("[T]he footnote is dictum."); *see also* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1077 (2001) ("[I]t only hints, without firmly deciding[,] that the just-compensation principle overrides the sovereign-immunity principle."). Lower federal courts and state courts are divided on the matter. *See* Berger, *supra* note 173, at 495 (collecting cases).

177. *See* Nebraska v. Wyoming, 325 U.S. 589, 616 (1945) (noting that both the plaintiff and defendant states "represent[ed] their citizens *parens patriae*").

178. WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 68 (1977) (citing Kansas v. Colorado, 206 U.S. 46, 99 (1907)); *see also* Kansas v. Colorado, 185 U.S. 125, 145–46 (1902) ("The gravamen of the bill is that the state of Colorado, acting directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the state of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas river . . . ."). Because acts of diversion in interstate water disputes are treated as being accomplished by the state itself, the question whether individual water users in the defendant state adhered to proper eminent domain procedures is irrelevant and the diversion may properly be characterized as an inverse condemnation. *Cf.* W.F.F. Annotation, *Exercise of Eminent Domain for Purpose of Irrigating Land of Private Owner*, 9 A.L.R. 583 (1920) ("There must be a statute expressly or impliedly conferring the right of eminent domain in order that the power may exist to condemn land for irrigation purposes, and the statute must be strictly pursued.").

sions, if attributed to the state, are clearly of the character of actions previously identified by the Court as physical takings.[179]

That an inverse condemnation suit might ultimately benefit private citizens ought not limit the *parens patriae* exception to sovereign immunity in water cases. As indicated in the Court's recent jurisprudence, so long as a sovereign actor sues to vindicate its own water rights, claims for individual vindication may also be adjudicated. In *Arizona v. California*, the Court granted the motion of five Indian Tribes to intervene in an interstate water dispute, notwithstanding the states' claims of sovereign immunity.[180] The Tribes, among other things, "raised claims for additional water rights."[181] The Court explained:

> Assuming *arguendo* that a State may interpose its immunity to bar a suit brought against it by an Indian tribe, the States involved no longer may assert that immunity with respect to the subject matter of this action. Water right claims for the Tribes were brought by the United States. Nothing in the Eleventh Amendment has ever been seriously supposed to prevent a state's being sued by the United States. The Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity . . . is not compromised.[182]

In other words, so long as an interstate water suit alleges both that the defendant state has trampled on the rights of both the plaintiff state and its individual citizens, the Court's jurisdiction is not enlarged by the adjudication of both claims, and the doctrine of state sovereign immunity is not implicated.

Indeed, the Court has explicitly opened the door to individual damage claims in the context of interstate water disputes. It has established that a state may not only "recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment,"[183] but also that such recovery may be based on "losses sustained by individual water users."[184] As in *Arizona v. California*, it is critical, in awarding such damages, that a state first "show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest."[185] So long as the state demonstrates such an interest, however, the Court has stated that neither "the

179. *See supra* notes 84–92 and accompanying text (describing the relevant takings jurisprudence).
180. 460 U.S. 605, 613–14 (1983).
181. *Id.* at 612.
182. *Id.* at 614 (citations omitted).
183. Kansas v. Colorado, 533 U.S. 1, 7 (2001).
184. *Id.*
185. *Id.* at 8.

method for calculating . . . damages" nor "postjudgment decisions concerning the use of the money recovered" will "retrospectively negate" its jurisdiction.[186]

It is only a short leap from the Court's current jurisprudence to the proposition that the Court itself may dispense damages for individuals. *Arizona v. California* also supports that proposition. Therein, the Supreme Court, in granting intervention to the Tribes, "rightly ignored the Special Master's argument that the relief sought by [them] would not 'run against the States.'"[187] To the contrary, the relief sought by the Tribes "would require a gallon-for-gallon reduction in the amount of water available" to the states.[188] That state sovereign immunity posed no bar to such an award is an indication that an award to individuals of just compensation for water seizures would be similarly permissible. Indeed, as the Supreme Court has already recognized, an award of water may, in some cases, be interchangeable with a monetary payment.[189] Individual monetary claims to water, no less than physical claims to water, may thus be brought within the Court's original jurisdiction over interstate water disputes, notwithstanding a state's sovereign immunity.[190]

C. Advantages of the Takings Approach

As demonstrated above, both the Court's recent damages jurisprudence and its sovereign immunity jurisprudence allow for the possibility of a takings-based approach to interstate compact violations. Nonetheless, the advantages of that approach become evident only in light of its potential impact. In adjudicating the breach of an interstate water compact, there are two analytical questions of importance. First, how will the adjudication affect future water use? Second, how, if at all, should injured rights holders be compensated for past wrongful use? The first question ought to be answered with regard to efficiency. The

186. *Id.* at 8–9.

187. Catherine T. Struve, *Raising Arizona: Reflections on Sovereignty and the Nature of the Plaintiff in Federal Suits Against States*, 61 MONT. L. REV. 105, 137 (2000).

188. *Id.* at 137 (citation omitted).

189. *See* Texas v. New Mexico, 482 U.S. 124, 132–33 (1987) (noting that monetary penalties could substitute for in-kind delivery of past-due water).

190. The Court's later decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), highlights the existence of a special rule particular to the water context. In that case, a tribe sought to quiet title to submerged lands, but the district court deemed this action to be "barred by the Eleventh Amendment" as the "functional equivalent . . . of a damages award against the state." *Id.* at 265. The Court affirmed that conclusion. *Id.* at 281–82. At the same time, however, and despite devoting significant analysis to the assertion that "navigable waters uniquely implicate sovereign interests," *id.* at 284, the Court in no way implied that *Coeur d'Alene* was in conflict with its decision in *Arizona v. California*. *See* Struve, *supra* note 187, at 138–39 ("[T]he Court has not retreated from its holding in *Arizona*. . . . [N]othing in *Coeur d'Alene Tribe* undermines *Arizona*.").

second ought to be answered with regard to individual justice. The takings-based approach would allow the Court to answer both questions appropriately.

Structuring the Court's response to interstate compact breaches in accordance with the above questions reflects both the practical historical approach to water rights management, in which the threat of unsustainable demand has repeatedly prompted legal changes intended to facilitate more efficient use of water, and a balanced approach toward individual right holders.[191] Yet, because any effective reallocation of water, even one supported by just compensation, may, in effect, cause dramatic changes to the landscapes of individual lives, it is important to recall that, for so long as water is insufficient to meet demand, such changes will color *some* persons' lives. In determining whether to disincentivize actions of a state that may affect a taking of another state's rights the question for the Court is not *whether* some persons will be affected, but rather *which* persons will be affected. As this section sets out to prove, it is far better that the Court's formula for compact damages incentivize efficient use of water—and thus preference efficient water users—than that it incentivize adherence to outdated water allocations and the beneficiaries of compacts' dated formulas. The appropriate counterweight to such an approach is to ensure that those individuals whose uses are less efficient are appropriately compensated for value of the water of which they are deprived, not that more efficient users be prevented from realizing any gains.

1. Efficient Breach

Justice Oliver Wendell Holmes once wrote that "few public interests are more obvious . . . than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished."[192] Holmes also wrote, however, that "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."[193] When rivers are not "wholly within" a state, the duty to maintain an interstate compact may, similarly, be construed as a prediction that a state must pay damages for any water use in excess of its assigned share. Although the Court has, in the past, used damages as a means of encouraging future compliance with existing compact allocations,[194] if the Court were instead exclusively to award compensatory damages in the form of just compensation, such awards could have the effect of encouraging the efficient breach of outdated compacts.

191. *See supra* notes 76–79 and accompanying text (describing the advent of systems of prior appropriation and, more recently, groundwater regulation).

192. Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

193. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

194. For example, in *Kansas v. Nebraska*, the Court noted the goal of "deter[ring] an upstream State from ignoring its obligations where it is advantageous to do so." 135 S. Ct. 1042, 1046 (2015).

The theory of efficient breach suggests that a contracting party may "breach a contract and pay damages if doing so would be more efficient than performance."[195] Indeed, the theory suggests that such breaches should not only be tolerated but actually encouraged.[196] Proponents of efficient breach argue that "allowing a promisor to escape the obligation to perform by paying a money substitute both increases the potential gain from contractual exchange, and corresponds to the arrangement that most contracting parties would have wanted."[197] Indeed, because the option to pay is "typically value-increasing, and thus in the interest of both parties," proponents of efficient breach posit that "the more efficient default rule in cases where the parties have left the matter silent is to imply the option" to breach and pay damages.[198]

Assuming the Court were to adopt a just compensation or compensatory-damage only regime for breaches of interstate water compacts, it would allow for the possibility of an "efficient breach" without otherwise diminishing the Court's ability to deter the breach of interstate compacts. That is, in the water context, "efficient breach" would occur only in the specific circumstances when an upstream state could use water more profitably than a downstream state, and only to the extent it could do so.

Such breach could take two forms. First, the water, applied to the same purpose in each state, could be more productive in the upstream state as a result of natural conditions. This was the case in *Kansas v. Nebraska*, in which the contested water was to be applied to agricultural uses in both states but was "substantially more valuable on farmland in Nebraska than in Kansas."[199] Second, the water, applied either to the same or different purposes, could be more valuable in the upstream state because it is used more efficiently or to a more economically valuable end.

In either case, the just compensation formula provides the flexibility needed to make more productive use of a diminished and dwindling resource. As discussed above, this is no mere theoretical concern. In an era in which lakes and rivers are rapidly become dry lakebeds and empty riverbeds, there is simply no room for a rigid enforcement system that prioritizes paper agreements over the necessity of efficiently sharing less water among more users than ever before.

If the Court were to allow states to efficiently breach compacts, however, it could be viewed as sanctioning the unilateral amendment of the water allocations set forth in interstate compacts. There is, presently, a "widely held view that . . . [a state] cannot unilaterally renounce an interstate compact except as

195. Avery Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777, 777 (2012).

196. *Id.*

197. *Id.*

198. *Id.* at 782.

199. 135 S. Ct. at 1056.

agreed by the parties."[200] That view traces to the Contracts Clause of the U.S. Constitution, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[201] The Supreme Court long ago held that the provision extended to the protection of interstate compacts; any provision of state law that impairs the obligations of such a compact is void.[202]

However, the Contracts Clause is not relevant in the interstate takings context. In cases such as *Kansas v. Nebraska*, the defendant state generally exceeds its water allocation not through affirmative legislation, but through the failure to enact or enforce legislation preventing excessive draws of interstate water.[203] Therefore, no "Law impairing the Obligation of Contracts" is at issue in such suits. As the Seventh Circuit has explained, "Mere refusal to perform a contract by a state"—in this case, refusal to enact or enforce legislation to restrict water use in line with an interstate obligation—"does not raise a constitutional issue."[204] Moreover, "the doctrine that a State cannot contract away the power of eminent domain" is long established.[205] To the extent that a state's laws may be viewed as affirmatively authorizing water use in excess of that allotted to its citizens by an interstate compact, such authorization ought to be characterized as a taking, the right to which the state could not contract away via compact.

Separately, at least one Supreme Court Justice has taken the view that a state may efficiently breach a contract by exercising its power of eminent domain. In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court held that, with regard to a contract for the sale of certain submerged lands, "[t]here can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust."[206] Justice Shiras, writing in dissent, held to the contrary that such contracts should be treated as final, as the state would nonetheless retain recourse to its power of eminent domain in order to reclaim what was given:

> Should the state of Illinois see . . . reason to doubt the prudence of her legislature in entering into the contract created by the passage and acceptance of the act of 1869, she can take the rights and property of the railroad company in these lands by a constitutional condemnation of them. . . . [A] state, by making a grant to a corporation of her own

200. Grant, *supra* note 34, at 121.

201. U.S. CONST. art. I, § 10, cl. 1.

202. Green v. Biddle, 21 U.S. 1 (1823).

203. *See supra* notes 170–179 and accompanying text (describing how individual actions are attributed to states in the context of interstate water disputes).

204. E & E Hauling, Inc. v. Forest Pres. Dist. of Du Page Cty., Ill., 613 F.2d 675, 678 (7th Cir. 1980).

205. U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 24 n.21 (1977).

206. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 460 (1892).

> creation, subjects herself to the restraints of law judicially interpreted . . . .[207]

Although the contract at issue was one between a state and a private party, Justice Shiras's logic is equally applicable to the breach of a contract between two states on behalf of their individual citizens, at least so long as the Contract Clause does not separately bar the exercise of eminent domain.

Though the specific objection of unilateral amendment therefore is no obstacle to the adoption of a takings-based approach, before this approach can be justified by reference to efficiency, traditional criticisms of efficient breach must be also answered, including the views that: (1) "many, and perhaps most, contracting parties attach a distinct noninstrumental interest to performance that is incommensurable with money, so that damages can never be truly compensatory" and (2) that "ordinary contracting parties do not in fact subjectively understand their agreements to contain an implicit buyout option."[208]

These objections, it could be said, are particularly salient in the water context.[209] The Court, certainly, understands states to have a "noninstrumental interest to performance" and the Court's decision in *Kansas v. Nebraska* suggests that states should infer no "implicit buyout option" in interstate compacts.[210] Indeed, as has been previously noted, interstate water compacts are ratified on the premise that the allocations set forth therein will bind all parties into perpetuity.

Moreover, it could be argued that substituting money for water undermines the sovereignty of the state whose citizens' property was taken. In his dissent in *Kansas v. Nebraska*, Justice Thomas wrote that "[a]uthority over water is a core attribute of state sovereignty."[211] Similarly, the Special Master in *Kansas v. Nebraska* rejected the applicability of efficient breach principles in the context of interstate compacts, writing that:

> While the benefits of efficiency reinforce the customary reluctance to employ disgorgement as the measure of an award in the typical action for breach of contract, they carry less weight in the context of a con-

207. *Id.* at 474 (Shiras, J., dissenting).

208. Katz, *supra* note 195, at 786.

209. As one author has argued, "Given the unique nature of water, interstate water compacts should not be viewed like other contracts where an efficient breach may be acceptable" because "money damages will not put water back in the [river]." Gold, *supra* note 53, at 429–30.

210. Katz, *supra* note 195, at 777.

211. Kansas v. Nebraska, 135 S. Ct. 1042, 1067 (2015) (Thomas, J., concurring in part and dissenting in part).

> tract of this type, where interests of sovereignty, property, and compliance with the law are also at stake.[212]

Yet, where the upstream state has engaged in actions that could best be characterized as a taking, its right to exercise the sovereign power of eminent domain is also at issue.[213] Such actions are therefore differentiable from circumstances in which only one state has invoked a sovereign interest, as in cases in which one state seeks explicitly to reach over the border into another state to secure its water needs or achieve a regulatory aim.[214] In such cases, therefore, the sovereign right of eminent domain must be balanced against the sovereign right to water, and requiring the payment of just compensation for interstate takings is an appropriate tool for obtaining balance.

In addition, the Court has already recognized that states may undertake new efficiency measures within the margins of compact allocations, even to the extent that doing so upsets established expectations with regard to the delivery of water. For example, in *Montana v. Wyoming*, the Court held that the Yellowstone River Compact did not prevent Wyoming rights holders from switching to a more efficient form of irrigation, which "increased crop consumption of water" such that, although the amount of water diverted remained consistent, "less water reache[d] downstream users in Montana."[215] Although the more efficient use was deemed to be allowable within the terms of the compact, rather than a breach of it, the Court's decision nonetheless upset the downstream expectations with regard to water deliveries, preferencing new, efficient upstream uses.

Moreover, the Court has long since moved away from its early statement that it could not—indeed was "not authorized to"—sanction any water-for-money scheme.[216] That is to say, every award of damages authorized by the Court—as opposed to an order for delivery of past due water—flies in the face of any "noninstrumental interest to performance" plaintiff states may have. To the extent that the Court has professed such awards to be calculated for the purpose of compensation, its actions do not match its rhetoric: in *Kansas v. Nebraska*, the only case in which the Court's award encompassed a disgorgement penalty, the amount of disgorgement was only a "small portion of the

212. Report of the Special Master at 133, Kansas v. Nebraska, 135 S. Ct. 1042 (No. 126, Orig.), https://perma.cc/U73V-ZYX5.

213. *See* 3 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 21:11 (2d ed. 2012) ("The right of eminent domain is part of the sovereign power of the state . . . .").

214. *Cf.* Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2137 (2013) (denying that an interstate compact conveyed to a state the authority to reach into the territory of another state to achieve its water needs); Virginia v. Maryland, 540 U.S. 56, 75–79 (2003) (denying the right of one sovereign to regulate riparian projects along an interstate water body in the territory of another state).

215. Montana v. Wyoming, 131 S. Ct. 1765, 1767 (2011).

216. *See* Kansas v. Colorado, 206 U.S. 46, 100 (1907).

amount by which Nebraska's gain exceeds Kansas's loss."[217] Though the Court described the award as "the kind of signal necessary to prevent another breach,"[218] economically, at least, the new incentive cut the opposite way. Nebraska still profited from the breach more than it lost on it.[219] The Special Master had expressed concern that, were the Court to embrace the principle of efficient breach, "a river might be pumped dry as long as the downstream state is compensated for the short-term impact."[220] In the end, though the Republican River had been pumped, if not dry, at least *drier*, the Court deemed monetary compensation the appropriate remedy.

The Special Master's ultimate concern—and that of the Court—therefore seems not to be with compensation as a remedy, but with the fate of those individuals deprived of water. As the Special Master wrote: "Few people in Kansas, for example, would agree to a return to the dust bowl in exchange for relocation to an economically equivalent residence and livelihood elsewhere."[221]

Yet, true concern for individual outcomes would manifest not only in the award of damages and the determination of their total size—the principle tools the court has to shape future behavior—but also in the dispensation of those damages, where the Court has the opportunity to compensate for past and ongoing deprivations. The Special Master's opinion, therefore, confuses the role of the Court in promoting the efficient use of water—a role the Court has historically embraced—with the Court's role in promoting individual justice and securing compensation for those actually injured, a distinct topic that can now be addressed.

2. Individual Justice

If the Court were to calculate damage awards on the basis of individual loss or, even better, to direct the payment of individual just compensation for interstate water takings, its decisions would have the effect of securing justice long denied to those persons on the losing end of compact breaches, instead of merely attempting to finesse the cost-benefit analysis that states might make in the context of a future breach.

To date, the Court has grappled unsuccessfully with the question of how the payment of damages could possibly help injured rights holders. In *Texas v. New Mexico*, the Court essentially threw up its hands with regard to the pay-

217. Kansas v. Nebraska, 135 S. Ct. at 1053.

218. *Id.* at 1059.

219. The Court ordered Nebraska to disgorge $1.8 million of profitable value deriving from its use of the water, "a small portion of the amount by which [its] gain exceed[ed] Kansas's loss." *Id.* at 1053–54, 1058–59.

220. Report of the Special Master at 133, Kansas v. Nebraska, 135 S. Ct. 1042 (No. 126, Orig.), https://perma.cc/U73V-ZYX5.

221. *Id.*

ment of monetary relief, asserting that identifying the rightful recipients of compensation would be "difficult if not impossible."[222] And in *Kansas v. Nebraska*, the Court likewise equivocated as to the calculation of appropriate monetary relief, describing "any hard number reflecting a balance of equities" as "random in a certain light."[223]

The Court has deemed damage payments helpful to injured rights holders as a means of deterring future harm. Yet, although the disgorgement award in *Kansas v. Nebraska* was allegedly aimed at that goal,[224] it was, as explained above, insufficient for that purpose. Indeed, the Court acknowledged as much, noting that future compliance with the compact in an era of emptying lakes and trickling rivers would occur—or not—regardless of the award.[225] Likewise, the Special Master conceded that the disgorgement award might better be conceived of as a special compensatory damage award to the state of Kansas, writing that it "moves substantially towards turning the actual recovery by Kansas, net of reasonable transaction costs, into an amount that approximates a full recovery for the harm suffered."[226] As Justice Thomas explained, "transaction costs" as described by the Special Master "presumably mean[t] the State's attorney's fees and litigation costs."[227] Indeed, as noted above, much of the award did end up in the hands of the office of the state Attorney General.[228] None of it was immediately transferred to injured rights holders.[229]

Thus, while the Court has long paid homage to the goal of individual justice, it has struggled to achieve it. The just compensation formula could provide the Court with the means of truly honoring the rights of individual water users.

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222. Texas v. New Mexico, 482 U.S. 124, 131 (1987).

223. Kansas v. Nebraska, 135 S. Ct. at 1059.

224. *Id.* (describing the award as "the kind of signal necessary to prevent another breach").

225. *Id.* ("The Master . . . reasonably concluded that the current water management plans, if implemented in good faith, 'will be effective to maintain compliance even in extraordinarily dry years.'" (quoting Report of the Special Master at 118, Kansas v. Nebraska, 135 S. Ct. 1042, https://perma.cc/U73V-ZYX5)).

226. Report of the Special Master at 179, Kansas v. Nebraska, 135 S. Ct. 1042 (No. 126, Orig.), https://perma.cc/U73V-ZYX5.

227. Kansas v. Nebraska, 135 S. Ct. at 1071 (Thomas, J., concurring in part and dissenting in part).

228. *See* Press Release, Office of the Att'y Gen. of Kan., Supreme Court Finds Nebraska Liable for 'Reckless' Water Use (Feb. 24, 2015), https://perma.cc/DT38-BJRU (noting that, of the $5.5 million awarded to Kansas in this case, $4.5 million will be diverted to the state Attorney General's office as reimbursement for the costs of litigation; the remaining $1 million will be remitted to the legislature).

229. *See id.*

Conclusion

The Supreme Court's jurisprudence with regard to the adjudication of interstate water disputes is haphazard and insufficient to the task of appropriately balancing the virtues of efficient water use and individual justice. As proposed herein, treating breaches of interstate compacts as inverse condemnation actions would promote both virtues.