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A Recipe for Breach: Kansas v. Nebraska's Unclear Equity Standards will Breed Interstate Water Litigation

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A RECIPE FOR BREACH: *KANSAS V. NEBRASKA*'S UNCLEAR EQUITY STANDARDS WILL BREED INTERSTATE WATER LITIGATION

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I. INTRODUCTION

Interstate compacts govern more than ninety-five percent of the available freshwater in the United States.[1] The Supreme Court has original jurisdiction over sister-state suits regarding the enforcement and interpretation of these agreements.[2] In the past, the Court has used principles of both contract law[3] and statutory interpretation[4] to resolve compact disputes. In *Kansas v. Nebraska*, the Supreme Court ordered the State of Nebraska to pay partial disgorgement damages for breaching its compact with the State of Kansas in one such dispute, but declined to grant an injunction against future violations.[5] The Court also held that the states had to revise an ancillary technical agreement specifying how water usage is calculated under the compact to ensure accuracy.[6] While each of these holdings is supported by precedent and public policy, the way the Court reached its decision on the technical agreement and denial of the injunction is problematic. In reforming the technical agreement, the Court articulated a rule that could apply to future cases and clarified previously confusing precedents. To set damages and deny the injunction, however, the Court

1. Noah D. Hall, *Interstate Water Allocation Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. 237, 239-40 (2010). *See generally* Joseph W. Giradot, Note, *Toward a Rational Scheme of Interstate Water Compact Adjudication*, 23 U. MICH. J.L. REFORM 151, 151 & n.5 (1989). Rarely, Congress or the Court has allocated water use for the states by statute or equitable apportionment, respectively. *Id.*

2. *See* L. Elizabeth Sarine, Note, *The Supreme Court's Problematic Deference to Special Masters in Interstate Water Disputes*, 39 ECOLOGY L.Q. 535, 545 (2012).

3. *See, e.g.*, Texas v. New Mexico (*Texas III*), 482 U.S. 124, 131 (1987).

4. *See, e.g.*, Alabama v. North Carolina, 560 U.S. 330, 351-52 (2010).

5. 135 S. Ct. 1042, 1057, 1059 (2015).

6. *Id.* at 1062 n.10.

relied on broad equitable powers and a misapplication of contract law, rather than establishing a consistent water-compact jurisprudence. The decision provides little guidance for states in future compact disputes which makes it harder for them to efficiently negotiate solutions, which in turn makes it more likely that they will occupy the Court with costly litigation.

II. DESCRIPTION OF THE CASE AND OPINIONS

The Republican River and its tributaries drain a 24,900-square-mile basin ("the Basin") across Colorado, Kansas, and Nebraska.[7] In 1943, those states, with Congress's approval, negotiated and adopted the Republican River Compact ("the Compact"),[8] which allocates the "virgin water supply" of the Basin as it would be if "undepleted by the activities of man" and specifies how much water each state can take from the river system.[9] The Compact worked well until the 1980s when the states clashed over whether water extracted from the Basin by Nebraska's numerous groundwater wells, which decreased river flow downstream to Kansas, counted toward Nebraska's allotment.[10] In 2000 the Court ruled that this groundwater extraction did count toward Nebraska's allotment, and a series of negotiations produced the 2002 "Final Settlement Stipulation" ("the Settlement"), which involved adopting a computer model for calculating each state's water use ("the Accounting Procedure").[11] The Settlement also clarified that in-Basin use of water imported from outside the Basin would not count toward a state's consumption.[12]

New problems emerged when Nebraska "substantially exceeded" its water allocation in 2005 and 2006.[13] Arbitration failed to resolve the dispute,[14] and Kansas petitioned the Court to enjoin further violations and award it "the greater of Nebraska's gain or Kansas's loss" in damages.[15] Nebraska counterclaimed that the Accounting Procedure erroneously included some imported water during dry years.[16] The dispute gave rise to the case of *Kansas v. Nebraska* and the Court referred the matter to a Special Master ("the Master").[17]

The Master found that Nebraska had taken inadequate steps to limit its water use and thereby "knowingly exposed Kansas to a substantial risk" of

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7. The river begins in Colorado, passes through northwestern Kansas into Nebraska, flows through southern Nebraska, and finally cuts back into northern Kansas. *Id.* at 1049.

8. *Id.* Congressional approval of water compacts is widely seen as necessary under Article I, Section 10 of the U.S. Constitution. *See* Giradot, *supra* note 1, at 151 n.5.

9. Act of May 26, 1943 (Republican River Compact), ch. 104, 57 Stat. 86 arts. II, III.

10. *See Kansas*, 135 S. Ct. at 1050; Aaron M. Popelka, *The Republican River Dispute: An Analysis of the Parties' Compact Interpretation and Final Settlement Stipulation*, 93 NEB. L. REV. 596, 601-02 (2004).

11. *See Kansas*, 135 S. Ct. at 1050.

12. *Id.*

13. *See id.*

14. *Id.* at 1050-51.

15. Report of the Special Master at 9, Kansas v. Nebraska, 135 S. Ct. 1042 (2015) (No. 126, Orig.) Kansas also sued Colorado, which played a "minor part" in the case, but the primary dispute was between Kansas and Nebraska. Kansas, 135 S. Ct. at 1051 n.3.

16. *See Kansas*, 135 S. Ct. at 1050-51.

17. *Id.* at 1051.

breach.[18] He estimated that Kansas's economic loss was $3,700,000,[19] but he added that because of local farming conditions Nebraska's gain was likely larger than that by "more than several multiples."[20] He did not, however, recommend granting Kansas all of the remedies it sought. Although he concluded that disgorgement was appropriate to promote future compliance and offset noneconomic harms,[21] the Master recommended only $1,800,000 of disgorgement and no injunction because Nebraska had improved its behavior and was on track for future compliance.[22] The Master also found that the Accounting Procedure had unfairly included some imported water in Nebraska's allocation, contrary to the Compact's intent.[23] Thus, he recommended that the Court adopt Nebraska's proposed changes to the algorithm to fix the oversight.[24] Both states filed exceptions to the report. Nebraska objected to the finding of "knowing" breach and to the disgorgement award, citing Section 39 ("Section 39") of the Restatement (Third) of Restitution and Unjust Enrichment ("the Restatement"), which allows disgorgement only for a "deliberate"—but not a "knowing"—breach.[25] Kansas wanted a larger disgorgement and opposed reforming the Accounting Procedure.[26]

The Court adopted the Master's recommendations and overruled all exceptions.[27] Writing for the Court, Justice Kagan[28] first noted that the Court's authority in cases between states is "basically equitable in nature."[29] She next asserted that the Court was empowered to use flexible equitable remedies to ensure compliance with water compacts for two reasons.[30] First, because states make compacts as a substitute for enforceable equitable apportionment by the Court, they presumably do so with the assumption that the Court is empowered to hold the parties to their agreement.[31] Second, because compacts are federal laws approved by Congress they trigger the Court's "full authority to . . . promote compliance with . . . public law."[32]

Accepting the Master's factual findings,[33] the Court held the breach warranted disgorgement. Reasoning that some areas of law treat knowingly reckless

18. *See* Report of the Special Master, *supra* note 15, at 111-12.
19. *Id.* at 170-71.
20. *Id.* at 178.
21. *See id.* at 132.
22. *See id.* at 112-16, 179, 183.
23. *Id.* at 15.
24. *See id.* at 23-25, 32-37, 43-57.
25. Kansas v. Nebraska, 135 S. Ct. 1042, 1056 (2015) (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011)).
26. *Id.* at 1051.
27. *Id.*
28. Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined the majority opinion. *Id.* at 1047.
29. *Kansas*, 135 S. Ct. at 1051 (2015) (citing Ohio v. Kentucky, 410 U.S. 641, 648 (1973)).
30. *Id.* at 1052.
31. *Id.* (citing Texas v. New Mexico (*Texas II*), 462 U.S. 554, 567 (1983)).
32. *Id.* at 1053 (citing Cuyler v. Adams, 449 U.S. 433, 438 (1981)).
33. *See, e.g., id.* at 1053-55.

conduct as deliberate[34] and that the Restatement only meant to preclude disgorgement in cases of "inadvertence, negligence, or unsuccessful attempts at performance,"[35] the Court held that Nebraska's conduct satisfied Section 39.[36] Disgorgement would also provide a disincentive against future breaches, the Court concluded, given that the "higher value of water on Nebraska's farmland than on Kansas's . . . is nearly a recipe for breach."[37] Noting that the aforementioned flexible equity principles allow awarding partial disgorgement, the Court agreed that Nebraska's credible commitment to future compliance justified the Master's small award.[38] Justice Kagan denied the injunction on similar grounds, citing the lack of a requisite "cognizable danger of recurrent violation" and noting that the threat of future disgorgement awards "will adequately guard" against a relapse.[39]

The Court also accepted the Master's suggestion to reform the Accounting Procedure to comport with the states' intention when they signed the Compact and Settlement, relying on two precedents where the Court had modified "subsidiary technical agreements" to water compacts.[40] The unfairness of the oversight primarily bothered Justice Kagan, who remarked that the large mistake cost Nebraska more than one million dollars and argued that an undetected error in Kansas's favor could not have been a *quid* traded for some dickered *quo* in Nebraska's favor.[41] She also worried that the unreformed Accounting Procedure violated the Compact—and thus federal law—by effectively reducing the amount of the virgin water supply that Nebraska could use.[42]

Justice Thomas's partial concurrence criticized the majority for deviating from established principles of equity to administer "abstract justice."[43] He argued that, to preserve state sovereignty, courts should interpret state compacts more narrowly than private contracts and should use equitable remedies "only rarely" in interstate disputes.[44] Therefore, he believed that the majority's precedents equating recklessness with deliberateness in certain distinguishable contexts did not justify a nonliteral reading of Section 39 against Nebraska.[45] He also criticized the $1,800,000 figure as a misapplication of disgorgement, characterizing it as an arbitrary number that "just feels like not too much, but not

34. *Id.* at 1056 (citing Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1759 (2013) (holding that the bankruptcy code's exclusion for defalcation includes a requirement of intentionality and that intentionality is satisfied by gross recklessness)).

35. *Id.* at 1057 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. f (AM. LAW INST. 2011)).

36. *See id.* at 1056-57 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. f (AM. LAW INST. 2011)).

37. *Id.* at 1057.

38. *See id.* at 1058-59.

39. *Id.* at 1059.

40. *See id.* at 1061-62 (citing Texas v. New Mexico (*Texas I*), 446 U.S. 540 (1980) and Kansas v. Colorado (*Kansas II*), 543 U.S. 86 (2004)).

41. *Id.* at 1060-61.

42. *See id.* at 1062-63.

43. *Id.* at 1065 (Thomas, J., concurring in part and dissenting in part).

44. *Id.* at 1065, 1067 (citing Alabama v. North Carolina, 560 U.S. 330, 351-53 (2010)).

45. *See id.* at 1068-69.

too little."[46] Finally, Justice Thomas opposed changing the Accounting Procedure because contract law only permits reformation in cases where the document does not accurately reflect what the parties actually agreed to—not to a case where the parties agreed to something but were surprised by its consequences.[47] The extent to which the error diminished Nebraska's allocation should be chalked up to the inherently approximate nature of mathematical modeling and so did not undermine the Compact.[48]

Chief Justice Roberts joined the majority on the partial disgorgement award and the denial of the injunction, but he agreed with Justice Thomas that the Court could not reform the Accounting Procedure.[49]

Justice Scalia joined Justice Thomas's partial concurrence but also wrote a brief opinion to criticize the Court's use of restatements.[50] Because restatement authors have "abandoned" their original mission of presenting "an orderly statement of the general common law" in favor of stating "what the law ought to be," he said that their works should be viewed with suspicion and are no more authoritative than any other secondary source.[51]

III. CRITIQUE

Each of the three remedy holdings in *Kansas*—technical reformation, partial disgorgement, and denial of the injunction—can be supported by the Court's precedent and may be sound public policy. Justice Thomas correctly stated that the majority deviated from established contract law, but that departure is not necessarily a bad thing. The Supreme Court should be empowered to advance the common law of original jurisdiction cases by fashioning new legal doctrines.[52] This is especially true in the area of water compact disputes, which are a relatively new kind of case.[53] Rather, the real problem arises when the Court neither adheres to an existing principle nor fashions a new one. Opinions rooted only in vague equitable powers are analytically suspect in terms of their legitimacy[54] and are of little help in resolving future disputes in terms of their utility.

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46. *See id.* at 1070-71.

47. *See id.* at 1071-72.

48. *See id.* at 1074.

49. *Id.* at 1064 (Roberts, C.J., concurring in part and dissenting in part).

50. *Id.* at 1064 (Scalia, J., concurring in part and dissenting in part).

51. *Id.*

52. *Cf.* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (declaring that to merit a preliminary injunction harm must be "likely" and not merely "possible"); Savage v. Boies, 272 P.2d 349, 350-51 (Ariz. 1954) (allowing intentional infliction of emotional distress claims without physical injury in Arizona); Gassner v. Lockett, 101 So. 2d 33, 33-34 (Fla. 1958) (granting disgorgement remedy for breach of a real estate contract for first time in Florida); Attorney Gen. v. Blake, [2000] UKHL 45, [2001] 1 AC 268 (appeal taken from Eng.) (allowing disgorgement damages for breach of contract for the first time in England).

53. The Court's first water compact case was Texas v. New Mexico (*Texas I*), 446 U.S. 540 (1980). *See* Sarine, *supra* note 2, at 544.

54. Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609-10 (1997) ("A decision that rests solely on 'equity' is an analytically naked, and analytically suspect, decision.").

A. TECHNICAL REFORMATION

On the question of technical reformation, Justice Kagan applied a new principle of equity, plausibly supported by Court precedent, that provides transparent guidance to future water compact disputants. This is an improvement to the Court's inconsistent jurisprudence about the extent to which compacts should be read literally. In contrast, the Court's refusal to recognize water compacts as unique legal instruments forced it to shoehorn flexible remedies into the rigid mold of established contract law. This produced a confusing and inconsistent ruling that makes it hard to predict what the Court will do in similar future cases. As populations grow and changing weather patterns interfere with water resources, conflicts like the one in *Kansas* will only become more common. The Court should facilitate negotiated settlements by giving clear, predictable guidance to states about what will happen should they litigate.[55]

To change the Accounting Procedure, the Court for the first time articulated a rule that its "authority to devise 'fair and equitable solutions' to interstate water disputes encompasses modifying a technical agreement to correct material errors in the way it operates and thus align it with the compacting States' intended apportionment."[56] This doctrine diverges from general contract law, but the Court's precedent supports it, and it may be a good rule for water compact cases. Most significantly, though, the doctrine is an important step toward resolving conflicting Court precedent about how narrowly or broadly to interpret compacts.

At common law, as Justice Thomas noted, the general rule is that once a deal is made "equity cannot make a new contract for the parties," even if the outcome may differ from what the parties expected.[57] In entering a contract the parties allocate the risk of such surprise; that the parties had mistaken expectations about how that risk would work out does not change the deal that they made.[58] Two Supreme Court precedents cited by Justice Kagan in *Kansas*, however, suggest that this rule might not apply to water compact cases. In *Texas I*,[59] Texas and New Mexico had allocated a river's waters according to the "1947 condition," expressly defined to mean the condition as described in a contemporary engineering report.[60] When the states later discovered that the report

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55. *See generally* Hall, *supra* note 1.

56. Kansas v. Nebraska, 135 S. Ct. 1042, 1062 (2015) (internal citations omitted).

57. Edwin H. Abbot, Jr., *Mistake of Fact as a Ground for Affirmative Equitable Relief*, HARV. L. REV. 608, 610 (1910); *accord* Kennedy, *supra* note 54, at 645-46; *see also, e.g.*, Lenawee Cnty. Bd. of Health v. Messerly, 331 N.W.2d 203, 208, 211 (Mich. 1982) (enforcing "as is" clause in land sale even though defects unknown to either party made the property essentially worthless); Wood v. Boynton, 25 N.W. 42, 42-43, 45 (Wis. 1885) (upholding a sale of a gemstone that turned out to be much more valuable than parties expected). *But see* Sherwood v. Walker, 33 N.W. 919, 923-24 (Mich. 1887) (demonstrating that courts sometimes allow such a surprise to void a contract under the doctrine of mutual mistake).

58. *See* Kennedy, *supra* note 54, at 640-41; *cf. Kansas*, 135 S. Ct. at 1074 (Thomas, J., dissenting) (arguing that the parties understood their agreement to include some imprecision in measurement).

59. Texas v. New Mexico (*Texas I*), 446 U.S. 540 (1980).

60. Texas v. New Mexico (*Texas II*), 462 U.S. 554, 559 (1983) (describing the history of the dispute and the *Texas I* holding).

was erroneous, however, the Court held that the provision should be reinterpreted to refer to the *actual* conditions in 1947.[61] Similarly, in *Kansas II*[62] the Court replaced a compact's one-year formula for calculating water consumption with a more accurate ten-year one, holding that even if the change ran contrary to the signatories' intended methodology, reformation would serve their broader purpose: accuracy.[63] Although Justice Thomas distinguished those cases from *Kansas*,[64] Justice Kagan's rule is at least a plausible extension of them.

Kansas is an important step toward clarifying the Court's inconsistent precedents about how courts should read compacts. Although *Texas I* and *Kansas II* indicate that courts should interpret compacts more flexibly than private contracts, another line of cases suggests just the opposite. For example, the Court held just a few years ago in *Alabama v. North Carolina*[65] that courts should read compacts narrowly to preserve state sovereignty and, therefore, should not read into them a duty to perform in good faith usually implied in private contracts.[66] The Court has also previously said that its equitable powers in interstate disputes do not extend to overriding explicit agreements holding, in *New Jersey v. New York*[67] and other cases, that it lacked authority to rewrite a boundary agreement between two states "no matter what the equities of the circumstances might otherwise invite."[68]

These two lines of cases show that there are good arguments for both broad and narrow readings of compacts. The important thing is that the Court should take a consistent approach, either by choosing one standard or making clear when it will read compacts literally and when it will reform them. In the past, however, the Court has alternated confusingly between the two. A series of cases between Texas and New Mexico illustrates this vacillation. As discussed above, the Court in *Texas I* reinterpreted the meaning of the phrase "1947 condition," despite explicit language to the contrary. In *Texas II*, however, the Court took a much narrower approach and refused to appoint a third-party tiebreaker to a deadlocked river commission because it could not give relief inconsistent with a compact's "express terms."[69] Yet in the dispute's final chapter, *Texas III*, the Court appointed a river master to manage ongoing disputes, asserting without explanation that such an order was consistent with the same compact even though it contained no provision allowing a river master.[70] Thus if the reformation doctrine expressed in *Kansas* is consistently followed, it will provide at least some clarity about how compacts will be read.

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61. *Id.* at 559-63, 573-74.

62. Kansas v. Colorado (*Kansas II*), 543 U.S. 86 (2004).

63. *Id.* at 99, 101-03; *see also* Oklahoma v. New Mexico, 501 U.S. 221, 244-46 (1991) (Rehnquist, C.J., dissenting) (describing the majority's reinterpreting of an explicit compact term to avoid what they perceived as an absurd result).

64. *See* Kansas v. Nebraska, 135 S. Ct. 1042, 1073 (2015) (Thomas, J., dissenting).

65. Alabama v. North Carolina, 560 U.S. 330, 351-52 (2010).

66. *Id.* at 352.

67. New Jersey v. New York, 523 U.S. 767 (1998).

68. *Id.* at 811; *see also, e.g.*, Arizona v. California, 373 U.S. 546, 565 (1963), *overruled on other grounds by* California v. United States, 438 U.S. 645, 674 (1978) ("[C]ourts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress."); Washington v. Oregon, 211 U.S. 127, 135 (1908).

69. Texas v. New Mexico (*Texas II*), 462 U.S. 554, 564 (1983).

70. *See* Texas v. New Mexico (*Texas III*), 482 U.S. 124, 134-35 (1987).

In addition to being reasonably supported by precedent, technical reformation is also a sensible rule. The long-term nature of water compacts[71] and the inherent limits of human foresight ensure that compacts will sometimes need to be modified, both in response to technological advancement and changing circumstances.[72] For example, many early water compacts treat water as a commodity and may be ill-suited to modern views of rivers as ecological and cultural resources.[73] Ideally, states should make necessary changes through negotiation, and sometimes they do. But when negotiations fail, as they did in *Kansas*, states turn to the Supreme Court.[74] Allowing the Court to arbitrate may be the least bad option.[75]

B. PARTIAL DISGORGEMENT

In contrast to Justice Kagan's clear statement of the principle behind reformation, the Court's monetary award in *Kansas* is confusing because although disgorgement may have been appropriate in principle, the amount actually awarded was either a misapplication of it or some other kind of damages masquerading as disgorgement. Disgorgement seems appropriate for two reasons. First, the majority's reading of Section 39 fits with the Restatement's focus on the promisor's culpability. The commentary clarifies, for example, that only the *breach*, not the resulting profit, need be deliberate.[76] And, as Justice Kagan noted, the commentary also indicates that only "inadvertence, negligence, or unsuccessful attempts at performance," which are less within the promisor's control, preclude disgorgement.[77] In terms of blameworthiness, Nebraska's knowing breach seems more analogous to a deliberate one than to an inadvertent one.

Second, while disgorgement is a rare remedy for contract breach,[78] water compacts might be an area where it is generally good public policy. In commercial contexts, contract scholars disagree over whether "efficient breach" is desirable: society may be better off if A can sell goods promised to B at a higher price elsewhere and compensate B for his actual loss.[79] With water compacts,

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71. Some are almost 100 years old. Popelka, *supra* note 10, at 597; Robert W. Adler, *Revisiting the Colorado River Compact: Time for a Change*, 28 J. LAND RESOURCES & ENVTL. L. 19, 19, n.3 (2008).

72. *See* Sarine, *supra* note 2, at 545.

73. *See* Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 105-07 (2003).

74. Sarine, *supra* note 2, at 539.

75. *Cf.* Jonathan Horne, *On Not Resolving Interstate Disputes*, 6 N.Y.U. J.L. & LIBERTY 95, 97 (2011) (characterizing original jurisdiction sister-state suits as a substitute for civil war).

76. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. b (Am. Law Inst. 2011) ("[T]here is no requirement . . . that the claimant prove the motivation of the breaching party."); *id.* at cmt. f (requiring that the "*breach* be deliberate" (emphasis added)).

77. *See* Kansas v. Nebraska, 135 S. Ct. 1042, 1056-57 (2015) (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. f (AM. LAW INST. 2011)).

78. *See* Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2110-11 (2014).

79. *See, e.g.*, Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second* Restatement, 81 COLUM. L. REV. 111, 114-16 (1981). *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. h (2011).

however, public policy favors performance over compensation for the two reasons Justice Kagan identified: to preserve states' sovereignty over their natural resources and to effectuate statutes passed by Congress. Yet as she noted, a situation where water is worth more in an upstream state than in a downstream one is practically a "recipe for breach."[80] Disgorgement solves this problem by making it no longer profitable for the upstream state to take more than its fair share.[81] The Court embraced similar logic in *Porter v. Warner Holding Co.* when it required a landlord to disgorge its profits from violating a rent control statute in order to remove its incentive to break the law.[82] The Court has also previously recognized that disgorgement uniquely protects a promisee's noneconomic interests.[83] Nebraska's breach imposed large noneconomic costs on Kansas, including the undermining of its autonomy and the forgone ecological and cultural benefits of having the river, even though those factors may have been included in the initial bargain.[84] These costs are hard to value directly, and expectation damages based on the price of water would undercompensate a downstream state for such losses.[85] By promoting compliance over compensation, disgorgement avoids the problem of valuation.

The problem with the Court's award in *Kansas*, however, is that it was disgorgement in name only. The majority said that it affirmed the amount because the Master properly weighed Nebraska's incentives, along with past and present behavior, to reach an appropriate amount,[86] but that is not what the Master actually did. His analysis made no weighing of Nebraska's incentives: nowhere does he state why, or even that, this amount will promote future compliance.[87] Moreover, the Master considered *improper* factors, writing that his award turns Kansas's damages "net of reasonable transaction costs, into an amount that approximates a full recovery for the harm suffered."[88] Thus rather than properly focusing on the promisor's incentives, the Master calculated "disgorgement" based on the promisee's loss.[89] Finally, other than mentioning these factors, the

80. *Kansas*, 135 S. Ct. at 1057.

81. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(2) (AM. LAW INST. 2011); Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131, 139 (2008) (quoting Judge Posner that disgorgement aims to remove the profitability from breach). *But see* Marco Jimenez, *Remedial Consilience*, 62 EMORY L.J. 1309, 1314 (2013) (arguing that the primary purpose of disgorgement is to punish, and that contract stability is an incidental benefit).

82. *See* Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

83. *See* Snepp v. United States, 444 U.S. 507, 514-16 (1980).

84. *Cf.* H. David Gold, *Supreme Court Struggles with Damage Assessment in Water Dispute as Interstate Compact Breaks Down*, 29 ECOLOGY L.Q. 427, 429-30 (2002) (arguing the Court's decision in *Kansas v. Colorado*, 533 U.S. 1 (2001) shows the compact's inability to "meet its stated objectives" and to account for the noneconomic aspects of water and state sovereignty).

85. *See* Linzer, *supra* note 79, at 116-17; *see also* Gold, *supra* note 84, at 429-30.

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

87. *See* Report of the Special Master, *supra* note 15, at 179 (saying only that the award "represents a disgorgement of the amount by which Nebraska's gain exceeds Kansas' [sic] loss").

88. *Id.*

89. *See Kansas*, 135 S. Ct. at 1070-71 (Thomas, J. dissenting) (characterizing the amount as either an "arbitrary penalty" or a circumvention of the "American Rule" that the loser does not usually pay the winner's legal fees); *cf.* Zamir, *supra* note 78, at 2113-14 (arguing that a promisor's unjustified gain is not inherently a loss to the promisee).

Master gave no explanation of how he *weighed* them to reach a number.[90] Of course the difference between $1,800,000 and, say, $1,900,000, might be inarticulable, but the Court should have at least given a rough sense of how the factors should be weighed to produce a number far below the "more than several multiples" by which Nebraska's profits exceeded Kansas's loss.[91]

Calling the award disgorgement also appears inconsistent with the denial of injunctive relief. As discussed above, Justice Kagan relied on the situation's being a "recipe for breach" to support the disgorgement award.[92] That makes sense since the promisor's incentives only need to be altered when there is a risk of nonperformance. At the same time, however, she also asserted that the likelihood of future breach was *low* to justify making the award small and denying an injunction.[93] The apparent contradiction is not irreconcilable; the Court may believe that the probability of future breach is generally low but just high enough to merit a small nudge. This approach would be unusual but not illogical.[94] If that is the case, however, the Court should take special care to explain why $1,800,000, of all numbers, provides the right amount of deterrence instead of rubber-stamping the Master's analysis that made no such calculation.[95] It is also possible that the award was intended to do something other than adjust Nebraska's incentives. Perhaps the Court agreed with the Master that Kansas should be compensated for its transaction costs. Or maybe the Court intended the damages to be punitive; dicta in *Texas III* hinted that the most culpable breaches might merit "additional sanctions."[96] If the Court had either of these aims, however, it should have said so clearly instead of distorting contract law by calling its award disgorgement.

C. STANDARD FOR INJUNCTIVE RELIEF

Finally, the Court's opinion does nothing to clarify the appropriate standard for injunctive relief in interstate disputes. Although Justice Kagan implied that compact cases would require the same "cognizable danger of recurrent violation" as other injunctions, she did not explain how strict that standard is or how it should be applied in an interstate water case.[97] The Court's opinion leaves unresolved a pair of seemingly contradictory precedents. In *North Dakota v. Minnesota*, the Court held that sovereignty concerns preclude an interstate injunction unless the complainant state establishes a threat of "serious magnitude" by clear and convincing evidence.[98] In *Texas III*, however, the Court issued an injunction requiring New Mexico to comply with the reformed compact even

90. *See* Report of the Special Master, *supra* note 15, at 179-80.

91. *See id.* at 178.

92. *Kansas*, 135 S. Ct. at 1057.

93. *Id.* at 1059.

94. *Cf.* Roberts, *supra* note 81, at 139 (suggesting that effective disgorgement must completely eliminate the profitability of breach).

95. *See Kansas*, 135 S. Ct. at 1056-58.

96. Texas v. New Mexico (*Texas III*), 482 U.S. 124, 132 (1987).

97. *See Kansas*, 135 S. Ct. at 1059 (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

98. North Dakota v. Minnesota, 263 U.S. 365, 374 (1923) (quoting New York v. New Jersey, 256 U.S. 296, 309 (1921)).

though New Mexico had acted in good faith up until then.[99] By failing to either overrule *Texas III* or explain why that case satisfied the "cognizable danger" standard while *Kansas* did not, the Court has left future disputants without guidance on when a state suffering compact breach is entitled to an injunction.

The majority in *Kansas* based its holdings on broad powers of equity in interstate disputes, violating the principle that modern equity is subject to constraints by rules and standards. But the Court could have reached the same results by clarifying general principles for resolving water compact cases. The Court partially did this on the question of compact interpretation, adopting a rule that ancillary technical agreements can be reformed to fit the compact's intended allocation.[100] The Court should have similarly explained its damages award—either by establishing a balancing test for flexible disgorgement remedies based on the threat of future breach or by classifying the damages as something other than disgorgement—and should have clarified the standard behind its denial of injunctive relief, especially by either distinguishing or overruling *Texas III*.

IV. CONCLUSION

The Constitution's compact clause encourages states to settle their disputes through peaceful negotiation.[101] Predictability in how the Court will enforce those agreements is necessary for states to make informed decisions about how to maintain and modify them as circumstances change.[102] Had the Court officially embraced or repudiated technical reformation earlier, a major part of the *Kansas* suit could have been settled well before trial. Its adopting such a rule in *Kansas* is a step toward creating a coherent water compact jurisprudence. Until the Court does the same on the questions of damages and injunctions, the justices will continue to face lawsuits between states that cannot make informed decisions to settle water disputes out of court.

99. *See Texas III*, 482 U.S. at 129, 133 (1987).

100. *See Kansas*, 135 S. Ct. at 1062.

101. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 534 (2008).

102. Decisions that rely on standardless equity powers give parties out of possession an incentive to sue rather than negotiate. *See* Horne, *supra* note 75, at 102–03 (discussing the "perverse logical madness" incentivized by the Court's "erratic results" based on "equity" in water compact cases); *see also* Sarine, *supra* note 2, at 546.