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## Free Riders on the Firestorm: How Shifting the Costs of Wildfire Management to Residents of the Wildland-Urban Interface Will Benefit Our Public Forests

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# FREE RIDERS ON THE FIRESTORM: HOW SHIFTING THE COSTS OF WILDFIRE MANAGEMENT TO RESIDENTS OF THE WILDLAND-URBAN INTERFACE WILL BENEFIT OUR PUBLIC FORESTS

BENJAMIN REILLY\*

**Abstract:** Since the early 1900s, the federal land management agencies—the Forest Service in particular—have focused their wildfire management efforts on suppression. A century of wildfire suppression policy has created a buildup of natural fuels in the Nation’s forests that contribute to larger, more damaging fires today. This, coupled with the rapid development of the Wildland-Urban Interface, makes today’s wildfires a greater threat to human life and property. As a result, the federal government’s annual expenditures for wildfire management have ballooned in recent years. Relying on the billions of tax dollars spent each year to fight wildfire, individuals have continued to develop property on fire-prone lands and insurers continue to issue them policies with premiums that do not reflect the true risk of wildfire. This situation creates an implicit subsidy for residents of fire-prone lands, which presents many of the same pitfalls as the National Flood Insurance Program’s explicit subsidy for residents of flood-prone lands. This Note advocates for a reform of the way we pay for wildfire management. Specifically, it encourages the federal government to implement a National Wildfire Insurance Program that employs a “homeowner mandate” to shift the costs of wildfire management to those who directly benefit from it: the residents of the Wildland-Urban Interface.

## INTRODUCTION

In the summer of 2013, the Nation’s attention was captured by the devastation of the Yarnell Hill fire that burned in central Arizona.<sup>1</sup> A lightning strike started the fire, and it was fueled by an extended drought and strong winds.<sup>2</sup> It

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<sup>1</sup> See Kirk Siegler, *A Tragic Year for Wildland Firefighters Ends in Tragedy*, NAT’L PUB. RADIO (Dec. 28, 2013, 9:49 AM), <http://www.npr.org/2013/12/28/257771391/a-tragic-year-for-wildland-firefighters-ends-in-reflection>, archived at <http://perma.cc/HSL7-SYUH> (noting that the Yarnell fire captured the Nation’s attention to a degree that other fires have not).

<sup>2</sup> Jason Samenow, *Behind the Weather That Led to the Deadly Yarnell Hill Fire*, WASH. POST, July 1, 2013, <http://www.washingtonpost.com/blogs/capital-weather-gang/wp/2013/07/01/the-weather-that-led-to-the-deadly-yarnell-hill-fire/>, archived at <http://perma.cc/5HSG-K3ML>.

destroyed 127 homes, making it a relatively destructive fire by history's standards, but it will be remembered most for the fact that it overran and killed nineteen members of the Granite Mountain Hotshot Crew, firefighters who were on-site, hand cutting firebreaks along the blaze's perimeter.<sup>3</sup> The tragic loss of life made the Yarnell fire the third deadliest wildfire in American history.<sup>4</sup>

In the past, the national attention given to wildfires has mimicked the life of fire itself: flaring up simultaneously with large fire seasons and fading just as quickly, once the flames are extinguished.<sup>5</sup> Now, however, there appears to be a growing national desire to alter our management of wildfires.<sup>6</sup> President Barack Obama has proposed a bill that would free up more federal funding for wildfire prevention measures by making Congress pay for wildfire suppression the same way it pays for natural disasters like earthquakes and hurricanes.<sup>7</sup> The president's proposal is well intentioned, but it fails to address the root of our wildfire problem: uninhibited expansion into the fire-prone Wildland-Urban Interface ("WUI").<sup>8</sup>

Given wildfire's disregard for jurisdictional and political boundaries, the management of wildfire is precisely the kind of realm where the federal government should contribute its assistance in conjunction with state police powers.<sup>9</sup> Because the federal government is a substantial holder of fire-prone lands, and because of the economic and resource constraints faced by the states, federal agencies have assumed most of the responsibility for wildfire management.<sup>10</sup> Tax dollars have thus been used to protect the property of a small, generally wealthy, segment of society in the western United States.<sup>11</sup>

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<sup>3</sup> See *Coverage of the Yarnell Hill Fire*, AZ CENTRAL, <http://www.azcentral.com/news/wildfires/yarnell/> (last visited Feb. 25, 2015), archived at <http://perma.cc/44QY-UD8Z> (noting that 127 homes were burned, and that the hotshots were hand-cutting firebreaks before they were killed). Though the loss of life in the Yarnell Hill fire was tragic, the loss of 127 homes is modest compared the 1554 homes destroyed by Texas's Bastrop County Complex fire. Will Weissert & Ramit Plushnick-Masti, *Texas Fire Destroys 1554 Homes, 17 People Missing*, SEATTLE TIMES, Sept. 11, 2011, [http://seattletimes.com/html/nationworld/2016175733\\_apustexaswildfires.html](http://seattletimes.com/html/nationworld/2016175733_apustexaswildfires.html), archived at <http://perma.cc/RC6S-HZRB>. The Black Forest wildfire, one of the largest in Colorado history, destroyed 486 homes, but was responsible for only two deaths. Sadie Gurman, *Black Forest Fire Caused \$85 Million in Damage to Homes, Assessor Says*, DENVER POST, July 9, 2013, [http://www.denverpost.com/ci\\_23626934/final-count-homes-destroyed-black-forest-fire-is](http://www.denverpost.com/ci_23626934/final-count-homes-destroyed-black-forest-fire-is), archived at <http://perma.cc/8J3R-UAYJ>.

<sup>4</sup> Siegler, *supra* note 1.

<sup>5</sup> See STEPHEN J. PYNE, *TENDING FIRE: COPING WITH AMERICA'S WILDLAND FIRES* 66 (2004) (noting that just a few low-fire years causes public perception of the "fire problem" to fade almost completely).

<sup>6</sup> See *infra* notes 93–98 and accompanying text.

<sup>7</sup> See *infra* notes 93–98 and accompanying text.

<sup>8</sup> See *infra* notes 99–119 and accompanying text (defining the WUI as the area where the boundaries of human development meet and intermix with undeveloped wildlands).

<sup>9</sup> See Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENVTL. L. 301, 324 (2006) (noting the "boundary-defying" nature of wildfire).

<sup>10</sup> See *infra* notes 65–98 and accompanying text.

<sup>11</sup> See *infra* notes 108–109, 120–121 and accompanying text.

The costs of protecting private property in the WUI from wildfire are being externalized on the nation, and they are rising at an alarming rate.<sup>12</sup>

In today's interconnected world, some externalities are a fact of life.<sup>13</sup> Externalities become a problem, however, when they incentivize people to continue to make economically inefficient decisions because they can externalize the costs of those decisions.<sup>14</sup> Economists call this "moral hazard."<sup>15</sup> Such a problem exists in the present wildfire management regime, because the federal government spends heavily to protect private property, which deflates the cost of homeowner's insurance in the WUI to a level that does not reflect the risk of living there.<sup>16</sup>

To address this problem, this Note advocates for Congress to enact a National Wildfire Insurance Program ("NWIP") to serve as the Nation's sole provider of wildfire insurance.<sup>17</sup> The proceeds of the program would be used to finance the wildfire suppression efforts of federal land management agencies.<sup>18</sup>

<sup>12</sup> See *infra* notes 99–151 and accompanying text.

<sup>13</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967) (noting that "[e]very cost and benefit associated with social interdependence is a potential externality").

<sup>14</sup> See Christine M. McMillan, Note, *Federal Flood Insurance Policy: Making Matters Worse*, 44 HOUS. L. REV. 471, 502 (2007) (arguing that the National Flood Insurance Program is a waste of tax dollars because subsidized rates encourage rebuilding in high flood-risk zones).

<sup>15</sup> See Allard E. Dembe & Leslie I. Boden, *Moral Hazard: A Question of Morality?*, 10 NEW SOLUTIONS 257, 257 (2000) (explaining that "moral hazard" in the insurance context is used to refer to incentives that "increase the risk of insured loss").

<sup>16</sup> See *infra* notes 120–151 and accompanying text. There is thus incentive to reside in the WUI because the correlative cost of the actual risk of wildfires is not borne by WUI-residents. See *infra* notes 120–151 and accompanying text. For the purposes of this Note, "actual wildfire risk" accounts for the suppression costs incurred by the federal government.

<sup>17</sup> See *infra* notes 181–220 and accompanying text. The debate surrounding the costs and benefits of wildfire is robust. See Rebecca K. Smith, *War on Wildfire: The U.S. Forest Service's Wildland Fire Suppression Policy and Its Legal, Scientific, and Political Context*, 15 U. BALT. J. ENVTL. L. 25, 43–44 (2007) (noting the breadth of opinions on how best to manage fire-prone wildlands). Many policy experts and foresters believe that the current system's prioritization of wildfire suppression over forest treatment and management prior to the development of wildfires is deeply flawed. See ROSS GORTE, HEADWATERS ECONS., THE RISING COST OF WILDFIRE PROTECTION 2–3 (2013), available at <http://headwaterseconomics.org/wphw/wp-content/uploads/fire-costs-background-report.pdf>, archived at <http://perma.cc/W4GX-PNGF> (arguing that the fire suppression policies of the twentieth century are a significant cause of the fuel build up in the WUI); Keiter, *supra* note 9, at 314 (arguing that federal fire suppression efforts have distorted the western forests, leaving them "older, denser, and less healthy, and thus prone to larger and more intense fires"). Whether the land management agencies should redirect suppression efforts towards other forms of forest management is a question to be answered by scientists, and is thus not addressed by this Note. See generally ASHLEY SCHIFF, FIRE AND WATER: SCIENTIFIC HERESY IN THE FOREST SERVICE (1962) (arguing that the federal government's undervaluing of forestry science resulted in mismanagement of the Nation's forests). Instead, this Note recognizes the focus on suppression as a reality to be dealt with and presents a new proposal for mitigating the growth of wildfire costs. See *infra* notes 175–177 and accompanying text. As such, this Note does not advocate for or against the national policy that focuses heavily on fire suppression.

<sup>18</sup> See *infra* notes 188–190 and accompanying text.

Further, this Note argues that the decision in *National Federation of Independent Business v. Sebelius* to uphold the Patient Protection and Affordable Care Act (“ACA”) individual mandate provides Congress with a potent tool for fighting regional externalities.<sup>19</sup>

Part I of this Note discusses the history of wildfire in the United States, explains the ecological importance of wildfire, and discusses how the different federal and state agencies coordinate to manage wildfire.<sup>20</sup> Part II introduces the concept of the WUI and discusses how rapid development trends therein contribute to rising fire management costs.<sup>21</sup> Part II also compares the current wildfire management system with the inefficient National Flood Insurance Program (“NFIP”).<sup>22</sup> Part III argues that Congress should take lessons learned from the failures of the NFIP and its newly defined taxing power under *Sebelius*, to enact the NWIP.<sup>23</sup>

Part IV provides an overview of Congress’s taxing power and the ACA individual mandate.<sup>24</sup> Furthermore, it explains the contours of the Supreme Court’s decision in *Sebelius* to uphold the individual mandate shared responsibility payment as a constitutionally permissible tax on those who fail to procure required health insurance.<sup>25</sup> Because the proposed NWIP would almost certainly be challenged on constitutional grounds, Part VI also addresses potential challenges and argues for why they should fail.<sup>26</sup>

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<sup>19</sup> See *infra* notes 166–221, 284–313 and accompanying text.

<sup>20</sup> See *infra* notes 27–98 and accompanying text. Most importantly, it explains how funding structures have given the federal government the most responsibility for wildfire management. See *infra* notes 27–98 and accompanying text.

<sup>21</sup> See *infra* notes 99–119 and accompanying text. It argues that federal wildfire suppression efforts have distorted the insurance market in the WUI, resulting in insurance premiums that are lower than they would be if they accurately reflected the risk of wildfire damage. See *infra* notes 120–151 and accompanying text.

<sup>22</sup> Several scholars and law students have noted the parallels between our wildfire management system and the NFIP. See *infra* notes 120–151 and accompanying text.

<sup>23</sup> See *infra* notes 166–220 and accompanying text. Unlike the NFIP, this program will not be an insurance subsidy; rather it will be modeled on the private insurance system that aims to generate revenue. See *infra* notes 188–197 and accompanying text; see also McMillan, *supra* note 14, at 486–87 (noting that historically, when the government enters the insurance business, it “does so for public policy reasons, rather than to make a profit,” but that it is not precluded from doing so).

<sup>24</sup> See *infra* notes 222–322 and accompanying text.

<sup>25</sup> See *infra* notes 249–280 and accompanying text.

<sup>26</sup> See *infra* notes 281–322 and accompanying text.

## I. WILDFIRE IN THE UNITED STATES

A. *The Ecological Significance of Wildfires*

Wildfires have been a part of natural history since long before humans walked the Earth.<sup>27</sup> They occur naturally throughout the world, with Antarctica being one of the few exceptions, and annually burn an area roughly the size of India.<sup>28</sup> In the United States, naturally occurring wildfires burn regularly in the west, the southeast, and the Great Lakes region.<sup>29</sup> For good reason, however, the wildfires of the west receive the most attention.<sup>30</sup> Western fires are the most common and most intense, and therefore pose a greater threat to people and property.<sup>31</sup>

In areas that have regular, naturally occurring wildfires, the fires actually become an integral process within the ecosystem.<sup>32</sup> For example, the plants that exist today in fire-prone ecosystems have evolved in order to thrive within it, a trait called serotiny.<sup>33</sup> In the United States, serotiny is most commonly found in the pines of the western states, such as the Lodgepole, which regenerates from seeds “dropped almost exclusively after . . . fire.”<sup>34</sup>

<sup>27</sup> Geologic records suggest that the first wildfires began burning 419 million years ago. PETER A. THOMAS & ROBERT S. MCALPINE, *FIRE IN THE FOREST* 10 (2010). By contrast, the earliest undisputed members of the human family are believed to have existed 2.9 to 3.6 million years ago. *Meet Your Ancestors*, PBS NOVA, <http://www.pbs.org/wgbh/nova/sciencenow/0303/02-mya-nf.html> (last visited Feb. 25, 2015), archived at <http://perma.cc/V5UL-JN48>.

<sup>28</sup> See THOMAS & MCALPINE, *supra* note 27, at 4.

<sup>29</sup> See STEPHEN J. PYNE ET AL., *INTRODUCTION TO WILDLAND FIRE* 267 (2d ed. 1996). Smaller fires in the northeast have been reported as well. See Barbara Goldberg, *East Coast Wildfires Whipped up by Winds*, REUTERS (Apr. 10, 2012, 6:01 PM), <http://www.reuters.com/article/2012/04/10/us-usa-wildfires-idUSBRE8391FU20120410>, archived at <http://perma.cc/VA66-NCDC>. In 2012, wildfires burned in New York and New Jersey, where dry conditions and heavy winds led to the burning of over 1000 acres. *Id.*

<sup>30</sup> See Lauren Wishnie, Student Article, *Fire and Federalism*, 17 N.Y.U. ENVTL. L.J. 1006, 1020 (2008) (noting that the “western states historically have been the most likely to burn”); Andrew Freedman, *Wildfire Alert Heightens as Blazes Char Western U.S.*, CLIMATE CENT. (Aug. 20, 2013), <http://www.climatecentral.org/news/wildfire-alert-heightened-as-blazes-char-western-us-16370>, archived at <http://perma.cc/JGG9-B4R3> (noting that California, Idaho, and Montana have had the highest concentration of large fires in recent years).

<sup>31</sup> See Garrett D. Trego, Note, *We Didn't Start the Fire . . . and We Won't Pay to Stop It: Financing Wildfire Management in America's Wildland-Urban Interface*, 36 WM. & MARY ENVTL. L. REV. 595, 600, 605 (2012) (noting that though there are more total homes in the WUIs in the eastern states, a “higher percentage of homes in western fire-prone states fall within this designation than the percentage of homes in eastern states”).

<sup>32</sup> See THOMAS & MCALPINE, *supra* note 27, at 120.

<sup>33</sup> Stephen J. Pyne, *How Plants Use Fire (and Are Used by It)*, PBS NOVA, <http://www.pbs.org/wgbh/nova/fire/plants.html> (last updated June 2002), archived at <http://perma.cc/CKL8-5YM6>. For example, many pine and hardwood trees in areas where wildfires are common have cones or fruits that require fire in order to release their seeds. THOMAS & MCALPINE, *supra* note 27, at 99.

<sup>34</sup> THOMAS & MCALPINE, *supra* note 27, at 106. Some plants that require fire for regeneration actually encourage fire by producing flammable resins. CAL. DEP'T OF FORESTRY & FIRE PROT., *BENEFITS OF FIRE* (2015), available at [http://www.fire.ca.gov/communications/downloads/fact\\_](http://www.fire.ca.gov/communications/downloads/fact_)

The types of wildfires also vary with the ecosystem in which they occur.<sup>35</sup> For example, Ponderosa Pine forests—commonly found in the southwest—tend to support “high frequency, low intensity fires,” whereas the Lodgepole Pine forests of the northern Rocky Mountain region usually experience “infrequent, high intensity fires.”<sup>36</sup> These fires benefit the individual plant organisms through fertilization and seed distribution, but also contribute to an overall healthier forest by clearing out aged, sickly trees and removing dead plant fuel.<sup>37</sup> Most importantly, regular wildfires in forests that are accustomed to stand-replacing fires allow such forests to exist as a mosaic of tree stands in different stages of life.<sup>38</sup>

Although wildfire is a common, natural process on the wildlands of the United States, its effect on human population centers can be devastating.<sup>39</sup> Throughout much of our history, wildfire has been thought of as an enemy that must be “fought.”<sup>40</sup> Because wildfires endanger federal, state, and private lands, many different parties have a stake in the creation and implementation of a wildfire policy to effectuate this fight.<sup>41</sup> As a result, the United States has developed a complicated patchwork of wildfire law and policy.<sup>42</sup>

### *B. History of U.S. Wildfire Law and Policy*

Wildfire regulation dates back to 1905, with the establishment of the Bureau of Forestry and later the Forest Service.<sup>43</sup> The Forest Service was charged with protecting the timber resources and watersheds within the National For-

sheets/TheBenefitsofFire.pdf, archived at <http://perma.cc/7QC5-H6K8>. When fire does not enable such plants to reproduce, they “eventually succumb to old age with no new generation to carry on.” *Id.*

<sup>35</sup> See Keiter, *supra* note 9, at 314.

<sup>36</sup> *Id.*

<sup>37</sup> CAL. DEP’T OF FORESTRY & FIRE PROT., *supra* note 34; THOMAS & MCALPINE, *supra* note 27, at 99.

<sup>38</sup> This helps prevent unnaturally large and damaging fires and harmful beetle infestations. See Joshua Nathaniel, Note, *Forests on Fire: The Role of Judicial Oversight, Forest Service Discretion, and Environmental Regulations in a Time of Extraordinary Wildfire Danger*, 84 DENV. U. L. REV. 923, 927–28 (2007) (noting the biggest problem facing many Lodgepole forests is the lack of age diversity, which results in large areas of forest “uniformly declining in vigor”).

<sup>39</sup> See STEFAN DOERR & CRISTINA SANTIN, LLOYD’S, WILDFIRE: A BURNING ISSUE FOR INSURERS? 20 (2013) (noting that since 1990, wildfire has cost California over \$8 billion in private property loss).

<sup>40</sup> Smith, *supra* note 17, at 43.

<sup>41</sup> See Karen M. Bradshaw, *A Modern Overview of Wildfire Law*, 21 FORDHAM ENVTL. L. REV. 445, 451–52 (2010) (noting that wildfire affects groups with inconsistent land use goals and correspondingly “variant interests in defining ideal wildfire outcomes”).

<sup>42</sup> See Keiter, *supra* note 9, at 358–59 (noting that because “both federal and state law are germane to fire management policy . . . a pastiche of laws and policies governing wildfire on the public lands” is created).

<sup>43</sup> PYNE ET AL., *supra* note 29, at 246–47. Keiter, *supra* note 9, at 305.

ests.<sup>44</sup> Consequently, it viewed wildfire as a “significant threat to its mission.”<sup>45</sup> Forest Service officers were charged with informing western settlers—who used fire to clear land and promote soil fertility—that the Forest Service would protect its timberland holdings with all legal means at its disposal.<sup>46</sup> The nascent Forest Service’s opposition to wildfires, however, remained primarily rhetorical until a particularly intense fire season in the summer of 1910.<sup>47</sup> The Great Burn of 1910 killed eighty-five people, burned three million acres, and became infamous in fire history and lore.<sup>48</sup> Further, it “became a focal point for political action that dramatically affected wildfire suppression throughout the [twentieth] century.”<sup>49</sup> In response to the Forest Service adopted a policy of total wildfire suppression—a policy that has changed the face of America’s forests dramatically.<sup>50</sup>

After the summer of 1910, the Forest Service actively fought all fires, regardless of the source, and even suppressed research efforts to examine whether fire might play a necessary role in preserving forest health.<sup>51</sup> The creation of the Civilian Conservation Corps as part of the New Deal provided the Forest Service with a firefighting force, which allowed it to expand its war on fire further into the wilderness.<sup>52</sup> After the Second World War, the Forest Service buttressed its firefighting programs with the addition of surplus military airplanes and other heavy machinery.<sup>53</sup> It was also during this time that it institut-

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<sup>44</sup> *Id.* at 247.

<sup>45</sup> Keiter, *supra* note 9, at 305.

<sup>46</sup> *Id.* at 306. The Forest Service’s initial charter outlined the legal provisions that it could employ to punish “malice or carelessness with fires.” GIFFORD PINCHOT, FOREST SERV., U.S. DEP’T OF AGRIC., THE USE OF THE NATIONAL FOREST RESERVES: REGULATIONS AND INSTRUCTIONS 67 (1905), available at [http://www.foresthistory.org/aspnet/publications/1905\\_use\\_book/1905\\_use\\_book.pdf](http://www.foresthistory.org/aspnet/publications/1905_use_book/1905_use_book.pdf), archived at <http://perma.cc/WAY6-8TVU>. They included fines and imprisonment for those who failed to extinguish the fires they set. *Id.* The charter also declared that the federal government may “bring civil action to recover damages caused by fire, no matter how it was set” and regardless of where the fire was set or if negligence was displayed. *Id.*

<sup>47</sup> See Keiter, *supra* note 9, at 306 (noting that prior to the fires of 1910, the Forest Service tacitly recognized the ways that wildfire could benefit the environment as well as the ways it could be put to beneficial human use).

<sup>48</sup> Dean Lueck, *Economics and the Organization of Wildfire Suppression*, in WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES 71, 72 (Karen M. Bradshaw & Dean Lueck eds., 2012).

<sup>49</sup> *Id.*

<sup>50</sup> Keiter, *supra* note 9, at 306, 314.

<sup>51</sup> See *id.* at 306–07. See generally SCHIFF, *supra* note 17 (arguing that administrators of the early Forest Service viewed their role as crusaders against wildfire and undervalued scientific research of the ecological importance of fire). Schiff notes that the Forest Service failed to release internal research that promoted prescribed burning as a sound management tool. *Id.* at 168. He claims that the Forest Service suppressed the findings, in part, because it would be an embarrassing affront to their crusade against fire. See *id.*

<sup>52</sup> Keiter, *supra* note 9, at 307.

<sup>53</sup> *Id.*



ed the Smokey the Bear fire prevention campaign and Walt Disney chipped in with anti-fire messaging in the film *Bambi*.<sup>54</sup>

As the wilderness movement gained momentum in the 1960s, the public's attitude began to shift "toward minimizing human intrusions in undeveloped public lands, whether for firefighting or other purposes."<sup>55</sup> Further, a scientific consensus that fire played a necessary ecological role began to emerge.<sup>56</sup> The federal land management agencies performed an about-face and began allowing natural wildfires to burn when they "promoted wildlife or vegetation management objectives."<sup>57</sup> They even employed human-ignited "prescribed fires" to mimic natural fires on lands that had been distorted by past suppression efforts.<sup>58</sup> The emergence of this progressive management scheme, however, was thwarted by the popular backlash following the 1988 Yellowstone fires that grew out of control.<sup>59</sup>

Although federal land management agencies have officially recognized the ecological importance of fire, and even endorsed the use of prescribed fire, the use of fire as a land management tool has been tempered by the fact that federal agencies must coordinate with local and state officials who are more fire averse because of the threat it poses to their constituents.<sup>60</sup> As a result of decades of aggressive suppression policies, our Nation's forests are severely unhealthy.<sup>61</sup> More than seventy million acres of federal lands are at a high risk for wildfire.<sup>62</sup> This increase in fire risk is attributable, in large part, to unnatu-

<sup>54</sup> See THOMAS & MCALPINE, *supra* note 27, at 20–21 (noting that Smokey the Bear and *Bambi* were instrumental in "instilling concern about unwanted fire in many Americans"). In the Disney classic, the hunters that killed *Bambi's* mother were also responsible for setting the forest ablaze by failing to tend to their campfire. *Id.* at 20. A terrified *Bambi* is nearly engulfed in the flames before being saved by his father. *Id.* Steven Pyne has noted that the original story of *Bambi* makes no mention of a forest fire; rather the fire was added for American audiences and sent a powerful anti-fire message to children. PYNE, *TENDING FIRE: COPING WITH AMERICA'S WILDLAND FIRES*, *supra* note 5, at 56.

<sup>55</sup> Keiter, *supra* note 9, at 308.

<sup>56</sup> *Id.* at 307.

<sup>57</sup> *Id.* at 308.

<sup>58</sup> STEPHEN J. PYNE, *FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE* 303–04 (1982) [hereinafter PYNE, *FIRE IN AMERICA*].

<sup>59</sup> See Keiter, *supra* note 9, at 309. The 1988 Yellowstone fires burned more than 1.5 million acres. *Id.* Despite the growing recognition that fires are a natural ecological process, local politicians considered the fire a tragedy due to the loss of the summer tourist season and because the Park's verdant forests were largely charred. *Id.* More significantly, the Yellowstone fires caused outrage in local communities that were jeopardized by the blaze, highlighting the conflict between the ecological benefits of fire and the interests of private landowners. *Id.*

<sup>60</sup> See *id.* at 310.

<sup>61</sup> See SARA E. JENSEN & GUY R. MCPHERSON, *LIVING WITH FIRE: FIRE ECOLOGY AND POLICY FOR THE TWENTY-FIRST CENTURY* 61–71 (2008).

<sup>62</sup> U.S. DEP'T OF INTERIOR ET AL., *REVIEW AND UPDATE OF THE 1995 FEDERAL WILDLAND FIRE MANAGEMENT POLICY* 8 (2001), available at [https://www.nifc.gov/PIO\\_bb/Policy/FederalWildlandFireManagementPolicy\\_2001.pdf](https://www.nifc.gov/PIO_bb/Policy/FederalWildlandFireManagementPolicy_2001.pdf), archived at <https://perma.cc/HS37-PD4P>. The federal government is responsible for managing 415 million acres of fire-adapted land. *Id.* at 7. It classifies these lands as

ral fuel accumulation as a result of the decades of suppression efforts.<sup>63</sup> To complicate the matter, more and more Americans are living in the direct path of these fires.<sup>64</sup>

### C. *The Organization of Wildfire Planning and Management*

The management of wildfires is defined by organizational complexity.<sup>65</sup> Federal, state, and local agencies all have responsibilities when it comes to fire planning and management.<sup>66</sup> Nevertheless, the Forest Service remains the primary entity responsible for the development and implementation of wildfire policies.<sup>67</sup> This is due, in large part, to the agency's access to "virtually unlimited emergency funding for suppression."<sup>68</sup> State agencies, on the other hand, have fixed budgets and generally are unable to employ deficit spending for emergency activities.<sup>69</sup>

When a fire is first reported, the firefighters from the affected administrative unit are generally the first to respond.<sup>70</sup> For example, when a wildfire breaks out in a national forest, the rangers and firefighting corps of that National Forest District will respond.<sup>71</sup> It is common for the fire management scheme to take on an interagency character as firefighters from nearby jurisdictions contribute resources in the form of direct suppression efforts or by buffering their own land from the spreading fire.<sup>72</sup> If the regional resources prove to

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Class 1, 2 and 3. *Id.* Class 1 lands are lands where "human activity has not significantly altered historical fire regimes. . . . These areas usually pose relatively low public safety and ecological risks." *Id.* On the other end of the spectrum are the 70 million acres of Class 3 lands, which pose risks to public safety, economies, and natural resources due to the fact that "[s]everal fire return intervals have been missed, resulting in considerable accumulation of live and dead fuels, increasing the potential for high-severity fires." *Id.* at 8.

<sup>63</sup> Keiter, *supra* note 9, at 311.

<sup>64</sup> See Trego, *supra* note 31, at 605–06.

<sup>65</sup> See Lueck, *supra* note 48, at 71 (noting that the suppression efforts for large fires resembles "a military-style hierarchical organization"); Wishnie, *supra* note 30, at 1015; see also DOERR & SANTIN, *supra* note 39, at 24–25 (noting the various regulations in the United States that differ state by state).

<sup>66</sup> Wishnie, *supra* note 30, at 1015.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> PYNE ET AL., *supra* note 29, at 433. In fact, one scholar has called fire management the Forest Service's *raison d'être*, as today's firefighting programs "contribute . . . more to the agency's budget than timber ever did." RANDAL O'TOOLE, CATO INST., THE PERFECT FIRESTORM: BRINGING FOREST SERVICE WILDFIRE COSTS UNDER CONTROL 5 (2007), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa591.pdf>, archived at <http://perma.cc/YY2Q-4QRE>.

<sup>70</sup> Wishnie, *supra* note 30, at 1019 (noting that some states have agreements with the federal government that allow the closest firefighting forces to make the initial response regardless of whether the fire started within their jurisdiction).

<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

be insufficient to manage the fire,<sup>73</sup> the National Interagency Coordination Center (“NICC”) assumes management of fire suppression resources.<sup>74</sup> The cooperative structure means “federal resources are also drawn into action when fire breaks out on state or private land.”<sup>75</sup> Though there are a multitude of fire-fighting bodies, the “Forest Service continues to play a dominant role even within these cooperative management structures.”<sup>76</sup>

The federal agencies have articulated that in suppressing wildfires, their first priority is protecting human life and that the prioritization of protecting other property and resources will be “based on the values to be protected, human health and safety, and the costs of protection.”<sup>77</sup> Though federal wildfire policy considers private and public property to be of equal priority, behind human life, the “political reality is that protecting people’s homes is given priority over protecting lands and resources.”<sup>78</sup> Opponents of this view note that it can lead to massive economic inefficiencies.<sup>79</sup> These scholars often cite the fact that prioritizing structures can lead to anomalous results, such as hundreds of acres of economically viable timberland being “allowed to burn to save a single, unoccupied home.”<sup>80</sup> These inefficiencies are further exacerbated by funding structures in which the federal government provides a backstop for the state and regional fire managers.<sup>81</sup>

Congress’s “blank-check” policy has put too much emphasis on fire suppression at the expense of prevention and mitigation efforts.<sup>82</sup> Furthermore, state level fire managers are incentivized to protect their budgets by accepting Federal Emergency Management Agency (“FEMA”) aid when possible.<sup>83</sup> If a wildfire that starts on non-federal land grows large enough, FEMA may desig-

<sup>73</sup> The NICC has divided the Nation’s state and federal firefighting resources into eleven regions. *Id.* When a region requires additional assistance, the NICC can deploy air tankers, smoke jumpers, and other firefighting personnel from all over the country. *Id.* at 1019–20.

<sup>74</sup> *Id.* The NICC is housed within the National Interagency Fire Center (“NIFC”). *About Us*, NAT’L INTERAGENCY COORDINATION CTR., <http://www.nifc.gov/nicc/about/about.htm> (last visited Feb. 26, 2015), *archived at* <http://perma.cc/L5QK-UCT6>. The NIFC, based in Boise, Idaho, acts as “the nation’s support center for wildland firefighting.” *Welcome to the Nation’s Logistical Support Center*, NAT’L INTERAGENCY FIRE CTR., <http://www.nifc.gov/> (last visited Feb. 26, 2015), *archived at* <http://perma.cc/M2F7-SQCR>.

<sup>75</sup> Wishnie, *supra* note 30, at 1020.

<sup>76</sup> *Id.*

<sup>77</sup> U.S. DEP’T OF INTERIOR ET AL., *supra* note 62, at 23.

<sup>78</sup> GORTE, *supra* note 17, at 7.

<sup>79</sup> *See generally* WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES, *supra* note 48 and accompanying text (discussing in detail how the current wildfire policy framework leads to resource waste).

<sup>80</sup> Bradshaw, *supra* note 41, at 456.

<sup>81</sup> *See infra* notes 82–90 and accompanying text.

<sup>82</sup> *See* O’TOOLE, *supra* note 69, at 1–5 (arguing that Congress’s “blank check” policy for wildfire suppression must be ended in order to control the rising cost of wildfire).

<sup>83</sup> *See* Trego, *supra* note 31, at 613.

nate it to be a “threat of major disaster.”<sup>84</sup> Under such circumstances, states can seek federal assistance with fire suppression costs through the Fire Management Assistance Grant Program.<sup>85</sup> Through this program, FEMA pays for seventy-five percent of a state’s wildfire suppression costs.<sup>86</sup> This provides state fire managers with the perverse incentive to allow minor fires to become full-on conflagrations in order to obtain substantial funding for the suppression efforts.<sup>87</sup> Once the state has reached the threshold amount of expenditures on fire suppression, it can apply for the grant.<sup>88</sup> According to FEMA, “the entire process is accomplished on an expedited basis and a FEMA decision is rendered in a matter of hours.”<sup>89</sup> Some western governors have publicly stated their desire for all wildfires to be treated as emergencies, putting pressure on state agency heads to procure federal funding through such an avenue.<sup>90</sup>

In addition to being on the hook for a substantial portion of the costs of wildfire on state lands, the federal government is also responsible for suppression costs on federal lands, particularly in the western states, where the federal government is the largest single landholder.<sup>91</sup> As a result, the federal government pays for the vast majority of all wildfire suppression efforts, yet Congress has continued to reaffirm and fund these programs because it views fire “as a boundary-defying natural force with large-scale destructive potential.”<sup>92</sup>

In his 2015 budget proposal, President Barack Obama has proposed a significant overhaul in how the federal government pays for wildfire management.<sup>93</sup> The President proposed that the federal government pay for wildfire suppression in the same manner that it does for hurricanes, tornadoes, and other natural disasters.<sup>94</sup> For example, when a disaster such as a hurricane is de-

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<sup>84</sup> *Fire Management Assistance Grant Program*, FEMA, <http://www.fema.gov/fire-management-assistance-grant-program> (last updated Feb. 6, 2015, 1:53 PM), *archived at* <http://perma.cc/VW9U-5PTC>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Bradshaw, *supra* note 41, at 459–60 (noting that fire managers have the incentive to let containable fires grow into “campaign fire” conflagrations that attract media attention and federal aid).

<sup>88</sup> *Fire Management Assistance Grant Program*, *supra* note 84.

<sup>89</sup> *Id.*

<sup>90</sup> See Rocky Barker, *FLAME Act Fails to Curb Fires: Lawmakers Say Fuel Reduction Must Be a Priority*, IDAHO STATESMAN (Aug. 28, 2013), [http://archives.mtexpress.com/index2.php?ID=2007147772&var\\_Year=2013&var\\_Month=08&var\\_Day=28#.VNDXEGTF\\_NU](http://archives.mtexpress.com/index2.php?ID=2007147772&var_Year=2013&var_Month=08&var_Day=28#.VNDXEGTF_NU), *archived at* <http://perma.cc/7KW9-64DT>.

<sup>91</sup> See *supra* notes 70–71 and accompanying text; see also Sam A. Snyder, *Geothermal Sales Contracts*, 5A ROCKY MTN. MIN. L. INST. 13 (1977) (noting that the federal government is the predominant landholder in the western states).

<sup>92</sup> Keiter, *supra* note 9, at 324.

<sup>93</sup> Coral Davenport, *Obama to Propose Shift in Wildfire Funding*, N.Y. TIMES, Feb. 22, 2014, *available at* [http://www.nytimes.com/2014/02/23/us/obama-to-propose-shift-in-wildfire-funding.html?\\_r=0](http://www.nytimes.com/2014/02/23/us/obama-to-propose-shift-in-wildfire-funding.html?_r=0), *archived at* <http://perma.cc/VUQ6-7XKB>.

<sup>94</sup> *Id.*

structive enough to be declared an emergency, FEMA is “authorized to exceed its annual budget and draw on a special disaster account.”<sup>95</sup> President Obama proposed that such an exception be made for the Departments of the Interior and of Agriculture, which oversee the Bureau of Land Management (“BLM”) and the Forest Service, respectively.<sup>96</sup> The point of the proposal is to protect the BLM’s and the Forest Service’s resources from being commandeered for suppression efforts rather than fire prevention efforts, their intended use.<sup>97</sup> If the President’s proposal is enacted, it may provide the BLM and the Forest Service with more resources to prevent fires, but it will not address the problem of WUI residents not paying their fair share for wildfire management.<sup>98</sup>

## II. FEDERAL WILDFIRE SUPPRESSION: A SUBSIDY FOR PEOPLE LIVING IN THE WILDLAND-URBAN INTERFACE

### *A. The Rising Costs of Wildfires and the Development of the Wildland-Urban Interface*

The federal government is spending more and more each year on wildfire management; in the 1990s, it spent under \$1 billion annually to manage wildfires, but that number has ballooned in recent years.<sup>99</sup> Since 2002, annual federal funding for wildfire protection has averaged \$3.1 billion.<sup>100</sup> Of this amount, roughly seventy percent goes to the Forest Service and thirty percent to the Department of the Interior (“DOI”).<sup>101</sup> The tripling of federal fire protection expenses is partly due to the more severe fire seasons—six of the worst fire seasons in the last fifty years have occurred in the last decade<sup>102</sup>—but it is also due to the increasing development of the Wildland-Urban Interface (“WUI”).<sup>103</sup>

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see *Bureaus & Offices*, U.S. DEP’T OF INTERIOR, <http://www.doi.gov/bureaus/index.cfm> (last visited Feb. 26, 2015), *archived at* <http://perma.cc/5RAL-9FWK> (noting that the BLM is contained within the Department of the Interior); *USDA Agencies and Offices*, U.S. DEP’T OF AGRIC., [http://www.usda.gov/wps/portal/usda/usdahome?navtype=MA&navid=AGENCIES\\_OFFICES](http://www.usda.gov/wps/portal/usda/usdahome?navtype=MA&navid=AGENCIES_OFFICES) (last modified Feb. 11, 2015), *archived at* <http://perma.cc/FZ7Z-RKRT> (noting that the Forest Service is contained within the Department of Agriculture).

<sup>97</sup> See Davenport, *supra* note 93. Secretary of Agriculture Tom Vilsack said, “[w]hen you take resources to suppress fires, you sometimes have to take [them] from the very resources that you would use to restore property or to prevent fires to begin with[,] . . . [a]nd that just basically shifts the risk to a much longer-term and more serious risk.” *Id.*

<sup>98</sup> See *infra* notes 99–151 and accompanying text.

<sup>99</sup> See GORTE, *supra* note 17, at 4 (noting that from 1991 to 1999, the Forest Service and the Department of the Interior averaged \$0.92 billion in annual wildfire protection appropriations).

<sup>100</sup> *Id.* at 14.

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 2, 14.

<sup>103</sup> See Jamison Colburn, *The Fire Next Time: Land Use Planning in the Wildland/Urban Interface*, 28 J. LAND RESOURCES & ENVTL. L. 223, 239 (2008) (arguing that the more people desire to live near what remains of our “wild” lands, the greater the cost to society).

The WUI, as defined by the Forest Service, includes areas “where structures and other human development meet or intermingle with undeveloped wildlands.”<sup>104</sup> The term is a bit of a misnomer because the WUI contains population densities far lower than what is typically considered urban.<sup>105</sup> In fact, in the western states, “on average 3.2 acres per person are consumed for housing in the wildland-urban interface, compared to 0.5 acres per person on other western private lands.”<sup>106</sup> This low density makes the homes of the WUI harder to protect from fire.<sup>107</sup> Furthermore, homes in the WUI are far more likely to be second homes.<sup>108</sup> In the rest of the privately held lands of the west, only one in twenty-five homes is a second home.<sup>109</sup>

Ninety-one percent of the federal appropriations for wildfire management are allocated for the use of protecting federal lands,<sup>110</sup> but there is evidence that the existence of private homes and other structures “adjacent to federal lands can significantly alter fire control strategies and raise costs.”<sup>111</sup> Although federal wildfire suppression policy “explicitly states that protecting human lives is the priority, and that protecting private property and natural resources are equal as the second priority . . . the political reality is that protecting people’s homes is given priority over protecting lands and resources.”<sup>112</sup> When a fire breaks out on federal lands with adjacent private structures, fire managers often deploy firebreaks and costly firefighting aircraft to protect the structures.<sup>113</sup> In a survey by the U.S. Inspector General, some Forest Service land managers estimated that “[fifty] to [ninety-five] percent of firefighting costs were attributable to protection of private property.”<sup>114</sup>

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<sup>104</sup> OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF AGRIC., AUDIT REPORT: FOREST SERVICE LARGE FIRE SUPPRESSION COSTS, at i n.1 (2006), available at <http://www.usda.gov/oig/webdocs/08601-44-SF.pdf>, archived at <http://perma.cc/9YDE-LS2P>; see also *Urban Wildland Interface Communities Within the Vicinity of Federal Lands That Are at High Risk from Wildfire*, 66 Fed. Reg. 752, 753 (Dep’t of Agric. Jan. 4, 2001) (notices) (defining the WUI as “where humans and their development meet or intermix with wildland fuel”).

<sup>105</sup> HEADWATERS ECONS., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE 5 (2009), available at <http://headwaterseconomics.org/wphw/wp-content/uploads/HeadwatersFireCosts.pdf>, archived at <http://perma.cc/45TW-GLVU>.

<sup>106</sup> *Id.* at 55.

<sup>107</sup> See *id.* at 56 (noting that it is easier to protect a single subdivision than the same number of homes spread out over a larger tract of land).

<sup>108</sup> *Id.* at 5. Only four percent of homes in the west are in the WUI and one in five of those homes is a second home. *Id.* at 11.

<sup>109</sup> *Id.* at 11.

<sup>110</sup> GORTE, *supra* note 17 at 14.

<sup>111</sup> *Id.* at 7.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* (citing OFFICE OF INSPECTOR GENERAL, *supra* 104, at ii). A study conducted for the Montana legislature found that firefighting costs are “highly correlated with the number of homes threatened.” HEADWATERS ECONS., MONTANA WILDFIRE COST STUDY TECHNICAL REPORT 18 (2008), available at [http://headwaterseconomics.org/wphw/wp-content/uploads/HeadwatersEconomics\\_FireCostStudy\\_](http://headwaterseconomics.org/wphw/wp-content/uploads/HeadwatersEconomics_FireCostStudy_)

Perhaps the most important feature of the WUI is its potential for further development.<sup>115</sup> At present, just fourteen percent of the forested private land adjacent to public land is developed, “leaving tremendous potential for future development on the remaining [eighty-six] percent.”<sup>116</sup> In fact, the WUI has been developed at such a rapid pace during the last decade that it is “the fastest growing category of real estate in America.”<sup>117</sup> To complicate these issues further, global warming may mandate significant increases in the already vast amount of federal money currently being spent on wildfire management.<sup>118</sup> Thus, fire economics experts have stated that “[t]he rising cost of wildland firefighting will not be controlled without also influencing the pace, scale, and pattern of residential development in the wildland-urban interface.”<sup>119</sup>

### *B. Government Subsidized Firefighting and Its Distortion of the Markets for Fire Insurance: A Comparison with the National Flood Insurance Program*

Billions of tax dollars are spent each year fighting wildfires that endanger private property in the WUI, despite the fact that a small, predominantly wealthy population lives in such areas.<sup>120</sup> The federal government’s fire policy is essentially subsidizing the desired mountain lifestyle of America’s wealthy.<sup>121</sup> Be-

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TechnicalReport.pdf, archived at <http://perma.cc/D7U5-BBUA>; see also PATRICIA H. GUDE ET AL., HEADWATERS ECONS., EVIDENCE FOR THE EFFECT OF HOMES ON WILDFIRE SUPPRESSION COSTS 14 (2011), available at [http://headwaterseconomics.org/wphw/wp-content/uploads/CAfire\\_Manuscript\\_July11.pdf](http://headwaterseconomics.org/wphw/wp-content/uploads/CAfire_Manuscript_July11.pdf), archived at <http://perma.cc/Y9CB-R3AY> (finding the same in a similar study conducted in California).

<sup>115</sup> HEADWATERS ECONS., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE, *supra* note 105, at 5.

<sup>116</sup> *Id.*

<sup>117</sup> Colburn, *supra* note 103, at 240.

<sup>118</sup> See generally CLIMATE CENTRAL, THE AGE OF WESTERN WILDFIRES (2012) (explaining that rising global temperatures contribute to longer and more extreme wildfire seasons in the western United States).

<sup>119</sup> HEADWATERS ECONS., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE, *supra* note 105, at 8.

<sup>120</sup> See *id.* at 5. (highlighting the disproportionately large percentage of second homes in the WUI).

<sup>121</sup> See GORTE, *supra* note 17 at 4, 11 (noting that more people are moving to the WUI because “[b]eautiful scenery, a forested setting, nearby wildlife, and relative isolation from neighbors are increasingly desired for private homes” and they do not have to bare the cost of wildfire protection); Wishnie, *supra* note 30, at 1020 (arguing that, through its wildfire management policies, “the federal government is, to a significant extent, subsidizing the western states and subsidizing landowners who choose to live in highly fire-prone areas”). Western mountain towns like Ketchum, Idaho rely on visitors and second-home owners for their economic wellbeing. See Barker, *supra* note 90. The increasing intensity of wildfire seasons can disrupt “critical summer tourism” in these towns, and “give owners of recreation homes second thoughts.” *Id.* As a result, many western lawmakers have endorsed wildfire suppression and prevention policies. See *id.* (quoting Ketchum mayor, Randy Hall as saying that “the second-home owners are getting tired [of recurring wildfires]”).

cause people have come to see the Forest Service's fighting of wildfires as a guarantee, private insurance companies offer policies with premiums that do not reflect the actual risk of living in the WUI.<sup>122</sup>

The costs of wildfire protection incurred by the federal government each year represent a major economic inefficiency and recently, these costs have begun to receive more attention from economists and legal scholars.<sup>123</sup> According to one such scholar, Carolyn Kousky, "public suppression activity is an implicit subsidy, driving a wedge between private benefits and costs in household and firm location decisions" that incentivizes development in fire-prone areas.<sup>124</sup> Dean Lueck, an economist and wildfire policy expert, notes that the organizational complexity of our wildfire management scheme has incentivized suppression crews and both public and private landowners to make economically inefficient choices.<sup>125</sup> Lueck notes that the "rule-based bureaucratic structure of suppression organizations, [and] the emergency status of fire suppression in law and policy" result in the vast overprotection of structures.<sup>126</sup> In fact, the federal government's 2003 budget stated that, "[i]n some western areas, the government pays more in suppressing fires than the fair market value of the structures threatened by those fires. It would literally be cheaper to let them burn and pay 100 percent of the rebuilding cost."<sup>127</sup>

Casting our wildfire management policy in such stark economic terms suggests that the system is indefensible. This Note, however, argues that some inefficiencies in our firefighting regime are inevitable.<sup>128</sup> Our wildfire suppression policies are deeply entrenched and it is unlikely that there will ever be the political will to set a policy that lets homes burn because it makes economic "sense."<sup>129</sup> Instead, this Note proposes that federal firefighting agencies continue to protect the people and the homes of the WUI, but that the federal government take steps to ensure that a fair share of the costs of the protection are borne by those who reap the benefits.<sup>130</sup>

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<sup>122</sup> See Bradshaw, *supra* note 41, at 462 (noting that homeowners in the WUI have the ability "to receive full insurance at a rate not reflective of the entire risk assumed").

<sup>123</sup> See generally WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES, *supra* note 48 (representing the "first coordinated effort by top legal scholars and economists" to address the policy dilemma posed by wildfires).

<sup>124</sup> Carolyn Kousky et al., *In Harm's Way: Homeowner Behavior and Wildland Fire Policy*, in WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES, *supra* note 48, at 178, 180.

<sup>125</sup> See Lueck, *supra* note 48, at 83 (noting that the regime encourages development in fire-prone lands and fire suppression techniques that are unnecessarily costly).

<sup>126</sup> *Id.*; see also *supra* notes 10–81 and accompanying text (illustrating the background of U.S. federal fire suppression policy).

<sup>127</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2003 BUDGET OF THE UNITED STATES GOVERNMENT 66 (2002).

<sup>128</sup> See *infra* notes 166–180 and accompanying text.

<sup>129</sup> See *supra* notes 78, 112, 122 and accompanying text.

<sup>130</sup> See *infra* notes 166–220 and accompanying text.



Recent scholarship regarding the implicit subsidy that the government provides for residents of the WUI has drawn parallels between federals spending on fire suppression and the National Flood Insurance Program (“NFIP”).<sup>131</sup> The NFIP was enacted in 1968 with the intention of reducing the costs of federal disaster relief provided to communities that suffer flooding events.<sup>132</sup> Due to the high risk and the seasonal nature of flooding, insurance companies were unable to offer affordable flood insurance coverage.<sup>133</sup> Consequently, many floodplain residents were forced to go uninsured, and the federal government ended up being saddled with massive disaster assistance costs after large floods.<sup>134</sup>

The NFIP, which is administered by Federal Emergency Management Agency (“FEMA”), provides flood insurance only to communities that agree to regulate development in flood-prone areas according to federal requirements.<sup>135</sup> Although land use regulation is traditionally reserved to the states, the National Flood Insurance Act, which created the NFIP, transfers to Congress land-use planning control in communities that participate in the NFIP.<sup>136</sup> As part of the NFIP, FEMA maps flood hazard zones.<sup>137</sup> It uses these mapping projects to assess risk of future flooding and conducts actuarial studies to set premium rates for newly issued policies.<sup>138</sup> Although new construction in communities that have joined the NFIP is subject to the higher risk-based rates, “the original, subsidized policyholders retain the subsidized rate.”<sup>139</sup>

Detractors of the NFIP—an explicit insurance subsidy for those living in the Nation’s most flood-prone areas—argue that the plan encourages irresponsible behavior by subsidizing the costs of building and rebuilding in locations

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<sup>131</sup> See Colburn, *supra* note 103, at 242–43 (drawing parallels between the inefficiencies of the NFIP and the current wildfire management regime); Trego, *supra* note 31, at 616–17 (noting the same inefficiencies as Colburn).

<sup>132</sup> FED. EMERGENCY MGMT. AGENCY, U.S. DEP’T OF HOMELAND SEC., NATIONAL FLOOD INSURANCE PROGRAM: ANSWERS TO QUESTIONS ABOUT THE NFIP 1 (2011), available at [http://www.fema.gov/media-library-data/20130726-1438-20490-1905/f084\\_atq\\_11aug11.pdf](http://www.fema.gov/media-library-data/20130726-1438-20490-1905/f084_atq_11aug11.pdf), archived at <http://perma.cc/79CP-RJNW>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> McMillan, *supra* note 14, at 481.

<sup>136</sup> *Id.* at 478–79. For example, FEMA must approve a community’s building code regulations before it can enter the program, thus allowing its residents procure flood insurance. *Id.* at 481. By setting zoning requirements, the federal government intended to mitigate the damages to property that would occur as a result of future flooding events. *Id.* For example, new homes built in the 100-year floodplain are required to use certain construction techniques that make them more resistant to flood damage. See *id.* at 501.

<sup>137</sup> *Id.* at 480.

<sup>138</sup> *Id.* at 482.

<sup>139</sup> *Id.*

that will continue to flood repeatedly.<sup>140</sup> They point to the \$24 billion in debt amassed by the NFIP, which has resulted from the program's years of charging actuarially unsound premiums, and the perverse incentive for homeowners to rebuild in harm's way.<sup>141</sup>

The NFIP's large debt has led many to criticize the program for creating a moral hazard and the political pressure to reform the NFIP has been intense.<sup>142</sup> In July 2012, reformers succeeded in passing the Biggert-Waters Flood Insurance Reform Act ("BWFIRA").<sup>143</sup> As a large reworking of the NFIP, the BWFIRA was designed to phase out the current insurance subsidies for properties in designated flood zones.<sup>144</sup> Recently, however, it was substantially modified by the Homeowner Flood Insurance Affordability Act of 2014 (the "HFIAA").<sup>145</sup> The HFIAA gradually phases in actuarially sound premiums for properties newly included in the 100 year flood map, but reinstates the subsidies for properties that were included in the map when the NFIP was created.<sup>146</sup>

At present, the federal government does not directly subsidize wildfire insurance in the way it does flood insurance.<sup>147</sup> The availability of wildfire insurance, however, will become decreasingly available, "creating a large burden

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<sup>140</sup> See generally McMillan, *supra* note 14 (arguing that the NFIP is not only bad policy, but that its encouragement of rebuilding in harm's way is negligent); John Stossel, *Taxpayers Get Soaked by Government's Flood Insurance*, ABC NEWS (Sept. 20, 2011), <http://abcnews.go.com/Business/Insurance/story?id=94181&singlePage=true>, archived at <http://perma.cc/7QM9-PN9G> (offering a personal anecdote that supports the notion that the NFIP encourages rebuilding after flood damage).

<sup>141</sup> See CAROLYN KOUSKY & HOWARD KUNREUTHER, WHARTON CTR. FOR RISK MGMT. & DECISION PROCESSES, ADDRESSING AFFORDABILITY IN THE NATIONAL FLOOD INSURANCE PROGRAM: MEANS-TESTED VOUCHERS COUPLED WITH MITIGATION LOANS (2013), available at [http://opim.wharton.upenn.edu/risk/library/WRCib2013d\\_Affordability\\_NFIP.pdf](http://opim.wharton.upenn.edu/risk/library/WRCib2013d_Affordability_NFIP.pdf), archived at <http://perma.cc/FAK8-DN2F>.

<sup>142</sup> See Logan Strother, *Insuring Risk: National Flood Insurance Policy & Moral Hazard*, DISASTERS, PROP. & POLITICS (Jan. 23, 2014), <http://disasterspropertypolitics.com/2014/01/23/insuring-risk-national-flood-insurance-policy-moral-hazard/>, archived at <http://perma.cc/GCK6-3DQE> (arguing that by making insurance more affordable in flood-prone regions, the federal government has actually "contributed to the concentration of people and capital in flood-prone areas"). See generally Louis Cruz, Note, *Examining Current Proposals for Increasing the Federal Role in Dealing with Coastal Hurricane Risk*, 16 CONN. INS. L.J. 323 (2009) (outlining the numerous proposed reforms to the NFIP).

<sup>143</sup> Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 405 (codified as amended at 42 U.S.C. §§ 4001–4129 (2012)) (repealed 2014). The BWFIRA is the rare law that "traditionally conservative free-market groups and traditionally progressive environmental groups supported enthusiastically." Eli Lehrer, *Strange Bedfellows: SmarterSafer.org and the Biggert-Waters Act of 2012*, 23 DUKE ENVTL. L. & POL'Y F. 351, 351 (2013).

<sup>144</sup> Lehrer, *supra* note 143, at 352.

<sup>145</sup> Homeowner Flood Insurance Affordability Act of 2014, 42 U.S.C. §§ 4005, 4015a, 4033, 4101d, 4101e.

<sup>146</sup> Dan Farber, *Sea Levels Rise, Premiums Not So Much*, LEGAL PLANET (Mar. 24, 2014) <http://legal-planet.org/2014/03/24/sea-level-rises-premiums-not-so-much/>, archived at <http://perma.cc/3TZS-L6RY>.

<sup>147</sup> See Kousky et al., *supra* note 124, at 191–92.

on the states.”<sup>148</sup> If and when this happens, the federal government will likely be called on to intervene, perhaps with a plan modeled after the NFIP.<sup>149</sup> In fact, California has already enacted a program that requires insurers in the state to join the “state-regulated association that acts as an insurer of last resort, providing property insurance to homeowners who cannot obtain insurance in the private market, and offering it at generally subsidized rates.”<sup>150</sup> One critic of this policy argues that it creates a moral hazard because it “significantly underprices wildfire risk in California and encourages development in the most hazardous areas.”<sup>151</sup>

*C. The Problem of Cost Shifting in the Healthcare Market and the Patient Protection and Affordable Care Act’s Individual Mandate*

The problem of cost shifting seen in the wildfire management and flood insurance contexts has existed in the Nation’s health care market for the last several decades.<sup>152</sup> In 1986, President Regan signed into law the Emergency Medical Treatment and Active Labor Act (“EMTALA”).<sup>153</sup> The EMTALA required all hospitals receiving Medicaid funding to offer emergency care to any patient that walks through the door, regardless of their ability to pay.<sup>154</sup> “Though EMTALA embodied a progressive notion of healthcare that ensured that no one would be denied emergency care due to lack of insurance, it was an unfunded mandate.”<sup>155</sup> As a result, a “free-rider” problem was created: uninsured individuals could receive free care by shifting costs to individuals.<sup>156</sup>

It is estimated that the health care system was obliged to provide more than \$43 billion in uncompensated medical care each year, as a result of EMTALA.<sup>157</sup> “These costs [were] passed on to insurers in the form of higher medical bills for the insured populations, and insurers, in turn, [passed the] costs on to the insured population in the form of higher premiums.”<sup>158</sup> Further, government programs that absorb the cost of providing critical care to the uninsured

<sup>148</sup> *Id.*

<sup>149</sup> *See id.*

<sup>150</sup> ROGER G. KENNEDY, WILDFIRE AND AMERICANS: HOW TO SAVE LIVES, PROPERTY, AND YOUR TAX DOLLARS 243 (2006).

<sup>151</sup> *Id.*

<sup>152</sup> *See* JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 2–4 (2013).

<sup>153</sup> *Id.* at 2.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2–3.

<sup>157</sup> *See* John K. DiMugno, *Navigating Health Care Reform: The Supreme Court’s Ruling and the Choppy Waters Ahead*, 24 CAL. INS. L. & REG. REP., no. 6, July 2012, at 1, 2.

<sup>158</sup> *Id.*

pass costs on to the taxpayers in the form of higher taxes.<sup>159</sup> One of the goals of the Patient Protection and Affordable Care Act (“ACA”) was to reduce the cost of health insurance by eliminating this cost shifting.<sup>160</sup> In order to combat the cross-subsidization problem, the ACA requires that all individuals sign up for at least a minimum level of health insurance.<sup>161</sup> Individuals who fail to comply with what is known as the individual mandate are forced to pay a penalty—a “shared responsibility payment”—to the federal government.<sup>162</sup>

Though the shifted costs of wildfire suppression pale in comparison to those seen in healthcare,<sup>163</sup> the cost of wildfire management is predicted to increase exponentially as more land in the WUI is settled and climate change creates a more fire-prone landscape in the west.<sup>164</sup> It is time to take action to mitigate the moral hazard problem created by development in the WUI.<sup>165</sup>

### III. A NEW APPROACH TO WILDFIRE INSURANCE: LESSONS LEARNED FROM THE NFIP AND THE ACA INDIVIDUAL MANDATE

The lessons learned from the National Flood Insurance Program (“NFIP”) are instructive in considering a new approach to rein in wildfire management costs.<sup>166</sup> Although fire insurance remains available—and is, in most cases, cheaper than it should be under pure market valuation<sup>167</sup>—it is possible that insurance providers will start dropping fire insurance coverage in the Nation’s more fire-prone areas.<sup>168</sup> Congress should take this opportunity to prevent a situation where it is pressured to subsidize fire insurance across the west, like

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<sup>159</sup> *Id.* This scenario is known as “cross-subsidization.” See Cruz, *supra* note 142, at 344. Cross-subsidization is when “the government covers the exposure property owners who choose to live in high risk coastal locations take on by spreading the cost of that risk to taxpayers”).

<sup>160</sup> See 42 U.S.C. § 18091(2)(C)–(I) (2012); Jennifer B. Wriggins, *Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act*, 19 CONN. INS. L.J. 275, 284–86 (2013).

<sup>161</sup> See 26 U.S.C. § 5000A (2012); DiMugno, *supra* note 157, at 1 (noting that the ACA aims to mitigate the problems of cost shifting in the health care system by requiring “all Americans to take personal responsibility for their health care by obtaining insurance”).

<sup>162</sup> 26 U.S.C. § 5000A(b).

<sup>163</sup> Compare DiMugno, *supra* note 157 (noting that costs of providing uninsured with healthcare exceeded \$43 billion annually), with GORTE, *supra* note 17, at 4 (noting that wildfire suppression costs the federal government over \$3 billion annually).

<sup>164</sup> See *supra* notes 99–119 and accompanying text.

<sup>165</sup> See *supra* notes 99–119 and accompanying text.

<sup>166</sup> See *supra* notes 120–151 and accompanying text.

<sup>167</sup> See *supra* note 122 and accompanying text.

<sup>168</sup> See Sarah E. Anderson & Terry L. Anderson, *The Political Economy of Wildfire Management: Saving Forests, Saving Houses, or Burning Money*, in WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES, *supra* note 48, at 113 (Karen M. Bradshaw & Dean Lueck eds., 2012). Indeed, California has already found it necessary to subsidize fire insurance in parts of the state. See *id.* at 113–14.

it was with flood insurance.<sup>169</sup> In so doing, it should endeavor to alter the wild-fire insurance market to ensure costs reflect actual wildfire risk.<sup>170</sup>

Academics and policy experts have long called for the federal government to create a national fire policy that focuses on returning fire to its natural, ecological role and reining in excessive spending on wildfire suppression.<sup>171</sup> Nevertheless, for decades, the government has ignored the calls to articulate an overarching fire policy.<sup>172</sup> Although we can neither eliminate fires or the risk they pose to people and property,<sup>173</sup> the academic and policy consensus is that the current framework will cause wildfire costs incurred by the federal government to grow at exponential rates.<sup>174</sup>

This Note does not advocate for or against federal agency policies that focus most resources on wildfire suppression rather than pre-treatment of fire-prone forests. Instead, it recognizes that those policies are deeply entrenched and likely to remain substantially the same for the foreseeable future.<sup>175</sup> As such, it proposes that Congress enact a National Wildfire Insurance Program (“NWIP”) to shift wildfire suppression costs to those who benefit most directly from the current status quo, while disincentivizing the rapid development of the Wildland-Urban Interface (“WUI”).<sup>176</sup> A NWIP can, and should, be achieved through federal legislation.<sup>177</sup>

Making those who own homes in the WUI pay for fire suppression based on the actual risk they assume will have a number of positive consequences. It will disincentivize to further development in the WUI,<sup>178</sup> and those who do take the risk of building in the WUI will be forced to help fund the government’s suppression policies.<sup>179</sup> Further, WUI residents will be incentivized to reduce the risk of fire on their property in order to reduce their insurance costs.<sup>180</sup>

<sup>169</sup> See *supra* notes 120–151 and accompanying text.

<sup>170</sup> See *infra* notes 188–197 and accompanying text.

<sup>171</sup> See Keiter, *supra* note 9, at 309–10.

<sup>172</sup> See *id.* at 303–04.

<sup>173</sup> See JENSEN & MCPHERSON, *supra* note 61, at 3 (noting that fire “is a problem that must be mitigated rather than solved. . . [and that w]e cannot extinguish fire permanently, so we must find a way to cope with it”).

<sup>174</sup> See *supra* notes 99–119 and accompanying text.

<sup>175</sup> See Keiter, *supra* note 9, at 315 (noting the emergence of a new “fire-industrial complex” in the west that “rival[s] the region’s flagging timber industry”).

<sup>176</sup> See *infra* notes 181–218 and accompanying text.

<sup>177</sup> The national forests and the relationships between federal, state, and private land contribute to this difficult problem. See *supra* notes 9, 10, 65–98 and accompanying text.

<sup>178</sup> Thereby reducing the moral hazard problems that have received a good deal of criticism in the context of the NFIP. Cf. Strother, *supra* note 142 (arguing that the federal government’s efforts to make flood insurance affordable has led to the “concentration of people and capital in flood-prone areas”).

<sup>179</sup> See *infra* notes 188–197 and accompanying text.

<sup>180</sup> See *infra* notes 208–214 and accompanying text.

The federal government should enact a NWIP, whereby it would be the sole insurer of wildfire loss.<sup>181</sup> Congress has already preempted the field of private flood insurance with the NFIP, and its ability to regulate insurance under its commerce power is plenary.<sup>182</sup> Thus, Congress has the power to prevent private insurers from underwriting wildfire loss.<sup>183</sup> A NWIP could be modeled after the NFIP.<sup>184</sup> For example, like the NFIP, the NWIP could be administered by Federal Emergency Management Agency (“FEMA”).<sup>185</sup> Unlike the NFIP, however, the NWIP would not offer any type of insurance subsidies.<sup>186</sup> Quite the contrary, the goals of the NWIP would be to reestablish market forces on property development in the WUI that reflect the risk of wildfire, to fund wildfire management with the premiums paid by the residents of the WUI, and to incentivize property management practices that mitigate wildfire risk.<sup>187</sup>

### A. Actuarially Sound Premiums

Unlike the premiums charged in the NFIP, the federal government should, in the proposed WFIP, charge actuarially sound premiums for wildfire insurance.<sup>188</sup> To accomplish this, the government would reflect its wildfire suppression costs in the premiums of the policies it issues.<sup>189</sup> The ultimate goal would be for the program to turn a profit in line with the expected wildfire suppression budgets of the federal wildland agencies.<sup>190</sup> Under this plan, Congress would use a “homeowner mandate” that requires those living in wildfire-prone areas to purchase federal wildfire insurance or to pay a tax modeled after the

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<sup>181</sup> See *infra* notes 182–220 and accompanying text.

<sup>182</sup> See Wendy K. Mariner, *The Affordable Care Act Individual Coverage Requirement: Ways to Frame the Commerce Clause Issue*, 21 ANNALS HEALTH L. 45, 58 (2012). Regulation of the insurance industry was historically reserved to the states. See *Paul v. Virginia*, 75 U.S. 168, 183 (1868) (holding that “issuing a policy of insurance is not a transaction of commerce” and thus out of the reach of Congress’s power to regulate commerce). The Supreme Court, however, reversed *Paul v. Virginia* in 1944 by holding that insurance contracts are in fact a type of interstate commerce and therefore subject to federal regulation. See *United States v. South-Eastern Underwriters Ass’n*, 332 U.S. 533, 553 (1944).

<sup>183</sup> See Charlene Luke & Aviva Abramovsky, *Managing the Next Deluge: A Tax System Approach to Flood Insurance*, 18 CONN. INS. L.J. 1, 21 (2012) (noting that there is no private market in basic flood insurance because Congress has preempted the field); Mariner, *supra* note 182, at 58.

<sup>184</sup> See *infra* notes 185–220 and accompanying text.

<sup>185</sup> See McMillan, *supra* note 14, at 480.

<sup>186</sup> See *supra* note 140 and accompanying text.

<sup>187</sup> See *infra* notes 188–220 and accompanying text.

<sup>188</sup> See Luke & Abramovsky, *supra* note 183, at 18.

<sup>189</sup> Cf. *supra* notes 120–151 and accompanying text (explaining how wildfire suppression policies have created an implicit insurance subsidy for residents of the WUI and drawing parallels with the explicit subsidy of the NFIP).

<sup>190</sup> Cf. Luke & Abramovsky, *supra* note 183, at 51 (advocating for a risk bracket system in their proposed NFIP reform).

shared responsibility payment model implemented by the Patient Protection and Affordable Care Act (“ACA”).<sup>191</sup>

The WFIP would charge premiums based on the chosen level of coverage and the level of wildfire risk in the WUI area.<sup>192</sup> For example, geographic areas could be designated high, medium, or low risk.<sup>193</sup> The infrastructure is already in place to assess and map wildfire risk; the federal government maps flood risk through the NFIP and some states already assess and map wildfire risk.<sup>194</sup> Private insurers have begun to use satellite mapping to better understand the risk they underwrite.<sup>195</sup> In fact, satellite mapping was instrumental in the decision by California insurers to stop insuring homes in California’s most fire-prone regions.<sup>196</sup> To encourage participation in a NWIP, residents of a risk zone who fail to obtain wildfire insurance would be subject to a shared responsibility payment modeled after the ACA individual mandate.<sup>197</sup>

### *B. The Phase-in of Increased Premiums for Current WUI Residents*

Although actuarially sound premiums would be the centerpiece of a NWIP, Congress should take care not to unduly burden residents of the WUI by raising wildfire insurance rates all at once.<sup>198</sup> The residents of the WUI, after all, are not directly to blame for the ballooning costs of wildfire management.<sup>199</sup> Nevertheless, the collective innocence of the residents of the WUI does not justify continuing to provide them with the implicit subsidy they currently receive.<sup>200</sup>

<sup>191</sup> See 26 U.S.C. § 5000A(b) (2012).

<sup>192</sup> Cf. Luke & Abramovsky, *supra* note 183, at 50 (advocating the same in their proposed NFIP reform).

<sup>193</sup> See Colburn, *supra* note 103, at 243 (noting that the Forest Service already has a LANDFIRE database that identifies and prioritizes areas that are at high risk of fire). Cf. Luke & Abramovsky, *supra* note 183, at 51 (advocating for a risk bracket system in their proposed NFIP reform).

<sup>194</sup> See *supra* notes 137–138 and accompanying text; see also HEADWATERS ECONS., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE, *supra* note 105, at 20 (noting that California, Oregon, and Montana all have legislation requiring state agencies to map fire risk in their respective state).

<sup>195</sup> See DOERR & SANTIN, *supra* note 39, at 22. Companies like Verisk Climate provide wildfire risk modeling to insurers as a service. *Wildfire Risk Scoring: Fire Line*, VERISK CLIMATE, <http://www.veriskclimate.com/solutions/riskscape/wildfire-risk-scoring-fireline> (last visited Mar. 1, 2015), archived at <http://perma.cc/J7VQ-RTK9>.

<sup>196</sup> See Louis Sahagun, *Inspections a Surprise to Homeowners*, L.A. TIMES, Sept. 25, 2004, <http://articles.latimes.com/2004/sep/25/local/me-insurance25>, archived at <http://perma.cc/6QJB-5HAL>.

<sup>197</sup> See 26 U.S.C. § 5000A(b) (2012).

<sup>198</sup> See *infra* notes 199–207 and accompanying text.

<sup>199</sup> See *supra* notes 99–151 and accompanying text.

<sup>200</sup> See Jennifer Wriggins, *Flood Money: The Challenge of U.S. Flood Insurance Reform in a Warming World*, 119 PENN. ST. L. REV. 361, 432 (2015).

Congress has the reforms of the NFIP as a model for staggered premium increases.<sup>201</sup> For example, the 2012 NFIP reform kept subsidies in place for primary residences until a sale of the home occurred, at which point premiums would readjust to risk-based rates.<sup>202</sup> Congress could proceed with the NFIP model or it could gradually increase rates before a sale occurs, which would avoid potential grandfathering of property to maintain subsidized rates.<sup>203</sup> Further, proponents of further NFIP reform have proposed that the NFIP not cover second homes.<sup>204</sup> Given the disproportionately high number of second homes in the WUI, however, it would be unfair and impractical to force such a large percentage of owners of fire-prone lands to go entirely uncovered.<sup>205</sup> Such an exclusion would also likely be a major financial injury to many western communities that rely on the spending of owner's second homes.<sup>206</sup> A practical middle ground under the proposed NWIP would be that second-home owners face substantially higher premiums.<sup>207</sup>

### C. Fire Mitigation Incentives

A NWIP would also give the federal government the ability to promote sound land management practices among its policyholders.<sup>208</sup> For example, premium rate reductions could be offered to those who take prescribed fire risk mitigating actions.<sup>209</sup> Premium reductions could be offered to those who install metal roofs and create defensible spaces around their home.<sup>210</sup>

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<sup>201</sup> See 42 U.S.C. § 4014 (g)(2) (2012) (repealed 2014).

<sup>202</sup> *Id.*

<sup>203</sup> See FED. EMERGENCY MGMT. AGENCY, QUESTIONS ABOUT THE BIGGERT-WATERS FLOOD INSURANCE REFORM ACT OF 2012 (Apr. 1, 2013), available at [http://www.fema.gov/media-library-data/20130726-1912-25045-9380/bw12\\_qa\\_04\\_2013.pdf](http://www.fema.gov/media-library-data/20130726-1912-25045-9380/bw12_qa_04_2013.pdf), archived at <http://perma.cc/Z9NU-BBBT> (noting that the 2012 reforms to the NFIP increased premiums on second homes almost right away).

<sup>204</sup> See Luke & Abramovsky, *supra* note 183, at 50 (arguing against allowing second home owners to be covered under a hypothetical universal flood insurance program because the program's primary purpose would be to act as a "social safety net").

<sup>205</sup> See *supra* notes 31, 106–109 and accompanying text.

<sup>206</sup> See Barker, *supra* note 90 (noting that the second-home owners have considerable political capital in Ketchum, Idaho).

<sup>207</sup> *Cf.* Luke & Abramovsky, *supra* note 183, at 50 (proposing that a reformed NFIP not cover second homes).

<sup>208</sup> See *id.* at 52.

<sup>209</sup> See HEADWATERS ECONS., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE, *supra* note 105, at 45–46 (noting that some private insurers already influence their policy holders to take fire prevention steps by offering premium reductions); see also Luke & Abramovsky, *supra* note 183, at 52 (noting that implementing risk brackets into a proposed NFIP reform would encourage individuals to reside in lower risk areas).

<sup>210</sup> See HEADWATERS ECONS., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE, *supra* note 105, at 45–46.



Historically, rural communities—particularly those in the west—have resisted zoning and other land use regulation.<sup>211</sup> Allowing premium reductions to those who chose to take mitigation steps sidesteps the problem of local opposition to land use regulation.<sup>212</sup> Those who want to modify their property may do so and for those who do not need to, no community consensus (i.e., zoning) is required.<sup>213</sup> Refunds and rate adjustments could be utilized to “make the benefits of having coverage more salient and to incentivize individuals to engage in mitigation efforts.”<sup>214</sup>

As in many other insurance reform proposals, there is an inevitable choice between eliminating cross-subsidization and crowding out private insurers.<sup>215</sup> Several insurance companies have offered proposals for reforming the flood insurance market in the NFIP context.<sup>216</sup> They all, however, rely on federally-backed reinsurance programs, or a “tax exception,” for the cost of flood insurance, and thus continue to externalize the cost of living in harm’s way on the broader tax base.<sup>217</sup> The proposed NWIP, though perhaps susceptible to being derided as a “socialist” takeover of the insurance market, offers the best opportunity for the federal government to place the costs of wildfire management squarely on those who benefit directly from those policies, thus mitigating the problem of cross-subsidization.<sup>218</sup>

In the aftermath of the protracted political battle over the ACA, increases in the duties of FEMA and the Internal Revenue Service to manage a universal wildfire insurance plan are likely to face strong political objections.<sup>219</sup> This Note does not endeavor to explain why wildfire insurance reform could be or would be more politically palatable than attempts to reform the NFIP or the ACA. Were the proposed NWIP to be implemented, inevitable detractors

<sup>211</sup> See PYNE, *TENDING FIRE: COPING WITH AMERICA’S WILDLAND FIRES*, *supra* note 5, at 173; Keiter, *supra* note 9, at 364.

<sup>212</sup> See Luke & Abramovsky, *supra* note 183, at 45 (arguing that a mandatory insurance plan would improve access to insurance because “coverage would not be held hostage by community demands” as it is in the NFIP context).

<sup>213</sup> See *id.*

<sup>214</sup> *Id.* at 43.

<sup>215</sup> See generally Cruz, *supra* note 142 (discussing the pros and cons of proposals for flood insurance reform offered by private insurers); *supra* note 159 and accompanying text (defining cross-subsidization).

<sup>216</sup> See Cruz, *supra* note 142, at 324.

<sup>217</sup> See *id.*

<sup>218</sup> Cf. Michael McAuliff & Sarah Kenigsberg, *Obamacare Is Socialism: Reps. Louie Gohmert, Steve King Attack*, HUFFINGTON POST (Mar. 20, 2014, 7:59 AM), [http://www.huffingtonpost.com/2012/03/27/obamacare-socialism-louie-gohmert-steve-king\\_n\\_1383973.html](http://www.huffingtonpost.com/2012/03/27/obamacare-socialism-louie-gohmert-steve-king_n_1383973.html), *archived at* <http://perma.cc/T6FR-3FTP> (quoting Tea Party-aligned members of Congress as saying that Obamacare and nationalized insurance plans are socialist programs). Indeed, proponents of other nationalized insurance programs have conceded that they would even be “politically difficult even in less partisan times.” Luke & Abramovsky, *supra* note 183, at 44.

<sup>219</sup> Luke & Abramovsky, *supra* note 183, at 44.

would likely challenge its constitutionality.<sup>220</sup> The proposed NWIP would likely survive such challenges.<sup>221</sup>

#### IV. THE FEDERAL TAXING POWER AND THE TRANSFERABILITY OF THE ACA INDIVIDUAL MANDATE TO OTHER EXTERNALIZED COSTS

##### *A. The Federal Taxing Power and Its Limitations*

The proposed National Wildfire Insurance Plan (“NWIP”) aims to mitigate the rising costs of wildfire management by using the federal taxing power as a means of influencing behavior that lies outside the reach of the federal power to regulate commerce.<sup>222</sup> Specifically, it suggests a “homeowner mandate” to compel residents of the Wildland-Urban Interface (“WUI”) to buy wildfire insurance from the federal government at risk-based rates or face a tax penalty for the costs their property ownership thrust on the tax paying public.<sup>223</sup>

The U.S. Constitution grants Congress broad, but not limitless, powers of taxation.<sup>224</sup> The limitations on the taxing power come from the Constitution’s requirements that direct taxes be apportioned among the states in proportion to population and that “all Duties, Imposts and Excises shall be uniform.”<sup>225</sup> The Uniformity Clause was written into the Constitution because, at the time of framing, the loyalties of many Americans primarily rested with their respective states, not the nation as a whole.<sup>226</sup> The Clause was thus included to prevent

<sup>220</sup> *See id.*

<sup>221</sup> *See infra* notes 281–322 and accompanying text.

<sup>222</sup> *See* U.S. CONST. art. 1, § 8, cls. 2–3; *supra* notes 166–220 and accompanying text. Prior to the decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), virtually every law professor that considered the issue believed that the individual mandate was clearly a permissible exercise of Congress’s commerce power. David A. Hyman, *Why Did Law Professors Misperestimate the Lawsuits Against PPACA?*, 2014 U. ILL. L. REV. 805, 807; *see* Abigail R. Moncrieff, *The Individual Mandate as Healthcare Regulation: What the Obama Administration Should Have Said in NFIB v. Sebelius*, 39 AM. J.L. & MED. 539, 561 (2013). *See generally* David Orentlicher, *Constitutional Challenges to the Health Care Mandate: Based in Politics, Not Law*, 160 U. PA. L. REV. ONLINE 19 (2011) (challenging the claim that the individual mandate is not a permissible exercise of Congress’s power to regulate commercial activity because failure to buy health insurance is inactivity). Despite the uniformity of opinion amongst academics, the Supreme Court held that the individual mandate is not a constitutionally permissible exercise of the commerce power, but that it is nonetheless a legitimate exercise of the taxing power. *See Sebelius*, 132 S. Ct. at 2594–97; *infra* notes 249–280 and accompanying text.

<sup>223</sup> *See supra* notes 188–197 and accompanying text.

<sup>224</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 5.2 (3rd ed. 1999). With the exception of “two specific limitations upon the exercise of the power and one prohibition, the power to tax is plenary.” *Id.*

<sup>225</sup> U.S. CONST. art. I, §§ 2, cl. 3, 8, cl. 1. Further limitations are found in the Due Process Clause of the Fifth Amendment and in the Bill of Rights. ROTUNDA & NOWAK, *supra* note 224, § 5.2.

<sup>226</sup> Jeffrey S. Kinsler, *Circuit-Specific Applications of the Internal Revenue Code: An Unconstitutional Tax*, 81 DENV. U. L. REV. 113, 125–26 (2003). Prior to the ratification of the U.S. Constitution,

groups of states from ganging up on others through economic exclusion or trade tariffs.<sup>227</sup>

It has been held that the Uniformity Clause allows progressive tax rates so long as the rate structure is uniform across state lines.<sup>228</sup> The Uniformity Clause, however, does not require that Congress “devise a tax that falls equally or proportionally on each State.”<sup>229</sup> This was evident in the Supreme Court’s holding in *United States v. Ptasynski*, where it considered the constitutionality of the Crude Oil Windfall Profit Tax Act of 1980.<sup>230</sup> The Act imposed a domestic oil tax but exempted oil produced in a remote area of Alaska.<sup>231</sup> The Act was challenged by a group of domestic oil producers who did not qualify for the exemption.<sup>232</sup> They claimed that the exemption violated the uniformity requirement because Congress framed the “tax in terms of geographic boundaries.”<sup>233</sup> The Supreme Court rejected this argument and upheld the tax, drawing on its earlier holding in the *Head Money Cases* that “the Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found.”<sup>234</sup>

The Uniformity Clause thus appears to be satisfied if the subject to be taxed is defined in non-geographic terms.<sup>235</sup> The Court went further in *Ptasynski*, however, and held that the Clause does not necessarily prohibit Congress

the federal government lacked the ability to regulate interstate commerce. *Id.* at 125. The resulting problems of regionalism and interstate trade barriers were the impetus behind the constitutional grant of the commerce power to the federal government. *Id.* at 125–26. Further, the Uniformity Clause was intended as a restraint on the newly empowered federal government, to prevent state favoritism. *Id.* at 126.

<sup>227</sup> See JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 428 (1833) (noting that the Uniformity Clause was included to thwart “undue preferences of one state over another in the regulation of subjects affecting their common interests”). Supreme Court Justice Joseph Story explained that the Uniformity Clause was intended to prevent groups of states in Congress from monopolizing certain areas of agriculture or manufacturing at the expense of other states with which they are not aligned. *See id.* Thus, for example, the Clause would prohibit Congress, at the urging of Wisconsin and its midwestern neighbors, from passing a law that taxed the production of New England cheese. *See Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 594 (1884) (noting that a tax satisfies the uniformity requirement when it “operates with the same force and effect in every place where the subject of it is found”).

<sup>228</sup> *See Knowlton v. Moore*, 178 U.S. 41, 106, 109 (1900) (stating that the Uniformity Clause does not require “intrinsic” uniformity, but only “geographic” uniformity, in upholding an inheritance tax with a progressive rate structure).

<sup>229</sup> *United States v. Ptasynski*, 426 U.S. 74, 82 (1983).

<sup>230</sup> *Id.*

<sup>231</sup> *See Crude Oil Windfall Profit Tax Act of 1980*, Pub. L. No. 96-223 § 4994, 94 Stat. 229, 244 (codified as amended in scattered sections of 26 U.S.C.) (exempting from the tax oil produced “from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least [seventy-five] miles from the nearest point on the Trans-Alaska Pipeline System”) (repealed 1988).

<sup>232</sup> *See Ptasynski*, 426 U.S. at 79.

<sup>233</sup> *See id.* at 80.

<sup>234</sup> *Id.* at 84.

<sup>235</sup> *See id.*

from defining a subject to tax in geographic terms.<sup>236</sup> Rather, the Court concluded that,

[T]he Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems . . . [b]ut where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination.<sup>237</sup>

In addition to the uniformity requirement, the Constitution also requires that “direct taxes” be apportioned among the states according to population.<sup>238</sup> In other words, a state with twice the population of another would have to pay twice the tax.<sup>239</sup> The unfairness of such a tax is manifestly evident and one scholar has argued it is a political impossibility.<sup>240</sup>

The distinction between direct and indirect taxes has a complicated history in American jurisprudence.<sup>241</sup> Although the U.S. Constitution does not define what a direct tax is, the general consensus prior to 1895 was that direct taxes “embraced only taxes on land . . . and poll or capitation taxes.”<sup>242</sup> The 1895 Supreme Court decision in *Pollock v. Farmers’ Loan & Trust Co.* threw a wrench in the federal tax structure by holding that the federal tax on income, “whether derived from rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property,” was unconstitutional because it did not apportion said taxes among the states.<sup>243</sup> The adoption of the Sixteenth Amendment, however, overruled the *Pollock* decision.<sup>244</sup> The Sixteenth Amendment provides that “Congress shall have power to lay and collect

<sup>236</sup> *See id.* at 84–85.

<sup>237</sup> *Id.*

<sup>238</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>239</sup> *See id.* The following hypothetical is useful to illustrate the meaning of this clause:

Suppose Congress enacted a tax on cars held for personal use, and suppose that Massachusetts and Connecticut had equal populations but Massachusetts had twice as many residents with cars as Connecticut. Under this scheme, Connecticut residents with cars would pay exactly twice as much as their counterparts in Massachusetts.

*See* Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 5–6 (1998) (outlining a similar hypothetical).

<sup>240</sup> *See* Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 296 (2004).

<sup>241</sup> *See generally id.* (arguing that the Constitution’s apportionment requirement is outmoded and absurd, and that courts should strive to find taxes to be free of the requirement).

<sup>242</sup> ROTUNDA & NOWAK, *supra* note 224, § 5.3 at 515. Capitation taxes—also known as poll taxes or per capita taxes—are “fixed taxes levied on each person within a jurisdiction.” BLACK’S LAW DICTIONARY 252, 1687 (10th ed. 2014).

<sup>243</sup> 158 U.S. 601, 618, 637 (1895).

<sup>244</sup> ROTUNDA & NOWAK, *supra* note 224, § 5.3 at 516.

taxes on incomes, from whatever source derived, without apportionment among the several States.”<sup>245</sup>

The Supreme Court has limited precedent on the distinction between direct and indirect taxes, but it had the opportunity to revisit the subject in its consideration of the constitutionality of the Patient Protection and Affordable Care Act (“ACA”) individual mandate.<sup>246</sup> In finding that the shared responsibility payment of the mandate was a constitutional exercise of Congress’s taxing power, the Court held for the first time that a tax on inaction was not necessarily a direct tax.<sup>247</sup> In so holding, the Court has potentially provided Congress with a tool to combat both widespread and localized problems presented by externalities.<sup>248</sup>

### *B. NFIB v. Sebelius: The Constitutionality of the ACA Individual Mandate*

The ACA—the signature piece of legislation of President Barack Obama’s first term<sup>249</sup>—is aimed at reducing the cost of health care by limiting the externalities thrust onto the public when those without health insurance receive care.<sup>250</sup> The Act intended to accomplish this by making it mandatory that all individuals sign up for at least a minimum level of health insurance.<sup>251</sup> Individuals who fail to comply with the individual mandate are forced to pay a penalty (a “shared responsibility payment”) to the federal government.<sup>252</sup> The amount of this payment is calculated based on the individual’s household income, “subject to a dollar-amount floor and a cap linked to the average cost of health insurance premiums.”<sup>253</sup> Thus, subject to the cap, the more one earns, the larger their penalty will be for failing to procure insurance.<sup>254</sup> Further, peo-

<sup>245</sup> U.S. CONST. amend. XVI.

<sup>246</sup> See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591–600 (2012); Matthew A. Melone, *The Pundits Doth Protest Too Much*: National Federation of Independent Business v. Sebelius and the Future of the Taxing Power, 2012 MICH. ST. L. REV. 1189, 1204.

<sup>247</sup> See *Sebelius*, 132 S. Ct. at 2599; David Kopel, *Online Symposium: The Bar Review Version of NFIB v. Sebelius*, SCOTUSBLOG (July 6, 2012, 5:31 PM), <http://www.scotusblog.com/2012/07/online-symposium-the-bar-review-version-of-nfib-v-sebelius/>, archived at <http://perma.cc/DM5X-V9HM>.

<sup>248</sup> See *supra* notes 166–221 and accompanying text.

<sup>249</sup> Jennifer Pinto, *Public Opinion of the Health Care Law*, CBS NEWS (June 28, 2012, 10:36 AM), <http://www.cbsnews.com/news/public-opinion-of-the-health-care-law/>, archived at <http://perma.cc/22VK-DA2C>.

<sup>250</sup> See DiMugno, *supra* note 157, at 1 (noting that the ACA aims to mitigate the problems of cost shifting in the health care system by requiring “all Americans to take personal responsibility for their health care by obtaining insurance”).

<sup>251</sup> 26 U.S.C. § 5000A (2012).

<sup>252</sup> *Id.* § 5000A(b).

<sup>253</sup> Janet E. Milne, *The U.S. Supreme Court Opens a Door: Expanded Opportunities for Environmental Taxes*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10406, 10406 (2013); see 26 U.S.C. § 5000A(c).

<sup>254</sup> See Melone, *supra* note 246, at 1194–95.

ple with an income below a certain level are exempted from the shared responsibility payment.<sup>255</sup>

On June 28, 2012, the Supreme Court issued its ruling on the constitutionality of the ACA individual mandate.<sup>256</sup> The Court refused to uphold the mandate as a valid use of Congress's commerce power.<sup>257</sup> The Court justified the mandate, however, as a legitimate use of Congress's taxing power.<sup>258</sup> The Court held that the taxing power does not allow Congress to command individuals to buy insurance.<sup>259</sup> It found, however, that the taxing power does allow Congress to impose a tax on those who choose not to buy insurance.<sup>260</sup>

Chief Justice Roberts, writing for the majority, found that the individual mandate's penalty was, for constitutional purposes, a tax by using a "functional approach."<sup>261</sup> The opinion pointed to several aspects of the "shared responsibility payment" that justified categorizing it as a tax.<sup>262</sup> First, the payment would be less than the actual cost of procuring insurance.<sup>263</sup> Second, the individual mandate contains no scienter requirement.<sup>264</sup> Lastly, the payment is collected solely by the IRS.<sup>265</sup> The Court had previously held that similar penalties were unconstitutional if they rose to the level of "punitive sanctions."<sup>266</sup>

<sup>255</sup> See 26 U.S.C. § 5000A(e).

<sup>256</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2566 (2012).

<sup>257</sup> *Id.* at 2591. The Court reasoned that an individual's decision to remain inactive in the health insurance market meant that the individual was not engaging in commerce and therefore regulation of that inactivity could not be justified under the commerce power. See *id.* at 2590–91 (rejecting the Government's argument that because health insurance is a "unique product," both choosing to buy health insurance and choosing to forego health insurance should be considered economic activity).

<sup>258</sup> *Id.* at 2600.

<sup>259</sup> See *id.* at 2596–97 (noting that penalties disguised as "taxes," because they cannot be justified by the commerce power, are unconstitutional); DiMugno, *supra* note 157, at 4 (noting that the taxing power "does not allow Congress to command people to purchase insurance").

<sup>260</sup> See *Sebelius*, 132 S. Ct. at 2600; DiMugno, *supra* note 157, at 4.

<sup>261</sup> *Sebelius*, 132 S. Ct. at 2595.

<sup>262</sup> See *id.* at 2595–96.

<sup>263</sup> See *id.* The majority noted that it might be a "reasonable financial decision to make the payment rather than purchase insurance." *Id.* at 2596. The Court distinguished this payment from the "tax" in *Bailey v. Drexel Furniture*, 259 U.S. 28, 38–39, 44 (1922), which was held to be an unconstitutional penalty because Congress was overstepping its regulatory authority by disguising a criminal penalty as a tax. *Id.*

<sup>264</sup> *Id.* Scienter is defined as "a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission . . ." BLACK'S LAW DICTIONARY 1463 (10th ed. 2014).

<sup>265</sup> *Sebelius*, 132 S. Ct. at 2596.

<sup>266</sup> See *id.* Chief Justice Roberts noted that the holding in *Drexel Furniture*—that a so-called "tax" was actually a penalty—supported the Court's finding in *National Federation of Independent Business v. Sebelius* that a so-called "penalty" was actually a tax. *Id.* Justice Taft had previously articulated the question thusly: "Does the law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?" *Drexel Furniture*, 259 U.S. at 36. This requirement serves to prevent Congress from using the taxing power to regulate in areas that are beyond the scope of its grant of power. See *id.* at 38.

Having determined that the shared responsibility payment is a tax, Chief Justice Roberts addressed whether it is a “direct tax.”<sup>267</sup> The Court has long held that “*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.”<sup>268</sup> Chief Justice Roberts concluded that because the shared responsibility payment was triggered by specific circumstances—not purchasing health insurance—it was not a capitation.<sup>269</sup> Further, as the shared responsibility payment is “not a tax on the ownership of land or personal property,” it could be neither of the types of taxes known to be direct taxes.<sup>270</sup>

One question that the *National Federation of Independent Business v. Sebelius* decision did not answer is whether the individual mandate is not a direct tax subject to apportionment because it is an income tax or an excise tax.<sup>271</sup> According to Chief Justice Roberts, “no one would doubt that this law imposed a tax, and was within Congress’s power to tax.”<sup>272</sup> One scholar has argued that a hypothetical in the opinion suggests that the Court views the mandate as an income tax.<sup>273</sup> In the hypothetical, Congress enacts a statute that requires all homeowners to pay fifty dollars to the Internal Revenue Service (IRS) if their home does not have energy efficient windows.<sup>274</sup> The actual amount due is “adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer’s income tax return.”<sup>275</sup> The implication of this statement is that adjusting a tax for income makes it an income tax that is not subject to the apportionment requirement.<sup>276</sup> On the other hand, there is evidence within the opinion that the Court regarded the tax as an excise because the trigger that attaches the penalty is the failure to obtain insurance.<sup>277</sup>

<sup>267</sup> *Sebelius*, 132 S. Ct. at 2598–600.

<sup>268</sup> *Id.* (quoting *Springer v. United States*, 102 U.S. 586, 602 (1881)). The exact definition of a direct tax, however, has been unclear since the time of drafting. *See id.* at 2598 (noting that at the time of drafting, it was “unclear what else, other than a capitation . . . might be a direct tax”).

<sup>269</sup> *Id.* at 2599. Justice Roberts stressed that “[c]apitations are taxes paid by every person, ‘with-out regard to property, profession, or any other circumstance.’” *Id.* (quoting *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796)).

<sup>270</sup> *Id.*

<sup>271</sup> *See* Melone, *supra* note 246, at 1240–41.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Sebelius*, 132 S. Ct. at 2597–98.

<sup>275</sup> *Id.* at 2598.

<sup>276</sup> Melone, *supra* note 246, at 1234. It is important to note, however, that the Chief Justice offered this hypothetical as a means of explaining why the individual mandate could be upheld as a tax regardless of the fact that Congress did not “frame” it as such. *See Sebelius*, 132 S. Ct. at 2597; Melone, *supra* note 246, at 1234. In the hypothetical, Chief Justice Roberts merely concluded that the \$50 payment would be a form of tax, not that it was in fact a type of income tax by virtue of being income-adjusted. *Sebelius*, 132 S. Ct. at 2598; Melone, *supra* note 246, at 1241–42.

<sup>277</sup> *See* Melone, *supra* note 246, at 1241.

The implications of *Sebelius* are not fully understood at this time.<sup>278</sup> The federal government's newly defined taxation powers after *Sebelius*, however, may allow it to reach problems that "lie beyond the scope of federal regulatory authority."<sup>279</sup> Such an application is central to the proposed NWIP.<sup>280</sup>

### *C. Potential Legal Challenges to the NWIP and Why They Are Unlikely to Succeed*

The Supreme Court's ruling on the ACA individual mandate increases the likelihood that the proposed NWIP could withstand judicial scrutiny.<sup>281</sup> If, however, the litigation surrounding the ACA is any indication, interest groups that oppose the expansion of the federal government's regulatory power will contest the plan.<sup>282</sup> The NWIP presents some novel constitutional questions and a legal challenge could force the Supreme Court to further elucidate the reasoning behind its holding that the ACA shared responsibility payment is not subject to apportionment.<sup>283</sup>

#### 1. NWIP: An Unconstitutional Tax on Property?

Opponents of the proposed NWIP "homeowner mandate" and subsequent "shared responsibility payment" for those who choose to forego wildfire insurance will likely challenge it as a constitutionally impermissible tax on property.<sup>284</sup> Federal taxes on property are considered to be direct taxes that require apportionment among the states.<sup>285</sup> Were the tax associated with the failure to procure fire insurance deemed a direct tax, each state would have to pay the tax in proportion to its population.<sup>286</sup> Such a requirement would be fundamentally at odds with the purpose of a national fire insurance program and unfair to certain residents of the WUI.<sup>287</sup> The apportionment requirement and the program would be irreconcilable.<sup>288</sup>

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<sup>278</sup> See Milne, *supra* note 253, at 10406.

<sup>279</sup> *Id.*

<sup>280</sup> See *supra* notes 188–197 and accompanying text.

<sup>281</sup> See *supra* notes 249–280 and accompanying text.

<sup>282</sup> See BLACKMAN, *supra* note 152, at 64–65, 79–88 (discussing the numerous legal challenges to the ACA filed immediately after its passage); Melone, *supra* note 246, at 1223 (noting that it is "highly unlikely that a future tax increase disguised as a penalty will pass without a political brouhaha").

<sup>283</sup> Cf. Melone, *supra* note 246, at 1234, 1241–42 (cautioning against relying on Chief Justice Roberts's hypothetical involving a tax on those who do not install energy efficient windows).

<sup>284</sup> Cf. *id.* at 1234 (arguing that taxing inaction connected to property "appears remarkably similar to a tax on real property, a direct tax").

<sup>285</sup> See *supra* notes 238–247 and accompanying text.

<sup>286</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2598 (2012).

<sup>287</sup> See *supra* notes 238–240 and accompanying text.

<sup>288</sup> See *supra* notes 238–240 and accompanying text. The main objective of the proposed NWIP is to require residents of fire-prone lands to pay their fair share of wildfire suppression costs. See *supra*



The ACA individual mandate is considered an indirect tax because it is triggered by certain circumstances.<sup>289</sup> It applies, however, to all people across the country who choose not to buy health insurance.<sup>290</sup> The proposed NWIP homeowner mandate, on the other hand, would only apply to those who owned a home in the WUI risk area.<sup>291</sup> Because of this difference, those challenging the law would likely argue that it is an unconstitutional federal property tax.<sup>292</sup> As opposed to the ACA individual mandate, the proposed tax has property ownership as an antecedent requirement.<sup>293</sup> Thus, challengers may have a compelling argument that this is a constitutionally significant distinction between the two programs' mandates.<sup>294</sup>

Based on a literal reading of the *Sebelius* decision, however, the proposed tax should not be interpreted as a direct tax by virtue of it being a federal tax on property.<sup>295</sup> Under the proposed plan, the tax should be considered an exaction because it attaches as a result of owning a home in a wildfire risk zone without purchasing wildfire insurance.<sup>296</sup> Following the logic of *Sebelius*, the shared responsibility payment is a tax on certain inaction, namely not procuring minimum levels of health coverage.<sup>297</sup> Similarly, the proposed mandate would be a tax on failure to procure fire insurance.<sup>298</sup> Finally, the mere fact that property ownership is an antecedent requirement for the tax to attach does not make it an unconstitutional tax on property.<sup>299</sup> Unapportioned federal income taxes on the sale of property, where property ownership is an antecedent requirement, are constitutional.<sup>300</sup>

If the Supreme Court were to clarify that it considers the ACA individual mandate to be an income tax, the NWIP would be partially insulated from con-

notes 166–197 and accompanying text. The apportionment requirement, however, would allocate the shared responsibility payment based on state population, not risk level assumed. *See supra* notes 238–240 and accompanying text.

<sup>289</sup> *See supra* notes 269–270 and accompanying text.

<sup>290</sup> *See* 26 U.S.C. § 5000A (2012). The mandate is national in scope, but it does provide exemptions for certain individuals. *See id.* § 5000A(e).

<sup>291</sup> *See supra* notes 192–197 and accompanying text.

<sup>292</sup> *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) (finding the ACA mandate constitutional as “plainly not a tax on the ownership of land or personal property”).

<sup>293</sup> *See supra* notes 188–197 and accompanying text.

<sup>294</sup> *Cf. Sebelius*, 132 S. Ct. at 2599 (noting that the ACA individual mandate was not subject to apportionment because it was not a property tax).

<sup>295</sup> *See id.* (noting that the individual mandate is not a direct tax because “it is triggered by specific circumstances”).

<sup>296</sup> *See supra* notes 188–197 and accompanying text.

<sup>297</sup> *See* 132 S. Ct. at 2599.

<sup>298</sup> *See supra* notes 188–197 and accompanying text.

<sup>299</sup> *See* U.S. CONST. amend. XVI; Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Unconstitutional?*, 97 COLUM. L. REV. 2334, 2344 (1997) (noting that the Sixteenth Amendment exempted all income taxes—even direct taxes—from the apportionment requirement).

<sup>300</sup> *See* Jensen, *supra* note 299, at 2342–44.

stitutional challenge by having the penalty amount linked to income rather than home values.<sup>301</sup> On the other hand, if the Court viewed the individual mandate as an indirect tax, the proposed homeowner mandate would likely be upheld because WUI residents could choose to avoid the mandate's tax simply by procuring wildfire insurance through the NWIP.<sup>302</sup> Erik Jensen, a proponent of a broad view of direct taxation, concedes that "an indirect tax is one which the ultimate consumer can generally decide whether to pay."<sup>303</sup>

## 2. NWIP: A Violation of the Uniformity Clause?

Opponents of the NWIP might also challenge the law on the grounds that the Uniformity Clause of the U.S. Constitution prohibits a location-specific tax. The NWIP's shared responsibility payment would disproportionately affect citizens of western states and one could argue in earnest that such a tax does violence to the intention of the Uniformity Clause—preventing a larger group of states from ganging up on a smaller group through geography-specific taxes.<sup>304</sup> The Supreme Court's Uniformity Clause jurisprudence, however, suggests that once a tax is defined as indirect, "Congress generally has no difficulty in meeting the uniformity requirement."<sup>305</sup>

In *United States v. Ptasynski*, the Supreme Court upheld legislation that exempted certain oil produced in Alaska from the tax.<sup>306</sup> Opponents of the NWIP might try to distinguish the holding in *Ptasynski* because the Court held that a geography-based exemption from a tax was deemed constitutional,<sup>307</sup> whereas the NWIP's *entire tax* would be inherently geography-based.<sup>308</sup> Nevertheless, this argument is weak in light of the fact that "there is no lack of uniformity . . . simply because the subject of the tax is not found in some states."<sup>309</sup> Tax law expert Lawrence Zelenak has argued that courts are unlikely

<sup>301</sup> See Melone, *supra* note 246, at 1234 (arguing that the *Sebelius* Court seemed to approve the \$50 tax on homeowners without energy efficient windows "because such a tax is adjusted based on income and filing status").

<sup>302</sup> See Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L. J. ONLINE 27, 31–32 (2009) (noting that the ability to shift tax liability through certain actions defines indirect taxes).

<sup>303</sup> See Jensen, *supra* note 299, at 2395.

<sup>304</sup> See STORY, *supra* note 227, at 428 (noting that the clause was intended to prevent certain states from thrusting "oppressive inequalities" on others through federal legislation); Anderson & Anderson, *supra* note 168, at 110 (noting that majority of the projected expansion into the WUI is expected to be in the intermountain west).

<sup>305</sup> ROTUNDA & NOWAK, *supra* note 224, § 5.4 at 518.

<sup>306</sup> 426 U.S. 74, 85–86 (1983).

<sup>307</sup> See *id.* at 77, 85–86.

<sup>308</sup> See *supra* notes 188–197 and accompanying text.

<sup>309</sup> Kinsler, *supra* note 226, at 130.

to strike down geographically defined taxes when Congress has attempted to address “geographically isolated problems.”<sup>310</sup>

Opponents are unlikely to succeed in arguing that the NWIP contains actual geographic discrimination.<sup>311</sup> The NWIP tax should not be seen as discrimination against western states; rather it should be seen as a policy aimed at reducing the preferential treatment the western states have received through the implicit subsidy provided by federal wildfire suppression.<sup>312</sup> As the Court has stated, “[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve isolated problems.”<sup>313</sup>

### 3. NWIP: An Illegal Federal Regulation of Private Property?

Opponents of the NWIP could also challenge the portion of the proposal that would provide incentives to influence property management as an unconstitutional federal regulation of private property.<sup>314</sup> Federal regulation of state property development is not constitutional.<sup>315</sup> For this reason, the zoning regulations that are part of the NFIP must be enacted at the local level in order to receive federal subsidies under the program.<sup>316</sup> Thus, the NFIP is an example of cooperative federalism whereby the states actually enact the federally approved zoning and property regulations in exchange for federal funds.<sup>317</sup> Opponents of the NWIP might argue that any premium discounts that provide incentives to manage one’s land to prevent fire—e.g., installing metal roofs—are an unconstitutional regulation of property.<sup>318</sup>

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<sup>310</sup> Lawrence Zelenak, *Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?*, 44 TAX L. REV. 563, 590–92 (1989) (quoting *Ptasynski*, 426 U.S. at 84). If Congress couches taxes in non-geographic terms there is little risk of judicial review holding the tax to be a violation of the Uniformity Clause. See *Ptasynski*, 426 U.S. at 84. Zelenak contends that the Court’s dicta in *Ptasynski*—“[h]ad Congress described this class of oil in non-geographic terms, there would be no question as to the Act’s constitutionality”—is likely to be applied in future Uniformity Clause challenges. Zelenak, *supra* note 310, at 590–92 (quoting *Ptasynski*, 426 U.S. at 86).

<sup>311</sup> See *Ptasynski*, 426 U.S. at 85.

<sup>312</sup> See *supra* notes 99–151 and accompanying text.

<sup>313</sup> See *Ptasynski*, 426 U.S. at 83–84 (quoting *Blanchette v. Connecticut Gen. Ins. Corps. (The Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 161 (1974)).

<sup>314</sup> See, e.g., *Texas Landowners Rights Ass’n v. Harris*, 453 F. Supp. 1025, 1028 (D. D.C. 1978) *aff’d*, 598 F.2d 311 (D.C. Cir. 1979) (holding on a challenge to the constitutionality of the NFIP on the grounds that it violated principles of federalism).

<sup>315</sup> See Edward T. Pasternick, *The National Flood Insurance Program*, in *PAYING THE PRICE: THE STATUS AND ROLE OF INSURANCE AGAINST NATURAL DISASTERS IN THE UNITED STATES* 125, 131 (Howard Kunreuther & Richard J. Roth, Sr. eds. 1998).

<sup>316</sup> This has been held to be a constitutionally permissible exercise of the federal spending power. See *Texas Landowners*, 453 F. Supp. at 1031 (holding that the NFIP is a constitutional use of Congress’s spending power because receipt of conditional spending was not mandatory).

<sup>317</sup> *Id.*

<sup>318</sup> See *id.*

Such a challenge is likely to fail because the insurance rate reductions granted for property management are completely voluntary.<sup>319</sup> The federal government uses a multitude of tax incentives to influence individual behavior.<sup>320</sup> Further, the majority in *Sebelius* appears to have sanctioned a federal tax on those who fail to make certain energy efficient modifications to their homes.<sup>321</sup> Of course, were such incentives so great that they constituted coercion, they might be stuck down.<sup>322</sup>

## CONCLUSION

The frequency and intensity of wildfires continue to increase in the United States. This, coupled with the rapid development of the Wildland-Urban Interface, or the WUI, is causing the cost of wildfire management to increase at alarming rates. Although these costs are borne by the general public, they only benefit the small segment of society that resides on the fringes of U.S. wildlands, in the WUI. This implicit subsidy has contributed to making the WUI the fastest growing category of real estate in America.

In order to avoid a situation analogous to that caused by the National Flood Insurance Program, or the NFIP, Congress must force residents of the WUI to shoulder their fair share of the costs of wildfire management. President Barack Obama's recent proposal to mitigate wildfire suppression costs does not answer this problem; in fact it makes the current wildfire problem look more and more like the failures of the NFIP, in that more federal dollars are being pumped into a faulty regime. Although the President's plan claims to free up as much as \$400 million in forest service funding—to be devoted to preventative measures—it does nothing to discourage development in the WUI or to shift costs to those who inhabit fire-prone lands. In fact, it continues to offer WUI resident the relative security of the current federal wildfire suppression regime. Providing additional federal funds to combat “disaster” scale fires increases the incentive to build there, just as the NFIP has encouraged building and rebuilding in flood-prone areas.

President Obama's plan does signal a renewed effort to focus more on prevention than suppression. The most effective way to reduce the cost of wildfires incurred by the general public, however, is to shift the costs of suppression to homeowners of the WUI. This Note proposes that Congress enact a National Wildfire Insurance Plan, or the NWIP, that employs a homeowner mandate modeled after the Patient Protection and Affordable Care Act individ-

<sup>319</sup> See *supra* notes 208–214 and accompanying text.

<sup>320</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2596 (2012); Melone, *supra* note 246, at 1203.

<sup>321</sup> See *Sebelius*, 132 S. Ct. at 2597–98.

<sup>322</sup> See *id.* at 2603–04. Whether the Supreme Court's conditional spending jurisprudence applies similarly in the context of tax incentives for individuals, however, is beyond the scope of this Note.

ual mandate. The plan would encourage individuals to participate because failure to do so would result in a required payment of a shared responsibility tax. Such a plan, at the very least, would alleviate the problems of unfairness associated with a wildfire management regime that is spending more and more tax dollars on a small segment of the population. Ideally, the proposed NWIP would also reduce the pace of development in the WUI by eliminating the implicit subsidy provided by federal wildfire suppression efforts. In turn, the plan would slow the loss of our Nation's wildlands and the degradation of the ecosystems therein.