Protecting Public Land from Trespass: Why the Six-Year Statute of Limitations in 28 U.S.C. § 2415(B) is Appropriate for All Trespass Cases on Federal Land

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ARTICLE

PROTECTING PUBLIC LAND FROM TRESPASS: WHY THE SIX-YEAR STATUTE OF LIMITATIONS IN 28 U.S.C. § 2415(B) IS APPROPRIATE FOR ALL TRESPASS CASES ON FEDERAL LAND

By Zach Fader*

ABSTRACT

The United States has the authority to bring claims for trespass on federal land under the statutes of the state in which the trespass occurs. Many states have statutes that codify and often alter the elements of common law trespass while also providing for double or treble damages. Thus, in cases of trespass on federal lands, the government is incentivized to bring claims under state trespass statutes. Doing so adds an alternate theory of liability and maximizes the opportunity to recover adequate damages. 28 U.S.C. § 2415(b), in part, sets a six-year statute of limitations for when the United States can bring an action to “recover damages resulting from trespass on lands of the United States.” However, the statute of limitations under most state trespass statutes is only three years.

It is unclear whether section 2415(b) preempts state statutes of limitations for statutory trespass because it may be construed to apply only to federal statutes and regulations and common law trespass. As to federal trespass, federal law (including statutes of limitations) clearly governs when available. As to common law trespass, it is distinct from most if not all state trespass statutes because these statutes typically change the elements required for liability, creating what might reasonably be viewed as an entirely

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Protecting Public Land from Trespass

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I. INTRODUCTION

The federal government is the largest landowner in the United States, owning roughly twenty-eight percent (640 million of the 2.27 billion acres) of the land (“public lands”). The Constitution’s Property Clause gives the federal government broad authority to protect these vast lands from trespass. Moreover, this broad authority is necessary for the government to meet its obligations under the public trust doctrine, which requires that public lands and resources be sustainably managed. Trespass can degrade public lands in various circumstances, as evidenced by the many trespass regulations employed across federal agencies that manage public lands.

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2. Light v. United States, 220 U.S. 523, 536 (1911) (“[T]he government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.”) (citation omitted) (discussing the Property Clause); see also Michael C. Blum & Olivier Jamin, The Property Clause and Its Discontents: Lessons from the Malheur Occupation, 43 Ecology L.Q. 781, 785–86 (2016) (“[T]he Supreme Court has consistently affirmed Congress’s broad authority under the Constitution’s Property Clause to establish federal land policy and to manage public lands.”).
4. See, e.g., 43 C.F.R. § 9239.0-7 (2022).
Illegal cannabis operations, illegal grazing, fire trespass, and timber trespass are all common instances in which trespass impedes the government’s ability to manage public lands sustainably. For example, illegal cannabis operations have had multiple negative impacts on forest ecosystems in Oregon and California. The pesticides used therein pose a threat to wildlife via poisoning and habitat destruction, and the diversion of water has a similar effect. Similarly, illegal grazing can severely degrade rangeland and riparian areas, particularly in the face of drought. Fire trespass, which occurs when negligent or intentional activity causes an unauthorized fire on public lands, can result in tens of millions of dollars in damages in any given instance. For example, the El Dorado Fire, which was sparked by a gender reveal party, burned over 22,000 acres in the San Bernardino National Forest, killed a United States Department of Agriculture Forest Service firefighter, damaged or destroyed 9 homes and 15 other structures, and cost over $42 million to suppress. While sometimes associated with wildfires, timber trespass, which “arises when an individual or entity damages trees belonging to another,” also covers illegal logging and any other activity that damages marketable forest products. Not only do these activities destroy public resources for future generations, they can deprive the government of important sources of revenue (e.g., grazing fees, land leases, and timber sales).

6. Id.
8. Instruction Memorandum No. CA-2010-019 from Paul Bannister, Acting State Dir., to Dist./Field Off. Managers, Dist./Field Off. FMO, Special Agent in Charge, on Fire Trespass (June 10, 2010), https://www.blm.gov/policy/ca-im-2010-019#:~:text=Background%3A%20Fire%20trespass%20is%20the,evidence%20of%20negligence%20or%20Intent [https://perma.cc/E4RV-M997].
Most states have statutes that provide for multiple damages in cases of wrongful trespass as affected by the defendant’s purpose or intent. Typically, wrongful trespass is presumed and multiple damages are awarded when the defendant knows the affected land is not their own, but single damages are awarded when the defendant trespasses on the mistaken belief that the land was theirs or that they had license to be upon it. These statutes supply federal public lands with a source of protection additional to federal statutes and regulations, and common law trespass. They not only offer an alternate theory of liability, but they also help compensate for future damages that are difficult to ascertain. However, if the federal government sues under a state trespass statute, it is unclear what statute of limitations applies to its claim. 28 U.S.C. § 2415(b), in part, sets a six-year statute of limitations for when the United States can bring an “action to recover damages resulting from a trespass on lands of the United States.” However, the statute of limitations under most state trespass statutes is only three years. The three-year difference between these limitation periods becomes important when considering the government’s limited resources to discover trespasses on vast and remote federal lands and the intensive process of calculating trespass damages to cultural resources.

In what follows, Section II discusses the text and legislative history of section 2415(b); Section III discusses contrasting case law on whether section 2415(b) applies to federal claims under state trespass statutes; Section IV analyzes the policy arguments implicated by this issue; finally, Section V recommends that the six-year statute of limitations in section 2415(b) be applied to all trespass claims brought by the United States. This rule is in the best interest of the public by virtue of preserving public lands, despite governmental failure or inability to act quickly in bringing trespass claims, while not unreasonably subjecting trespassers to indefinite liability.
II. LEGISLATIVE HISTORY

The relevant language from section 2415(b) states:

> every action for money damages brought by the United States . . . which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: Provided, that an action to recover damages resulting from a trespass on lands of the United States . . . may be brought within six years.\(^\text{18}\)

Prior to this law’s passage, the federal government was generally not subject to statutes of limitations.\(^\text{19}\) Section 2415 was passed to establish limitations for contract and tort actions, putting the government on more equal footing with private litigants.\(^\text{20}\) Congress believed this change would “reduce unnecessary litigation and court congestion, speed up meritorious settlements and cut down on unproductive paperwork.”\(^\text{21}\)

The text of section 2415(b) may be ambiguous. This Note raises a central debate from this ambiguity by examining whether this section preempts state statutes of limitations regarding trespass. Additionally, this Note presents two interpretations of the section. Under one interpretation that favors preemption, “an action to recover damages resulting from a trespass on lands of the United States,”\(^\text{22}\) without other limiting language, would reasonably encompass an action, brought under state statute, to recover damages resulting from a trespass on lands of the United States. Under another interpretation that does not favor preemption, Congress, when describing trespass as a tort, was referring to the elements of a widely recognized common law claim and not elements that have been tweaked and codified in state statutes. If so, section 2415(b) would not apply to actions brought under these “trespass” statutes. As for federal trespass statutes and regulations, it could be argued that while section 2415(b) is not directly applicable (under the no preemption theory), it is a more appropriate choice of law than a state statute of limitations. Still, under the no preemption theory, a state statute of limitations would be more appropriate for an action brought under a state trespass statute.

On balance, the legislative history of section 2415(b) supports preemption and the application of the six-year statute of limitations therein to all trespass claims by the United States. In seeking to put the United States on

\(^{18}\) 28 U.S.C. § 2415(b).


\(^{20}\) Id. at 2502–03.

\(^{21}\) Id. at 2503.

\(^{22}\) 28 U.S.C. § 2415(b).
more equal footing with private litigants, Congress noted, “[t]he limitation periods fixed in the bill are similar to those fixed by Federal and State law for the same types of actions” — two to three years for torts in most cases. However, they also recognized that certain actions, including trespass on federal lands, required a six-year limitation because such actions “are of a type which might not be immediately brought to the attention of the Government or would only be uncovered after some investigation.” Thus, Congress understood (1) that state statutes of limitations for trespass did not apply to the federal government in most cases, (2) that congressional action was required to put some time limitation on the government’s ability to bring trespass actions, and (3) that the proper time limitation for trespass actions concerning federal land is six years.

Section 2415(b) is couched in terms of actions founded upon a tort. The legislative definition of tort in this provision is an action “based on damage or injury from a wrongful or negligent act.” One could argue that construing this definition as a reference to the common law, and thereby precluding preemption, would give effect to Congress’s intent to put the federal government on equal footing with private litigants. However, this definition does not necessarily tie trespass as a claim to the common law. As discussed above, state trespass statutes often include wrongful intent as an element of the claim. Similarly, section 2415(b) applies to wrongful as well as negligent acts via the legislative definition of tort. Additionally, the fact that the United States brings its claim under a state statute does not affect the difficulty in discovering the actions of the trespasser. Thus, Congress’s consideration of this factor would be frustrated by a rule that interprets trespass in section 2145(b) to refer only to the common law claim.

The push and pull between allowing the government sufficient time to prosecute trespasses on federal land and fairness to private litigants is at the heart of section 2415(b). Not surprisingly, this tension is drawn out in the case law that addresses whether section 2415(b) should apply to state statutory claims. That case law is further examined below.

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24. Id. at 2504; see also Improvement of Procedures in Claims Settlement and Government Litigation: Hearing on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before Subcomm. No. 2 of the H. Comm. on the Judiciary, 89th Cong. 7 (1966) [hereinafter Improvement of Procedures in Claims Settlement and Government Litigation] (“A common characteristic of these tort actions is the difficulty in discovering the identity and conduct of the alleged tortfeasor.”).
26. See discussion supra Section I.
III. RELEVANT CASE LAW

There is no case law that directly addresses whether section 2415(b) preempts state statutes of limitations. However, several decisions address the broader question of whether and under what circumstances the United States is subject to statutes of limitations. In United States v. Summerlin, the Supreme Court provided the following formulation of a longstanding rule: “[i]t is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.”27 However, in Denver & Rio Grande Railroad Co. v. United States, the Eighth Circuit recognized an exception to the general rule in Summerlin when the United States brings claims that are unique to a state statute.28 Later, the Eighth Circuit, in United States v. Miller, clarified that the exception in Denver does not apply when the United States sues under the common law.29 Furthermore, the court noted that when the United States sues in its sovereign capacity, it cannot be barred by a general state statute of limitations.30

Even so, district courts within the Ninth Circuit, in United States v. Magnolia Motor & Logging Co. and United States v. Eytcheson, applied the exception in Denver broadly to bar claims by the United States under state trespass statutes where the state statute of limitations had run.31 Thus, if section 2415(b) does not preempt state statutes of limitations for claims by the United States under state trespass statutes, Denver and its progeny support applying the state statute of limitations to those claims.

The cases discussed thus far were all decided before section 2415(b) was passed and none have been explicitly overruled by its passage.32 However, several circuit court cases decided since the passage of section 2415(b) support preemption. In United States v. Hess, the Tenth Circuit noted, “[w]e must give statutes of limitation which bar the government’s rights . . . a strict construction in the government’s favor.”33 Similarly, in Federal Deposit Insurance Corp v. Hinkson, the Third Circuit noted that section 2415 “contains no reference to the effect of state law on the statute of limitations . . .

27. United States v. Summerlin, 310 U.S. 414, 416 (1940) (citing e.g., United States v. Thompson, 98 U.S. 486 (1878)).
29. See United States v. Miller, 28 F.2d 846, 850–51 (8th Cir. 1928).
30. Id. at 851 (echoing the rule in Summerlin).
32. See Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 (establishing a statute of limitations for certain actions brought by the government) (codified as amended at 28 U.S.C § 2415(b)).
33. United States v. Hess, 194 F.3d 1164, 1175 (10th Cir. 1999) (citation omitted).
nor does [it] furnish any basis for modifying the six-year term because a private litigant would not be similarly affected.” Finally, in United States v. Bacon and Bresson v. Commissioner, the Ninth Circuit explicitly utilized the Summerlin rule to support its holding that a federal statute of limitations preempted the state statute of limitations provided for in the statute under which the United States brought its claim.

Although Hess, Hinkson, Bacon, and Bresson support preemption, in United States v. California, the Supreme Court noted, “[w]hether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question.” Furthermore, there is a lack of case law in which section 2415(b) has been applied to state statutory trespass claims, and at least two cases decided since its passage support the no preemption theory: first, in United States v. Bailey Feed Mill, the Eastern District of North Carolina suggested that state statutes, which supply a more appropriate theory of liability than tort or contract claims by the United States, should have the time limitations within enforced; and second, in Ofuasia v. Smurr, the Washington Court of Appeals highlighted the differences between Washington common law and statutory trespass, which are common in many other states.

In fleshing out the case law, Section IV below demonstrates that the rule in Summerlin, also stated in Miller, ultimately undermines the argument against preemption and further supports applying the six-year statute of limitations in section 2415(b) when the United States sues to protect federal land under state trespass statutes.

A. The Summerlin Rule

The Summerlin Court did not squarely address whether a state statute of limitations would apply to the United States when its claim is brought under a state statute because there the claim was under a federal statute. In particular, the United States sought to recover a debt acquired under the National Housing Act after the death of the debtor, J. F. Andrew. Summerlin, the Defendant administrator of Andrew’s estate, had given notice to

35. United States v. Bacon, 82 F.3d 822, 823 (9th Cir. 1996); Bresson v. Comm’r, 213 F.3d 1173, 1179 (9th Cir. 2000).
41. United States v. Summerlin, 191 So. 842, 842 (Fla. 1939), rev’d, 310 U.S. 414 (1940).
creditors to file proof of their claims against Andrews’s estate within eight months, as required by Florida state statute. However, the United States filed its claim in state probate court after the eight months and was denied based on the state statute of limitations.

The Court overturned this decision, reasoning,

\[\text{[i]t is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights . . . The same rule applies whether the United States brings its suit in its own courts or in a state court . . . We are of the opinion that the fact that the claim was acquired by the United States through operations under the National Housing Act does not take the case out of this rule . . . When the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement . . . If [the applicable state statute] merely determin[ed] the limits of the jurisdiction of a probate court and thus provid[ed] that the County Judge should have no jurisdiction to receive or pass upon claims not filed within the eight months, while leaving an opportunity to the United States otherwise to enforce its claim, the authority of the State to impose such a limitation upon its probate court might be conceded. But if the statute, as sustained by the state court, undertakes to invalidate the claim of the United States, so that it cannot be enforced at all, because not filed within eight months, we think the statute in that sense transgressed the limits of state power.}\]

In summary, the Summerlin Court affirmed a general rule that the United States is not subject to state statutes of limitations when suing in its sovereign capacity; it further emphasized that the rule applies in state court to a claim under a federal statute; and it recognized that the rule might not apply when a state statute deprives a state court of jurisdiction but does not deprive the United States of relief elsewhere (presumably in any other jurisdiction). Finally, the Court asserted that a state statute of limitations that completely deprives the United States of its claim is unenforceable.

**B. An Exception to the Summerlin Rule**

The general rule that the United States is not subject to state statutes of limitations has been distinguished on several occasions and to varying degrees. In Denver, the Defendant railroad company allegedly set a fire

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42. *Id.* at 842–43.
44. *Id.* at 416–17 (citations omitted).
through operation of its railroad.\textsuperscript{45} The fire then spread onto federal land, destroying timber thereon.\textsuperscript{46} The United States sued under theories of negligence and under a Colorado state statute providing for liability against railroad companies for damages caused by fire set “negligently or otherwise” through operation of a railroad.\textsuperscript{47} The Defendant brought a motion to dismiss for failure to state a claim.\textsuperscript{48} The trial court granted the motion as to the United States’ claim based on the statute but allowed the United States to proceed based on the theory of negligence.\textsuperscript{49} The Eighth Circuit held that the United States did not have a claim as to either theory of liability due to its failure to bring suit within the two-year period required by the state statute.\textsuperscript{50}

The court’s reasoning was threefold. First, the Colorado fire trespass statute “embodied the entire law on the subject of the liability of a railroad company for fire set out or caused by it in the operation of its road” and therefore superseded the common law in this area.\textsuperscript{51} Second, the time fixed within the statute for a plaintiff to bring suit was a condition of the right to sue.\textsuperscript{52} Therefore, because the United States’ complaint was not brought within the fixed period, it failed to state a cause of action on which relief could be granted.\textsuperscript{53} Third, the generally recognized law that statutes of limitations do not apply to the United States in suits to enforce public rights did not apply here because the United States was asserting a property right, and therefore not suing in its sovereign capacity.\textsuperscript{54} For this proposition, the court cited a wide range of precedent it interpreted as supplying a blanket rule that anytime the United States sued to protect its property rights, it ought to be treated as any other private land owner under the local laws.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{45} Denver & Rio Grande R.R. Co. v. United States, 241 F. 614, 615 (8th Cir. 1917).
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at 615, 617.
\item \textsuperscript{48} Id. at 615–16.
\item \textsuperscript{49} Id. at 616.
\item \textsuperscript{50} Id. at 617–20.
\item \textsuperscript{51} Id. at 619–20 (quoting Rhinehart v. Denver & Rio Grande R.R. Co., 158 P. 149, 154–55 (Colo. 1916)). Rhinehart, the case on which the Eighth Circuit relied for this proposition, was later overruled. Morgan Cnty. Junior Coll. Dist. v. Jolly, 452 P.2d 34, 36 (Colo. 1969).
\item \textsuperscript{52} Denver & Rio Grande R.R. Co., 241 F. at 617–18 (differentiating a condition of the right to sue from a limitation of the remedy). “Limitation of remedy” is sometimes called an ordinary or general statute of limitations. United States v. Miller, 28 F.2d 846, 848 (8th Cir. 1928). A condition of the right to sue is an element of the unique statutory claim, whereas a general statute of limitations is an appendage to one or several claims that affect the Plaintiff’s ability to recover and not necessarily the Defendant’s liability.
\item \textsuperscript{53} Denver & Rio Grande R.R. Co., 241 F. at 618.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} See id. at 618–19 (One case the Court cites to in its reasoning is Cotton v. United States, 52 U.S. 229 (1850)).
\end{itemize}
Later, the Eighth Circuit in *Miller* dealt with a similar case of trespass on federal lands.56 Here, the Defendant cut and sold timber from the land under the mistaken belief that he had perfected his homestead entry there.57 The United States brought suit to recover the value of the timber nine years later.58 Like in *Denver*, the Defendant sought to dismiss for failure to bring the claim within the state statute of limitations.59 However, here, the court held that the United States’ claim was not barred.60

The court discussed the holding of *Denver*:

This court held in *Denver & R.G.R. Co. v. United States*, supra, that the statute of Colorado imposing an absolute liability created a cause of action which did not exist at common law, and that the provision that suit must be brought within two years acted as a limitation of the liability, and pointed out that this differed from ordinary statutes of limitation which affect the remedy alone; that, there being no legislation by Congress providing for the right of action, the plaintiff could recover only by virtue of some statute or under the common law as adopted by the particular state, and based its decision holding the statute of limitation applicable on the theory that, as the government brought its action under the statute, it was bound by the limitations thereof. As the Supreme Court of Colorado had held that the statutory remedy was exclusive; that theory would, of course, be followed by this court, and the United States, seeking to recover for a loss under that statute, would be confined to the right given thereby. But that is not holding that the limitation provided in the act was the same as a general statute of limitations, which is concerned only with a remedy to enforce a right — not with the creation of one.61

Following this discussion, the court distinguished the case at bar based upon the facts that the cause of action was brought under the common law of Arkansas62 and that the applicable state statute of limitations was a general statute of limitations only, which fixed no time limit as a condition of the right to sue.63 In discussing the importance of these distinctions, the court noted that when the United States brings a claim in its sovereign

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57. Id.
58. See id.
59. Id.
60. Id. at 850–51.
61. Id. at 848.
62. It is important to note that the case was not brought in Colorado (unlike *Denver*), so the court here did not have to tangle with the idea that the statute at issue in *Denver* superseded the common law as to this claim. Although this holding was later overturned, it was not until forty years after *Miller* was decided.
63. *Miller*, 28 F.2d at 848.
capacity, it is immune to general state statutes of limitations.\textsuperscript{64} Here, the United States acted in its sovereign capacity because the land upon which the cause of action accrued was held in trust for the benefit of the public at large and not merely for the benefit of the United States as a private actor.\textsuperscript{65}

District courts from the Ninth Circuit have taken the exception in Denver to the rule of sovereign immunity to state statutes of limitations, as stated in Summerlin, and applied it more broadly than the Eighth Circuit in Miller by ignoring the question of whether the United States brings suit in its sovereign capacity when suing under a state statute. In United States v. Magnolia Motor & Logging Co., the United States sued to recover the value of timber illegally logged by the Defendant on public land.\textsuperscript{66} The United States sought to recover treble damages under California’s timber trespass statute, which contained a five-year statute of limitations, yet brought the action seven years after the end of the logging operation.\textsuperscript{67} After finding no applicable federal statute of limitations, the Northern District of California held that the state’s statute of limitations governed the United States’ claim for treble damages.\textsuperscript{68}

The court explained:

The law appears to be settled that, as to common law actions, no state statute of limitations can be made to apply to the United States. The law also appears to be that, as to causes of action specifically created by state law, state statutes of limitation are applicable to the United States.\textsuperscript{69}

Thus, Magnolia was decided solely on whether the cause of action was created by state statute and apart from the common law, not (as in Denver and Miller) on whether the United States was acting in its sovereign capacity in bringing the state law claim and whether the time limitation within that statute was a general statute of limitations (limiting the remedy only) or a limitation of the liability itself.\textsuperscript{70} The Magnolia court recognized, however,

\begin{itemize}
\item \textsuperscript{64} Id. at 849–50.
\item \textsuperscript{65} Id. at 850–51 (“We are unwilling to hold that the government of the United States, in the protection of its public domain held in trust for the people of the United States and acting solely in the public interest, is engaged merely in enforcing a private right and not acting in its capacity as a sovereign. We do not think the contrary doctrine can be drawn from Denver & R.G.R. Co. v. United States, supra. If it can, we would not be willing to follow it.”).
\item \textsuperscript{66} United States v. Magnolia Motor & Logging Co., 208 F. Supp. 63, 63 (N.D. Cal. 1962).
\item \textsuperscript{67} Id. at 63–64.
\item \textsuperscript{68} Id. at 65–66.
\item \textsuperscript{69} Id. at 65 (citing Miller, 28 F.2d at 846 and Denver & Rio Grande R.R. Co. v. United States, 241 F. 614, 615 (8th Cir. 1917)).
\item \textsuperscript{70} See id. at 65–66 (determining that Cal. Civ. Code § 3346 created a new cause of action, rather than a measure of damages for an existing common law trespass or conversion
\end{itemize}
that pursuant to a federal regulation then in effect, where the state statute creates a “mere measure of damages for an existing, common law cause of action,” as opposed to a new cause of action, governmental claims under the statute may not be barred following the rule in *Miller*.\(^{71}\)

The simplified rule that governmental claims under state statutes are subject to state statutes of limitations, as construed in *Magnolia*, was also applied by the District of Montana, in *United States v. Eytcheson*.\(^{72}\) There, the United States sought to recover damages from a forest fire on federal land based on negligence and under a Montana state statute, “which creates strict liability, regardless of negligence, for the setting of a fire which spreads and damages or destroys property.”\(^{73}\) The court was not persuaded to distinguish the case from *Denver* on the grounds that the state law provided the limitations period in a different section of the code.\(^{74}\) Nor was the court persuaded to view the doctrine of strict liability for the spreading of fire as a common law doctrine codified by the state statute.\(^{75}\)

However, the court did apply the holding in *Miller* (that common law causes of action cannot be barred by state statute of limitations where the United States sues in its sovereign capacity) to the claim of negligence.\(^{76}\) Like *Magnolia*, *Eytcheson* was decided before section 2415(b) was published and, therefore, in the absence of an applicable federal statute of limitations. Unlike *Magnolia*, however, *Eytcheson* did not touch on the significance of that fact.\(^{77}\)

In summary, the courts in *Magnolia* and *Eytcheson* saw another exception to the rule in *Summerlin*: in the absence of an applicable federal statute of limitations, where the United States brings its claims under a state statute, state statutes of limitations apply. *Magnolia* recognized an exception to the *Denver* exception where the state statute merely provides a measure of damages for a common law claim. Both district courts grounded their

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71. See id. at 66.
73. Id. at 372–73.
74. Id. at 373.
75. Id. (recognizing the exception in *Magnolia* that when a state statute provides a mere measure of damages for a common law cause of action, claims by the United States may not be barred by the statutes’ limitation period).
76. Id. at 372–73.
77. See id. at 371–73; but see United States v. Magnolia Motor & Logging Co., 208 F. Supp. 63, 65 (N.D. Cal. 1962) (noting a difference in applicable state and federal periods of limitation does not create an unfair advantage for the United States, even when the cause of action itself is state created).
understanding in the holding of Denver. However, in Denver, the Eighth Circuit was likely not creating such a broad rule. Instead, that court based its opinion on the theory that the United States does not act in its sovereign capacity when bringing state property law claims and on grounds that the state statute at issue created a time limitation on the Defendant’s liability, not merely on the remedy sought by the Plaintiff. Later, the Eighth Circuit in Miller applied a similar rule to Summerlin where the United States brought a common law property claim subject to a general state statute of limitations. Specifically, the court distinguished the case from Denver and noted that the United States does act in its sovereign capacity when bringing claims related to public trust lands.

C. Case Law Supporting Preemption

While section 2415(b) has not been applied to a claim brought by the United States under a state statute, the Tenth Circuit’s decision in United States v. Hess gives some guidance on when it applies and further explores general principles governing conflicts between federal and state common law. There, the conflict arose when the Defendant, a private citizen, began operating a commercial gravel pit on land they had acquired subject to a mineral reservation for the Southern Ute Tribe. On behalf of the Tribe, the United States sought to quiet title to the mineral interest and recover damages based on common law trespass thereto. The district court applied the six-year and ninety-day statute of limitations in section 2415(b) to the United States’ claim. The court noted both that “[w]e must give statutes of limitation which bar the government’s rights . . . a strict construction in the government’s favor” and that the plain language of the statute indicated it should apply to trespass actions. Additionally, in considering what constituted a mineral under the land exchange in question, the court indicated

79. See United States v. Miller, 28 F.2d 846, 848–49 (8th Cir. 1928).
80. Id.
82. Id. at 1169.
83. Id. at 1173–77.
84. Id. at 1175 (citing Foutz v. United States, 72 F.3d 802, 806 (10th Cir. 1995)); see also United States v. Pall Corp., 367 F. Supp. 976, 979–80 (E.D.N.Y. 1973) (citing United States v. 93 Ct. Corp., 350 F.2d 386, 388 (2d Cir. 1965) and applying 28 U.S.C. § 2415(a) to the government’s contract claim in the face of an applicable statute of limitations under the UCC) (“The federal statute of limitations should be construed in the light of the general rule that the statute of limitations and the defense of laches do not apply to the United States unless Congress provides otherwise.”).
that, so long as the relevant state property law is not aberrant or hostile to federal law, the federal government should adhere to it.85

The Third Circuit, in Federal Deposit Insurance Corp. v. Hinkson, made similar arguments for preemption while interpreting section 2415(a). There, the Defendant took a loan from the Farmer’s Bank of Delaware, and that loan was then transferred to the Federal Deposit Insurance Corporation.86 The United States sought to collect on the loan by filing a suit in district court more than eleven years after the Defendant defaulted.87 In holding that the six-year federal statute of limitations for contract claims in section 2415(a) applied over the twenty-year state statute of limitations for collection actions, the court noted that section 2415 “contains no reference to the effect of state law on the statute of limitations . . . [n]or does [it] furnish any basis for modifying the six-year term because a private litigant would not be similarly affected.”88 Furthermore, the court opined that, regardless of whether an applicable state statute of limitations was shorter or longer than the limitation in section 2415, “Congress’s intent to establish a uniform time limitation and to encourage the expeditious disposition of government litigation” should not be frustrated by state law, and more explicitly that, “[t]he federal statute of limitations preempts a state statute of limitations after the claim comes within control of the federal government.”89

Finally, in a situation that parallels the United States bringing trespass claims under state statutes to protect public land, the rule from Summerlin was adopted by the Ninth Circuit in United States v. Bacon and explicitly applied to a cause of action created by state law.90 Specifically, the court applied the “ten-year federal statute of limitations governing tax assessment collection actions” in 26 U.S.C. § 6502(a)(1) to an action brought under the state’s Uniform Fraudulent Conveyance Act.91

The Ninth Circuit later expounded on its view of Summerlin in Bresson v. Commissioner.92 There, the United States sought to recover unpaid

87. Id.
88. Id. at 432–35.
89. Id. at 434; see also United States v. Bailey Feed Mill, Inc., 592 F. Supp. 844, 846 (E.D.N.C. 1984) (citing United States v. Chesley’s Sales, Inc., 523 F. Supp. 528, 529 (W.D. Pa. 1981)) (“An action brought by the United States to recover damages for conversion of property is governed by the six-year statute of limitations contained in 28 U.S.C. § 2415(b) and not by similar statutes provided by state law.”).
90. United States v. Bacon, 82 F.3d 822, 823, 825 (9th Cir. 1996).
91. Id. at 825. The state’s Uniform Fraudulent Conveyance Act has since been repealed and replaced by the Uniform Voidable Transfer Act. WASH. REV. CODE § 19.40.
92. Bresson v. Comm’r, 213 F.3d 1173, 1177, 1179 (9th Cir. 2000).
corporate income and capital gains taxes after finding that the Defendant had acquired a piece of property from a third party that the third party failed to pay capital gains taxes on. In holding that the time limitation in the California Uniform Fraudulent Transfer Act (CUFTA) did not apply to the United States, the court noted, “if the United States comes into possession of a valid claim, that claim cannot be cut off later by a state statute of limitations” because “states transgress the limits of state power when they attempt to set limitations periods on claims acquired by the United States in its governmental capacity.” The Bresson court noted an additional consideration for the Summerlin rule: “[t]he true reason . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.” This sentiment underscores the tension in section 2415(b) between allowing the government sufficient time to prosecute trespass on federal land and fairness to private litigants. It also adds an element not discussed thus far. Namely, that the weight of public interest (preserving public property) favors a longer statute of limitations.

Despite the policies underlying Summerlin that weigh in favor of preemption, the Supreme Court’s most recent guidance on the issue, in United States v. California, raises some uncertainty on the matter. There, the United States sought to recover eleven million dollars of taxes assessed by the state of California against an oil drilling federal contractor. In part, the United States relied on an exemption under the California tax code for recovery. However, the exemption included a ninety-day requirement for filing court actions in the event of an administrative denial. In determining whether the six-year statute of limitations in section 2415(a) for contract claims applied to the United States’ exemption claim, the Supreme Court noted, “[w]hether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question.” However, the Court ultimately did not decide the issue because it reasoned

93. Id. at 1174. Note that the tax liability was initially that of a third party, but after the IRS was unable to locate them, the liability transferred to the Defendant, under the California Uniform Fraudulent Transfer Act (CUFTA). CAL. CIV. CODE § 3439.09 (West 2016).
94. Bresson, 213 F.3d at 1174.
95. Id. at 1176 (internal quotations omitted).
96. Id. at 1179 (quoting United States v. Summerlin, 310 U.S. 414, 417 (1940) (internal quotations omitted)).
97. Id. at 1176 (quoting Guar. Tr. Co. v. United States, 304 U.S. 126, 132 (1938)).
99. See id. at 750.
100. See id.
101. Id. at 758.
that where the United States acquired its claim through subrogation and
where the contractor’s state law claim had been dismissed, the United
States acquired a claim that was already infirm.\footnote{102} Therefore, the Court
held, the claim could not be revived by the rule in \textit{Summerlin} (that state
statutes of limitations do not apply to the United States when suing to en-
force its rights).\footnote{103} Even so, in discussing the issue, the Court provided a
helpful framework for applying the \textit{Summerlin} rule.

The Ninth Circuit in \textit{Bresson} pulled together this framework and char-
terized it as follows: “the Court suggested that two relatively functional
considerations should govern the application of the \textit{Summerlin} rule. \textit{Sum-
merlin} applies (1) when ‘the right at issue was obtained by the government
through, or created by, a federal statute,’ and (2) when ‘the government
was proceeding in its sovereign capacity.’”\footnote{104} Returning to the relevant lan-
guage in \textit{California} shows that an appropriate federal statute of limitations
is an alternative to the first prong of this framework.\footnote{105} Applying the first
prong, the \textit{Bresson} court stated, “although the IRS must rely on the CUFTA
to establish Petitioner’s transferee liability, the government’s underlying
right to collect money in this case clearly derives from the operation of fed-
eral law (i.e., the Internal Revenue Code).”\footnote{106} \textit{Bresson} also affirmed the rul-
ing from the tax court, which decided the case on the basis that the IRS
made its claim within the applicable federal statute of limitations.\footnote{107} As to
the second prong, the court stated, “in its efforts to collect taxes, the United
States unquestionably is acting in its sovereign capacity.”\footnote{108} Taken together,
\textit{Bacon} and \textit{Bresson} clearly suggest that the Ninth Circuit will not apply a
state statute of limitations to the United States, even when the action is
brought under a state statute, so long as the United States’ right derives
from the operation of federal law and the United States is acting in its sov-
ereign capacity, particularly when an applicable federal statute of limita-
tions is available.

In summary, the general rule set forth in \textit{Summerlin}, that state statutes
of limitations do not apply to claims brought by the United States, is subject
to a limited exception where the United States acquires the right to a claim
after the statute of limitations has run, in which case the \textit{Summerlin} rule

\footnote{102}{Id. at 757–58.}
\footnote{103}{Id. at 758 (citing Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126, 142 (1938)).}
\footnote{104}{Bresson v. Comm’r, 213 F.3d 1173, 1177 (9th Cir. 2000) (quoting \textit{California}, 507
U.S. at 757).}
\footnote{105}{See \textit{California}, 507 U.S. at 757.}
\footnote{106}{Bresson, 213 F.3d at 1178.}
\footnote{107}{Id. at 1175, 1179.}
\footnote{108}{Id. at 1178.}
cannot be used to revive the claim. However, the Supreme Court has not addressed whether there is an additional exception where the government brings its claim under a state statute. Instead, in California, the Court provided a general framework governing the application of the *Summerlin* rule. The Ninth Circuit applied this framework in *Bacon* and *Bresson*, holding that a federal statute of limitations preempted applicable Washington and California state statutes of limitations. While there is no case law applying the federal statute of limitations in section 2415(b) to a U.S. claim under state statute specifically, several circuit courts of appeals have interpreted the statute, and the reasoning of those courts generally supports a strict construction of the statute in the government’s favor, particularly in the face of state law conflicts.

A strict construction in the government’s favor on this issue, as suggested in *Hess*, the broad legislative definition of tort in Senate Report 1328, and the lack of language couching the term trespass in the common law from the *Hess* decision support applying section 2415(b) to a claim by the United States under state trespass statutes. Furthermore, any state law that defines “trespass” as only a common law claim would not be persuasive, considering the note in *Hess* that hostile state rules do not provide an appropriate standard for federal law. Similarly, the Third Circuit’s precedent in *Hinkson* explicitly disfavors applying state law to frustrate Congress’s intent to create a uniform time limitation for claims by the United States listed and described under section 2415. Therefore, the reasoning in *Denver*, that the United States was acting as a private landowner and was subject to state property law, is at odds with both *Hess* and *Hinkson*. Furthermore, the reasoning in *Denver* is unpersuasive because, even when the government does prevent the public from directly accessing federal land, it does so for a public purpose.

**D. Case Law Against Preemption**

As discussed in Section III above, one could argue that section 2415(b) acts only to bar actions for common law trespass. In other words, Congress, when describing trespass as a tort, was referring exclusively to the elements

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110. See *supra* note 25 and accompanying text.
111. See United States v. Hess, 194 F.3d 1164, 1173–75 (10th Cir. 1999).
112. *Id.* at 1173.
114. See *supra* note 55 and accompanying text.
of a widely recognized common law claim and not elements that have been
tweaked and codified in state statutes. Therefore, statutory trespass claims
would represent an exception to section 2415(b). This argument would then
open the door for a party to reference the precedent in Denver, Magnolia,
and Eytcheson, which generally stands for the proposition that in the ab-
sence of an applicable federal statute of limitations, state statutes of limita-
tions should govern claims by the United States brought under state tres-
pass statutes.

The case against preemption finds support in the lack of case law in
which section 2415(b) was applied to state statutory trespass claims and
elsewhere in case law where courts chose not to apply 2415(b). In United
States v. Bailey Feed Mill, the United States sought to recover the value of
soybeans ($8,600) purchased by the Defendant from its debtor.116 The De-
fendant averred that the United States’ interest in the soybeans terminated
prior to the United States’ suit under a North Carolina statute governing ag-
Ricultural liens.117 The Eastern District of North Carolina adopted the time
limitation within the state statute in the face of the United States’ claim that
section 2415(b) applied to its claim for conversion.118 The court’s decision
was predicated on finding that (1) the state statute was better suited to the
United States’ claim to recover on an agricultural lien upon soybeans than
its claim for conversion, (2) that the time limitation in the state statute was
not a statute of limitations (but a condition upon the right to sue119), and
(3) that the state statute was not discriminatory to the United States.120 This
case, then, suggests that where a state trespass statute provides a more ap-
propriate theory of recovery than a common law trespass claim, and the
time limitation within is not a statute of limitations, the shorter time limita-
tion is not itself discriminatory to the government and should apply.

Similarly, in Ofuasia v. Smurr, the Washington Court of Appeals noted
the differences between statutory trespass and common law trespass and
held that dismissal of the former did not necessitate dismissal of the lat-
There, the element of intent differed between the two claims as did
the damages provided for.122 The state statute (1) required that the Defend-
ant knew or had reason to know they lacked the authority to access the land

117. Id.
118. Id. at 846.
119. See discussion of Denver and Miller supra Section IV.B (describing the difference
between a general statute of limitations and a time limitation on the right to sue).
122. Id.
in order to find the Defendant liable and (2) provided for treble damages; whereas, the common law (1) required an intentional act that would cause a reasonably foreseeable disturbance to the Plaintiff’s interest in the land and (2) provided for actual and substantial damages. These differences, which are common in many states, support the inference that Congress, when passing section 2415, did not view statutory trespass and common law trespass as the same action. Therefore, section 2415 could reasonably be interpreted narrowly to refer only to common law trespass.

Ultimately, the case law against preemption, which postdates section 2415, echoes the holding in Denver because it emphasizes that some state statutes crowd out common law tort claims and contain time limitations which are inextricable from the right created. Although these cases do not advocate for a broad exception to the Summerlin rule, unlike Magnolia and Eytcheson, they do not address the broader concern of federal sovereignty. The simple fact, as demonstrated by the case law supporting preemption, is that the balance struck in section 2415 between federal sovereignty in protecting federal lands from trespass and fairness to private litigants is a far more appropriate standard than the minimal and disparate case law which clings to the reasoning of outdated precedent predating Congress’s careful consideration of the issue. However, if any doubt remains regarding section 2415’s application, comparing the policy arguments for and against preemption likely put them to rest.

IV. POLICY ARGUMENTS FOR AND AGAINST PREEMPTION

Several current policy considerations highlight Congress’s wisdom in setting a longer statute of limitations for trespass on federal lands. The vastness of public lands in the United States not only makes discovering and assessing trespass a difficult proposition, but it also makes preventing trespass in the first instance equally difficult. For example, the National Park Service (NPS) employs roughly 1,800 park rangers to patrol 84 million acres of NPS land. Even if every ranger worked simultaneously and covered an equal territory, that would leave each ranger to patrol over 46,000 acres. This example highlights the need to provide the government with great leverage to protect federal lands from trespass through the use of state trespass

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123. Id.
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statutes, which act as an important deterrent in the government’s legal arsenal.\textsuperscript{126}

Another policy consideration alluded to above is the sovereignty of the United States and the resulting immunity from statutes of limitations.\textsuperscript{127} This policy protects the people of the United States, for whose benefit the government brings suit, from government oversight and neglect. The government undoubtedly acts in the public interest when suing (1) to recover damages to public land caused by trespass or (2) to prevent the use of public land that is incompatible with the public interest. To penalize the public by reducing the federal government’s avenues for protecting federal lands based on state law would contradict the very purpose of the federal government’s immunity from statutes of limitations without the express direction of Congress.

To curtail the power of the United States to bring trespass claims at its leisure, Congress passed section 2415(b).\textsuperscript{128} This begs the question of whether the balance struck by Congress, between allowing the government sufficient time to discover and address the trespass and fairness to the prospective litigant, is appropriate. In a case study on the constraints facing federal land management agencies, the General Accounting Office identified six main factors inhibiting effective law enforcement: funding, prosecutorial discretion, remoteness of the land, vehicle travel restrictions, employment coverage, and information sharing.\textsuperscript{129} The absence of a reference to the time needed to bring trespass claims in this study, which occurred fourteen years after section 2415(b) went into effect, while not conclusive, suggests that the six-year statute of limitations therein is likely not overburdensome. However, the passage of section 2415(b) and its explicit reference to the need to prolong the typical three-year statute of limitations for trespass actions suggests that three years is too short a time. Therefore, the balance struck by section 2415(b) seems appropriate to the competing policies at issue in cases of trespass on federal lands.

\textsuperscript{126} See Harold v. Toomey, 158 P. 986, 987 (Wash. 1916) (“[T]he statute was enacted for a just, double purpose, to punish a voluntary offender and to provide, by trebling the actual present damage, a rough measure of compensation for future damages not generally ascertainable.”).

\textsuperscript{127} See discussion supra Section IV.B.

\textsuperscript{128} See Improvement of Procedures in Claims Settlement and Government Litigation, supra note 24, at 6 (“[T]he effective and fair conduct of Government litigation requires that lawsuits be instituted and trials held in reasonably prompt fashion . . . the passage of time increases the costs of keeping records and detecting and collecting on old claims to the point that those costs may exceed any probable recovery.”).

\textsuperscript{129} U.S. GOV’T ACCOUNTABILITY OFF., CED-82-48, ILLEGAL AND UNAUTHORIZED ACTIVITIES ON PUBLIC LANDS: A PROBLEM WITH SERIOUS IMPLICATIONS 8–10 (1982).
In contrast, the policy arguments against preemption ignore the balance struck by section 2415(b). The first of these arguments is entire fairness to private litigants. The *Denver* court made this argument when noting that in enforcing a property right, the United States should be held to the same standard as any other landowner.\(^{130}\) Entire fairness, it is argued, does justice to the defendant.\(^{131}\) Although the court does not expand much on this concept, entire fairness would doubtlessly reduce litigation and court congestion, speed up meritorious claims (thereby reducing fear of lingering liability), and cut down on unproductive paperwork to an even greater extent than a uniform federal six-year statute of limitations. However, this argument completely ignores the values underlying the Property and Supremacy Clauses of the Constitution and the vastness of public land, as discussed above. In short, the government is not like any other private landowner: so says the Constitution, so says Congress, and for good reason.

Another policy argument against preemption is the rights of the states.\(^{132}\) Under this argument, state property law should not be subject to any federal interference. The fundamental principle driving state sovereignty in the area of property law is the concept that states are better suited to manage the land within their borders.\(^{133}\) A long-standing conservative principle, the benefits of unbridled state control of property law and management are increased productivity of the land and the use of local knowledge to maintain it.\(^{134}\) While an extensive discussion of the benefits of federal land management is beyond the scope of this Note, suffice it to say that cooperative federalism (the collaboration between state and federal land managers while maintaining federal supremacy) is not at odds with these goals.\(^{135}\) In fact, section 2415 represents the sort of compromise that balances local property interests with the federal government’s admirable efforts to protect the land they manage in trust for every American.\(^{136}\)

\(^{130}\) See *Denver & Rio Grande R.R. Co. v. United States*, 241 F. 614, 618–619 (8th Cir. 1917).

\(^{131}\) *Id.* at 618.


\(^{133}\) *See id.*

\(^{134}\) *Id.* (“[W]e believe the sale of some surplus land will increase productivity and increase State and local tax bases. It will also unleash the creative talents of free enterprise in defense of resource and environmental protection.”).

\(^{135}\) See Logan Glansenapp, *Collaborative Federalism: The Sage Grouse Solution to the Sagebrush Rebellion*, 8 *Aniz. J. Env’t L. & Pol’y* 1, 24–31 (2017) for a deeper dive into why cooperative federalism is ultimately in the best interest of all public lands stakeholders.

\(^{136}\) See 28 U.S.C. § 2415 b–c (2023) (delineating the push and pull between local property interests and federal management of lands in the public trust).
such, it should be applied to all cases of trespass on federal lands, whether brought under the common law, federal statute, or state statute, as further addressed below.

V. RECOMMENDATIONS

The complexity of the case law discussed above in addressing the appropriate statute of limitations for trespass claims brought by the United States under state trespass statutes brings a destabilizing uncertainty to federal land management practices.\(^{137}\) It is in the best interest of protecting public lands to clarify this confusion. Case law that clarifies this issue may be forthcoming. In the meantime, federal land management agencies are well advised to rely on the six-year statute of limitations in section 2415(b) in expectation that this statute preempts any state trespass statute of limitations.\(^{138}\) A broad exception to section 2415(b) for state trespass statutes, or even one that depends more narrowly on the appropriateness and form of the state statute in question, ultimately harms the public interest.\(^{139}\)

Although agencies have a strong legal foundation for relying on section 2415(b) when bringing claims under state trespass statutes, Congress should clarify the issue to remove all ambiguity by amending section 2415(b) to more obviously preempt state statutes of limitations. By doing so, Congress would better effectuate its original desire to provide a uniform statute of limitations for trespass actions concerning federal land because these claims are difficult to discover and prosecute.\(^{140}\) Uniformity would also reduce unnecessary litigation on the issue and allow land management agencies to better carry out their missions.\(^{141}\) Finally, an amendment would better reflect the longstanding rule in Summerlin, which is grounded on important ideals of federal sovereignty.\(^{142}\)

VI. CONCLUSION

Section 2145(b) likely preempts state trespass statutes of limitations, even when the United States brings claims under state trespass statutes. However, case law from the Eighth Circuit, expanded upon by district courts in the Ninth Circuit, calls this conclusion into question. Preemption is backed

\(^{137}\) See discussion supra Section I.
\(^{138}\) See discussion supra Sections IV.C–D.
\(^{139}\) See discussion supra Sections IV.C., IV.
\(^{140}\) See discussion supra Section IV.C.
\(^{141}\) See discussion supra Section IV.
\(^{142}\) See discussion supra Section III.
by precedent from the Third, Ninth, and Tenth Circuits.\textsuperscript{143} Furthermore, Congress has weighed the policies underlying the general rule that the United States is not subject to statutes of limitations and balanced them with the burdens of indefinite liability for trespassers.\textsuperscript{144} In so doing, Congress has created a statute of limitations that accommodates the difficulties of discovering, assessing, and bringing claims for trespass on federal lands.\textsuperscript{145} The federal government’s effectiveness in bringing these claims has significant implications for the public’s use and enjoyment of lands held in trust for them.\textsuperscript{146} A clear rule which adheres to this principle, notwithstanding the tendencies of the current Supreme Court, is in the Nation’s best interest.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{143} See discussion supra Section IV.C.
\item \textsuperscript{144} See discussion supra Section II.
\item \textsuperscript{145} See id.
\item \textsuperscript{146} See discussion supra Section I.
\end{enumerate}
\end{footnotesize}