WHEN SHOULD WATER BELONG TO THE PUBLIC?

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ABSTRACT

Focusing on the tension between public values and private property rights in the area of U.S. water law, the Article focuses on a case arising from the longest drought in California's history. The Article examines when public values espoused by the regulator should curtail private exercise of often long-held private water rights. The Article argues that, as usufructuary water rights, water belongs to the public, which should emphatically uphold its right to regulate what happens to its resource, even when in the hands of private rights-holders, during a public emergency such as a devastating drought. Such issues have historically arisen to great contention in western states, and they are likely to continue to do so for the foreseeable future.

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* Visiting Assistant Professor, Peking University School of Transnational Law, Shenzhen, China. My heartfelt thanks to David Blankfein-Tabachnick, whose generosity of spirit and collegiality resulted in the invitation to contribute this Article. My thanks, as well, to the editors of the Michigan State Law Review, with whom it has been a pleasure to work. I began thinking of this Article while serving as the Reginald F. Lewis Fellow for Law Teaching at Harvard Law School between 2015–2017. My thanks to the Reginald F. Lewis Foundation, the Reginald F. Lewis Fellowship Committee at Harvard Law School, and former Dean Thomas Graca of Harvard Law School, who arranged for me to teach the reading group "Does Water Belong to the Public?", which I taught in the fall of 2016 to a group of thoughtful and insightful students. Dean Philip McConnaughay of Peking University School of Transnational Law subsequently provided me both with the time to do the work I love and the support to do it. Christine Desan, Tom Hennes, Messalina Forbes, Donna Hensley, and Lynn Girton have discussed water law, among so many subjects, with me over the years, and it has been both a privilege and an honor to have them on the journey. For my late grandmother, Ellaine Rudolph, who worked, loved, and respected the land.

INTRODUCTION

Between approximately 2011 and 2017, California experienced its worst drought in 1,200 years.[1] California produces in excess of 400 farm products that constitute roughly one-tenth of the nation's total agricultural output, making California the country's largest agricultural producer and exporter.[2] As a result of the drought, at least 102 million trees died in California's forests, millions more were moribund, and they increased the risk of wildfires.[3] The drought also

1. Daniel Griffin & Kevin J. Anchukaitis, *How Unusual Is the 2012–2014 California Drought?*, 41 GEOPHYSICAL RES. LETTERS 9017, 9017 (2014) (estimating 2014 as the worst year of drought in the state of California in the last 1,200 years); *see* Kyle Kim & Thomas Suh Lauder, *275 Drought Maps Show Deep Drought and Deep Recovery*, L.A. TIMES (Apr. 7, 2017, 12:00 AM), https://www.latimes.com/local/lanow/la-me-g-california-drought-map-htmlstory.html [https://perma.cc/5RWF-XX87] (showing a drought monitor that was last clear in December 2011 with a steady recovery by 2017). While a previous paper I wrote on a related subject begins similarly, the current paper focuses on California in more detail and expands upon the insights of the previous paper. *See generally* Duane Rudolph, *Why Prior Appropriation Needs Equity*, 18 U. DENV. WATER L. REV. 348 (2015).

2. *See* PAC. INST., IMPACT OF CALIFORNIA'S ONGOING DROUGHT: AGRICULTURE 1 (2015).

3. Press Release, USDA OFFICE OF COMMC'N., *New Aerial Survey Identifies More Than 100 Million Dead Trees in California* (Nov. 18, 2016), https://www.fs.fed.us/news/releases/new-aerial-survey-identifies-more-100-million-dead-trees-california [https://perma.cc/PZD3-5RKT].

affected animal migrations and hibernations, and it increased contact between humans and wild animals in search of food and water.[4] Fish stocks were imperiled and waterfowl were forced to respond to the drought as well.[5] The drought affected agriculture and increased groundwater pumping,[6] and as a result, water conservation measures were put into place.[7] At the end of the drought, the governor of California signed two bills into law that made water-conservation measures permanent.[8] "We have efficiency goals for energy and cars," the governor stated, "and now we have them for water."[9]

California is one of ten states following a hybrid approach to water rights.[10] Most states, especially in the east, where water is more abundant, have adopted the riparian doctrine, which apportions water based on title to land that is contiguous to the water source, and the riparian doctrine requires reasonable use of contiguous water.[11] Where water is scarcer and needs to be transported outside the basin, as in a number of western states, the prior appropriation doctrine holds sway, and it privileges water access based on the ancestry of the claim to the water, while requiring beneficial use of water diverted from its

4. *See* Jami Smith, *Drought Hurting Animals, Plants*, CAL. ACAD. OF SCI. (Feb. 7, 2014), https://www.calacademy.org/explore-science/drought-hurting-animals-plants [https://perma.cc/L2W3-6VYH].

5. *See id.*; Jay Lund et al., *Lessons from California's 2012–2016 Drought*, 144(10) J. OF WATER RES. PLAN. & MGMT. 10 (2018).

6. *See* PAC. INST., *supra* note 2, at 2; Lund et al., *supra* note 5, at 10.

7. *See* Ian Lovett, *California Approves Forceful Steps Amid Drought*, N.Y. TIMES (July 15, 2014), https://www.nytimes.com/2014/07/16/us/forceful-steps-amid-a-severe-drought.html [https://perma.cc/63V2-UXZ2].

8. *See* Paul Rogers, *Drought or No Drought: Jerry Brown Sets Permanent Water Conservation Rules for Californians*, MERCURY NEWS (May 31, 2018), https://www.mercurynews.com/2018/05/31/california-drought-jerry-brown-sets-permanent-water-conservation-rules-with-new-laws/ [https://perma.cc/2EJF-8VHA].

9. *Id.*

10. *See* DAVID H. GETCHES, WATER LAW IN A NUTSHELL 8 (4th ed. 2009) (explaining "[s]everal states originally recognized riparian rights, but later converted to a system of appropriation while preserving existing riparian rights. These states that follow this hybrid approach are: California[,] Kansas[,] Mississippi[,] Nebraska[,] North Dakota[,] Oklahoma[,] Oregon[,] South Dakota[,] Texas[, and] Washington[.]").

11. *See id.* at 16 (explaining "[t]he fundamental principle of the riparian doctrine is that the owner of the riparian land, i.e., land bordering a waterbody, acquires certain rights to use the water. Each riparian landowner may make reasonable use of the water on the riparian land if the use does not interfere with reasonable uses of other riparian owners.").

source.[12] A jurisdiction that enforces both the appropriation and riparian doctrines, California has enshrined both the riparian doctrine's reasonable-use requirement and the appropriation doctrine's beneficial-use requirement in its constitution.[13] When the two water rights doctrines conflict in the state, state law privileges riparian rights over appropriative rights.[14]

California's drought engendered lawsuits. Lawsuits arose when the state agency tasked with overseeing water quality, allocation, and beneficial use, the State Water Resources Control Board (State Water Board), moved to curtail private water uses in the state in 2015.[15] California's complex water-rights system upholds appropriative water rights, in particular, based on the age of the claim to water, with 1914 being the decisive year since the legislature required permitting for water rights beginning that year.[16] Pre-1914 water rights claims are not subject to permitting, and they are considered more senior water rights, limited only by the amount of historical diversion.[17] Both pre- and post-1914 rights are subject to the state's police power.[18] In other words, some California water rights date back to the nineteenth century and have priority dates that are nearly 150 years old.

In response to the drought, in 2015, the State Water Board curtailed water uses and imposed penalties of up to $10,000 a day for violation of its curtailment notices, which also encompassed pre-1914 rights-holders.[19] Rights-holders sued and argued, inter alia, that the State Water Board lacked jurisdiction over senior water rights-holders, and the State Water Board could not curtail their water rights.[20] The court agreed with the rights-holders.[21] As in many other states, however, a water right in California is a right to *use* the water, a usufructuary right, which does not vest the owner with ownership of

12. *See id.* at 7 (explaining that the prior appropriation doctrine governs in Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming).

13. *See* Cal. Water Curtailment Cases, No. 2015-1-CV-285182, slip op. at 7–8 (Cal. Sup. Ct. Feb. 21, 2018).

14. *See* CAL. CONST. art. X § 2; *Cal. Water Curtailment Cases*, slip op. at 8.

15. On the role of the State Water Board, see CAL. WATER BOARDS, https://www.waterboards.ca.gov [https://perma.cc/H5RR-XT5E] (last visited Dec. 23, 2019). *See also Cal. Water Curtailment Cases*, slip op. at 8–10.

16. *Cal. Water Curtailment Cases*, slip op. at 7.

17. *See id.* at 7–8.

18. *See id.* at 8.

19. *Id.* at 13–16.

20. *See id.* at 21–31.

21. *See id.* at 30.

the water itself.[22] Ownership of the water remains with the public.[23] The question arises, therefore, of what should be done to balance public ownership of water with a private rights-holder's usufructuary right in a moment of public emergency. That is, when *should* the public's claim to its own resource be at its most emphatic?

Curtailment of water rights during drought as a matter of public necessity is not only a California concern. Cities in Colorado, Idaho, Maryland, and Oregon, among others, have also considered or curtailed water uses during public emergencies.[24] The focus of this paper is, thus, which arguments in the public interest should a legislator, regulator, or court use in moments of public emergency as a basis to curtail private exercise of often long-held water rights? The distinction between the public and the private has historically arisen to great contention in western states, and the problems arising from the distinction are likely to continue for the foreseeable future.[25] Implicit in this discussion are, thus, a variety of water-rights doctrines, some millennia old, and they go to the public/private distinction in water rights, each of which I will briefly explore.

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22. *See* Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 640 (1957).

23. *See id.* at 642.

24. *See* Brent Gardner-Smith, *Mandatory Curtailment of Water Rights in CO Raised as Possibility*, ASPEN TIMES (Sept. 19, 2018), https://www.aspentimes.com/news/local/mandatory-curtailment-of-water-rights-in-co-raised-as-possibility/ [https://perma.cc/TFV5-ME95] (Colorado); Greg Garland, *Maryland Drought is Worst in 70 Years; No Relief Seen; Water Use Restricted*; *Curtailment Notices and Orders*, IDAHO DEP'T OF WATER RES., https://idwr.idaho.gov/legal-actions/curtailments [https://perma.cc/Z94P-U3XU] (last visited Dec. 23, 2019) (Idaho); *Water Curtailment Plan*, CITY OF BANKS, OR., https://www.cityofbanks.org/watercurtailmentplan [https://perma.cc/Z4Y9-2LSH] (last visited Dec. 23, 2019) (Oregon); *Livestock, Crops Suffer*, BALT. SUN (July 10, 1999), https://www.baltimoresun.com/news/bs-xpm-1999-07-10-9907100112-story.html [https://perma.cc/756A-A75S] (Maryland).

25. *See* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990) (discussing the public nature of the water right as a distinctive kind of property right); Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1, 2 (1965) (arguing that water rights should be treated like other property rights, which redounds to the public good); Scott Andrew Shepard, *The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation & Ecological Protection in the Western Water Law Context*, 17 N.Y.U. ENVTL. L.J. 1063, 1070 (2009) (asserting that water rights are compensable property rights). *See generally* Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228 (2015) (providing an excellent overview of the public–private tension in water rights since the inception of the prior appropriation doctrine).

Given the breadth of any paper discussing the public/private divide in water rights, the Article builds on the work of other scholars and cases in order to draw its conclusions. The Article's contribution is not only its expanded and more recent synthesis of legal doctrines in response to the particular question about what courts and state laws mean when they state that water belongs to the public but also how such doctrines might apply to a particular recent case and to those that will likely follow. My Article's insight is that water, in jurisdictions like California, always belongs to the public, and the public can and *should* intervene during moments of public emergency to regulate the public resource that is water, even expansively, in the public interest—subject to federal constitutional limitations based on long-held public values governing water.

Part I engages with older sources to explore the public dimension of water as property. While some might find jarring the presence of as many references to either Roman water law or nineteenth-century case law and their antecedents in an article on current American water law, an understanding of previous case law and its antecedents is pivotal to understanding the development of American water rights. Such an understanding is vital because nineteenth-century case law gave rise to a major part of American water law, notably the appropriation doctrine, which is distinctly American in its development. Water law's past is, thus, in some ways its present—and it is still good law. Current water law cases, almost 150 years later after many of those nineteenth-century cases, continue to cite to such older case law.[26]

The first section in Part I explores the usufructuary nature of the water right. Courts and commentators often rely on the insight that water is a usufruct, without going into much detail about what that

26. *See, e.g.*, Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1353–54 (Fed. Cir. 2013) (citing Eddy v. Simpson, 3 Cal. 249, 252 (1853)); Baley v. United States, 134 Fed. Cl. 619, 669 (2017) (citing Irwin v. Philips, 5 Cal. 140, 143 (1855)); Frees v. Tidd, 349 P.3d 259, 264 (Colo. 2015) (citing Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882)); McKenna v. Witte, 346 P.3d 35, 40 (Colo. 2015) (citing *Coffin*, 6 Colo. at 447); Kemper v. Hamiliton, 274 P.3d 562, 573 (Colo. 2012) (citing *Coffin*, 6 Colo. at 443); Kobobel v. State Dep't of Nat. Res., 249 P.3d 1127, 1137 (Colo. 2011) (citing *Coffin*, 6 Colo. at 447); V Bar Ranch LLC v. Cotten, 233 P.3d 1200, 1208 (Colo. 2010) (citing *Coffin*, 6 Colo. at 447); City of Pocatello v. State, 180 P.3d 1048, 1053 (Idaho 2008) (citing *Eddy*, 3 Cal. at 252); City of Pocatello v. State, 180 P.3d 1048, 1054 (Colo. 2008) (citing *Coffin*, 6 Colo. at 443); Archuleta v. Gomez, 140 P.3d 281, 284 (Colo. App. 2006) (citing *Coffin*, 6 Colo. at 443); *In re* Water Rights Of: Farmers Reservoir & Irrigation Co., 2008 Colo. Water LEXIS 35, at *22 (2008) (citing *Coffin*, 6 Colo. at 447); Mattaponi Indian Tribe v. Commonwealth, No. 3001-RW/RC, 2007 WL 6002103, at *7 (Va. Cir. Ct. 2007) (citing *Irwin*, 5 Cal. at 140).

entails.[27] The usufruct originated in Roman law, where it privileged the rights of the owner over those of the usufructuary—the individual who had rights to the fruits of a given piece of property.[28] Under Roman law, the owner "retained bare ownership" of the thing, "and he could dispose of the thing without violating the rights of the usufructuary."[29] The usufructuary, on the other hand, "had the thing at his disposal and had the right to take the fruits without diminishing, deteriorating, or destroying it."[30] A usufruct was possible in almost "anything," including fruit, land, minerals, perishable goods, real estate, and slaves.[31] Significantly, the usufruct had to be surrendered to the owner, usually at the death of the usufructuary.[32]

As property, the usufruct thus delineates the boundaries of private *use* of water, and the usufruct merely permits the private rights-holder to draw fruits or profits from the use of the water, which always belongs to the public. As such, the private user of the water is not the owner of the water and only occupies a transitional proprietary interest in the use of the water, whose title remains in the people of the state. Part I also briefly examines the statutory and constitutional language of public ownership of water in a number of western states, since a number of state constitutions or statutes provide that water belongs to the public or to the people of the state. Such statutory or constitutional language similarly underscores the usufructuary nature of the water right, and it also makes clear that a legislative grant of administrative and judicial discretion in water-rights cases in the name of the public at large is at play in water-rights cases.

So as to draw attention to the limited nature of usufructuary rights in water, Part I also examines the public dimension of key water-law doctrines. The public trust doctrine, for example, holds that the state acts as a fiduciary of the natural resources within its boundaries for the public's benefit. States like California have raised the doctrine to constitutional status, and they have adopted an expansive view of the doctrine on behalf of their citizens. In

27. *See* David B. Anderson, *Water Rights as Property in* Tulare v. United States, 38 MCGEORGE L. REV. 461, 488–90 (2007).

28. *See* RAFAEL DOMINGO, ROMAN LAW: AN INTRODUCTION 158 (2018).

29. *Id.*

30. *Id.*; *see also* ANDREW M. RIGGSBY, ROMAN LAW AND THE LEGAL WORLD OF THE ROMANS 145 (2010).

31. DOMINGO, *supra* note 28, at 159, 185; RIGGSBY, *supra* note 30, at 143, 144; WILLIAM WARWICK BUCKLAND, THE ROMAN LAW OF SLAVERY: THE CONDITION OF THE SLAVE IN PRIVATE LAW FROM AUGUSTUS TO JUSTINIAN 60 (1908).

32. DOMINGO, *supra* note 28, at 159; RIGGSBY, *supra* note 30, at 144, 274-75.

California, the public trust doctrine has undergone landmark changes. The doctrine may operate as a defense to Takings claims in some cases, and, in others, it requires the payment of just compensation. Part I also explores the federal navigation servitude, which provides that the federal government may act to protect the public's dominant interest in navigation against riparian landowners, which is subject to the No Compensation Rule for the riparian landowner, under the Takings Clause of the Fifth Amendment. Part I concludes with an examination of other state and federal doctrines that underscore the public dimension of a water right.

Part II proposes solutions. Beginning with a state constitutional amendment in California that would make explicit the usufructuary nature of a water right and the public's continued right to regulate its property interest, especially during a public emergency, the Part also proposes a similar legislative solution. Should the constitutional amendment fail, a legislative enactment might codify the language of the constitutional amendment. Indeed, these changes are proposed in addition to what other commentators have suggested along similar lines, including additional funding for the State Water Resources Board so that it might be more appropriately equipped to face challenges during a drought. Similar arguments, or their beginnings, have been made by Joseph L. Sax and others.[33] My contribution is to expand upon these and other insights, while applying them to a recent water-rights case. I then consider how a constitutional amendment might have helped in the California drought case in which the State Water Board was defeated in court for curtailing water during a public emergency.

I. WATER AND THE PUBLIC

This Part begins with an exploration of the usufructuary nature of a water right. The usufruct underscores public ownership of a water right, and it makes clear that the private rights-holder merely may draw fruits or profits from public water, but the rights-holder does not own the water. Roman law and foundational American case law dealing with water—which remain relevant today—also demonstrate the public nature of an American water right. The Part concludes with

33. *See* Gabrielle Kavounas, Note, *California's Curse: Perpetual Drought and Persistent Land Development*, 53 SAN DIEGO L. REV. 1055, 1055 (2016); Dave Owen, *The Public Trust Doctrine 30 Years Later: The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1105 (2012); Sax, *supra* note 25, at 260.

an examination of the statutory and constitutional language of public ownership of water in western states, and it takes a look at the various doctrines governing water to show that water belongs to the public.

A. Water as Usufruct

At the beginning of water law is the usufruct. Cases and commentators describe water as a usufruct, often without going into much detail about the meaning and entailments of such a designation. Courts and commentators often altogether misconstrue the usufructuary nature of water.[34] What, therefore, is a "usufruct," and why does an understanding of its meaning matter?

1. *The Tarnished History of the Usufruct*

The usufruct is a Roman-law creation.[35] Initially intended to provide women with sustenance for a period of time after the death of the male head of the household, the usufruct eventually extended to almost everything else, including slaves, who were "things," or *res*, under Roman law.[36] The usufruct allowed the usufructuary to draw fruits or profits from the *res*, without damaging or destroying the *res*.[37] The usufructuary could neither alienate the usufruct, nor could the usufructuary transfer the usufruct to anyone other than the owner.[38] At the end of the usufructuary's life, the property was to be returned to the owner.[39] An implicit standard of care applied to the usufruct.[40] The usufructuary was to take care of the property like the owner, invariably a male citizen, would have.[41] The owner also owed responsibilities to the usufructuary, as defined in the terms governing the usufruct.[42]

Implicitly relying on Roman law, more recent commentators have noted that the usufruct is a right to "use and consume resources, limited by others having rights to access, use, and consume them on

34. *See generally* Anderson, *supra* note 27 (explaining how the commentary misconstrued the usufructuary nature of water).

35. *See* DOMINGO, *supra* note 28, at 158; RIGGSBY, *supra* note 30, at 143.

36. *See* DOMINGO, *supra* note 28, at 158; RIGGSBY, *supra* note 30, at 144; BUCKLAND, *supra* note 31, at 10–38.

37. DOMINGO, *supra* note 28, at 158; RIGGSBY, *supra* note 30, at 145.

38. DOMINGO, *supra* note 28, at 158.

39. *See id.* at 159, 274; RIGGSBY, *supra* note 30, at 144.

40. RIGGSBY, *supra* note 30, at 145.

41. *Id.*

42. DOMINGO, *supra* note 28, at 158.

similar terms."[43] Tribal customary laws provide examples of the usufruct, given that usufructs involve "the use and enjoyment of the profits of property belonging to another as long as that property is not damaged or altered in any way."[44] As such, the usufruct is a transitional entitlement in duration that permits the use of specific land for either a short or medium period of time.[45] A usufruct "carved out of public lands" can be of a few hours duration, for example.[46] The usufruct is thus a property interest of a predetermined duration permitting its holder to draw the "profits" of the property without damaging or altering it.

At the basis of the usufruct is the "classic usufruct." "[A] *classic usufruct* can be defined as an immutable package of land-use rights that are not transferable and that terminate when the usufruct's owner dies or ceases the use, at which time the land is again up for grabs among group members."[47] Classic usufructs eliminate transactional costs associated with fee simples and lands sales, but classic usufructs could also encourage rent-seeking "as would-be successors jockey for position in a usufruct's late stages."[48] Such usufructs might also encourage landowners to be shortsighted as they might deplete the resource while it is under their control.[49]

The first American opinion to mention the usufruct in the property rights context, *Somerville v. Johnson*, is from 1770.[50] It is, unfortunately, a slavery case. The case illuminates, nonetheless, the continuing legacy of Roman law and its effect on the evolution and nature of the usufruct in American law, which has remained largely unchanged since 1770. *Somerville* asks whether the slave children born after the death of the testator to Priscilla, a slave, could be considered part of the "use" of Priscilla, which "use" the testator

43. Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 415, 443 (2017). *But see* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 746 (explaining usufruct as proof of the ancestry in property law of the right to exclude given that the usufruct is possibly the first property rights regime).

44. John C. Hoelle, Note, *Re-Evaluating Tribal Customs of Land Use Rights*, 82 U. COLO. L. REV. 551, 552 (2011) (quoting Sokaogon Chippewa Cmty. v. Exxon Corp., 805 F. Supp. 680, 686 n.1 (E.D. Wis. 1992)).

45. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1364 (1993).

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.*

50. *See* Somerville v. Johnson, 1 H. & McH. 348, 352 (Md. 1770).

bequeathed to the life tenant, or if Priscilla's children were an "accessory."[51] In that case, the Maryland Court of Chancery determined that Priscilla's children were part of the life tenant's "use" of Priscilla and part of the bounty.[52] *Somerville v. Johnson* makes clear that the usufruct quite literally means—in the worst possible sense—the "fruits" from which a profit might be drawn, with care given not to damage the usufruct because the usufructuary is not the owner. The view reflects Roman law concerning slaves as usufructs.[53] Cases from other jurisdictions also support this view of the usufruct as "fruit," "profit," "revenue," or "benefit."[54]

Water rights cases, unfortunately, confirm this meaning. The first water rights opinion to mention a usufruct dates more than fifty years after *Somerville v. Johnson*, and it only mentions a usufruct in passing.[55] An 1825 opinion from Connecticut, *Mitchell v. Warner*, however, clarifies the meaning of the usufructuary right in water.[56] In that case, when the defendant entered upon the plaintiff's land and diverted water from the stream for his own use and was said to have disseized the plaintiff of the land, the plaintiff sued for breach of the covenant of warranty, which guarantees peaceable enjoyment of

51. *See id.*

52. *See id.* at 354.

53. BUCKLAND, *supra* note 31, at 356 ("The usufructuary is not owner, and thus a legacy of 'my slaves' does not cover those in which I have a usufruct, and does cover those in which I have granted a usufruct to someone else.").

54. THOMAS CURRY, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF LOUISIANA 97 (1837) (explaining parents have usufruct in their children during their minority and may "benefit" from it); THOMAS CURRY, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF LOUISIANA 509 (1842) (explaining children of slaves are not "natural fruits" belonging to the usufructuary within the meaning of the state code); SIMON GREENLEAF, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE 8 (1820–1821) (explaining husband acquires the usufruct or "profits" of the lands of which wife is seized in fee at marriage); O.C. & R.K. HARTLEY, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF TEXAS 628–29 (1858) (explaining usufructuary does not own the usufruct but enjoys "enlarged rights" insofar as he may enjoy the fruits of the usufruct except for slaves).

55. *See* THOMAS HARRIS & REVERDY JOHNSON, REPORTS OF CASES ARGUED & DETERMINED IN THE COURT OF APPEALS OF MARYLAND 205 (1825). To be sure, the first case mentioning the usufruct in the water-rights context is from 1811. *See* WILLIAM JOHNSON, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE AND IN THE COURT FOR THE TRIAL OF IMPEACHMENTS AND THE CORRECTION OF ERRORS IN THE STATE OF NEW YORK 507 (1813). In that case, the court itself does not use the term but counsel does. *See id.*

56. *See* THOMAS DAY, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT 519–20 (2d ed. 1913).

property.[57] The issue was whether water was, like land and tenements, covered by the covenant of warranty.[58] In holding that the covenant of warranty did not include water because it was neither land nor tenement, the court identified, in language that merits citation at some length, why water is a usufruct and why its ownership cannot be said to permanent by any means:

> *Water* is neither land nor tenement, nor susceptible of absolute ownership. It is a moveable, wandering thing; and must, of necessity, continue common by law of nature. It admits only of a transient, usufructuary property; and if it escape for a moment, the right to it is gone forever; the qualified owner having no legal power of reclamation. Consistently with the preceding remarks, it is not capable of being sued for, by the name of water, or by a calculation of its cubical or superficial measure; but the suit must be brought for the land that lies at the bottom, covered with water. Hence, as it is said in the authorities just cited, water is a distinct thing from land. The truth of this observation will be recognized, by every person, who understands the natural properties of each. No action of trespass is sustainable for poisoning the water on a person's land. But trespass on the case may be maintained, for the injury done to a usufructuary right. The same observation is equally applicable to *air* and *light*; and on account of its fugitive nature, water is classed, by all jurists, with these elements. Hence, the air which hovers over one's land, and the light which shines upon it, are as much land, and embraced by a covenant of general warranty, as water is. As water is not land, neither is it a tenement; because it is not of a *permanent nature*, nor the subject of absolute property.[59]

Water law has indeed evolved significantly since 1825. Nevertheless, the extract above makes clear that, inasmuch as water is not "susceptible of absolute ownership," the usufruct is a subordinate property right.[60] A water right is, therefore, a subservient or dependent property right actionable only within a predetermined scope. This is

57. *See id.* at 516–17.
58. *See id.* at 517.
59. *Id.* at 519–20 (citations omitted).
60. *See id.* at 519; *see also* N. SAXTON, REPORTS OF CASES DECIDED IN THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY 189 (2d ed. 1886) ("There is no such thing as actual property in running water. It is transient in its nature, and must be permitted to flow for the common benefit."); JOHN L. WENDELL, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT FOR THE CORRECTION OF ERRORS 628 (1836) ("By the general sense of mankind, the use and control of rivers that are subservient to commerce, has been considered a thing of common right, while from the nature of the element, individual property in the water flowing in such rivers must be regarded as transcient, [sic] usufructuary and subordinate."); JOHN L. WENDELL, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICATURE AND IN THE COURT FOR THE CORRECTION OF ERRORS OF THE STATE OF NEW YORK 331 (1840) ("No proprietor has a right to use the water, to the prejudice of other proprietors above or below him. He has no property in the water itself, but a simple usufruct while it passes along.").

still the case in riparian jurisdictions, for example, where the usufruct runs with the land.[61]

About twenty-five years after *Mitchell v. Warner*, the mid-nineteenth century brought the California Gold Rush, which gave rise to the prior appropriation doctrine that grew out of western mining customs.[62] The foundational California case from 1855, *Irwin v. Philips*, held that the equitable maxim *qui prior est in tempore, potior est in jure* (first in time is first in right) applied in water rights dispute between a riparian and appropriating miner along a stream.[63] Counsel in that case argued that "[t]he right of property [was] merely usufructuary," and the court, in dicta, noted that use rights in water might apply to private landowners, but that was not the case since the land through which the water ran in the case belonged to the public.[64]

Another foundational water-rights case from around the same time also makes the usufructuary nature of water clear. "The property in the water, by reason of riparian ownership, is in the nature of a usufruct," *Crandall v. Woods* stated, "and consists in general not so much in the fluid as in the advantage of its impetus."[65] Cases from other jurisdictions similarly stipulate that the usufructuary nature of a water right is about use and not ownership.[66] Foundational cases thus identify the usufruct as a transitional property right subordinate to a property right in land since a water right is only a use right. The usufructuary thus does not own the water and must always remain

61. *See* Lux v. Haggin, 4 P. 919, 922, 926 (Cal. 1884) (citing to various state precedents indicating that both the appropriation and riparian rights regimes are usufructuary).

62. United States v. Hunter, 236 F. Supp. 178, 180 (S.D. Cal. 1964) ("After the discovery of gold in California in January 1848, followed by the ceding of part of the public lands of Mexico to the United States by the Treaty of Guadalupe Hidalgo, 9 Stat. 922 on July 4, 1848, a rush of population from the East poured into California to occupy and mine the public lands now belonging to the United States. As disputes arose between the miners as to possession of mining locations as well as the use of water necessary to successful hydraulic or placer mining operations, customs became established in the mining camps to the use of water by prior appropriation—'first in time, first in right'–which became valid local law in the absence of any specific State or Federal legislation authorizing the appropriation of water, or providing procedural steps for acquiring appropriative rights therein.").

63. *See* W.M. GOUVERNEUR MORRIS, REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF CALIFORNIA 147 (1906).

64. *Id.* at 143–44.

65. Crandall v. Woods, 8 Cal. 136, 141 (1857).

66. *See, e.g.*, Stein v. Burden, 29 Ala. 127, 130 (1856) (holding that riparian proprietor "has no property in the water itself, but a simple usufruct while it passes along"); *see also* Haas v. Choussard, 17 Tex. 588, 589 (1856) (stating that proprietor "has no property in the water itself, but a simple usufruct while it passes along").

aware of the limitations placed upon the right to use water. While the usufructuary may draw benefits, profit, and revenue from the use of the water, the usufructuary is answerable for any damage to the usufruct or for surpassing the bounded nature of the rights granted by the usufruct.

2. *Current Problems Defining the Usufruct*

While a number of more recent cases, including from California, state that water is a usufruct, problems continue to arise in defining the usufruct.[67] Commentators and cases are split on the usufructuary nature of the water right. One understanding of "usufructuary" extends the use right from the water's source of diversion through its beneficial use by the usufructuary, while the other separates the diversion of the water at its source from the water's later beneficial use.

In other words, the first view envisions one continued use of water from removal of the water from its source through to its later beneficial use in irrigation, manufacturing, and other recognized beneficial uses of water, depending on the jurisdiction. The second view holds, meanwhile, that we can only speak of a usufructuary right when discussing the right to make use of water from the source. Once the water is diverted, what follows afterward amounts not to the usufruct but to possession or ownership. After possession, beneficial

67. *See, e.g.*, N. Cal. Water Ass'n. v. State Water Res. Control Bd., 230 Cal. Rptr. 3d 142, 167 (Cal. Ct. App. 2018) (citations omitted) ("The right conferred is the 'right to *use* the water—to divert it from its natural course.' The right is usufructuary only and confers no right of private ownership of water in a watercourse. 'Unlike real property rights, usufructuary water rights are limited and uncertain.'"); *see also* Grand Valley Water Users Ass'n v. Busk-Ivanhoe, Inc., 386 P.3d 452, 461 (Colo. 2016) (citations omitted) ("Under Colorado's doctrine of prior appropriation, a water right is a usufructuary right that affords its owner the right to use and enjoy a portion of the waters of the state. One does not 'own' water, but owns the right to use water within the limitations of this doctrine."); Light v. State Water Res. Control Bd., 173 Cal. Rptr. 3d 200, 212 (Cal. Ct. App. 2016) (citing Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 727 (Cal. 1983) for the proposition that "the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water . . ."); People v. Davis, 208 Cal. Rptr. 3d 39, 43 (Cal. Ct. App. 2016) (citations omitted) ("Water is a resource for which '[o]wnership . . . is vested [collectively] in the state's residents . . . .' 'Hence, the cases do not speak of the ownership of water, but only of the right to its use.'"); Heal Utah v. Kane Cty. Water Conservancy Dist., 378 P.3d 1246, 1250 (Utah Ct. App. 2016) (observing that permit issued by the State Engineer "gives an individual only a usufruct in water—the right to use some maximum quantity of water from a specified source, at a specific point of diversion or withdrawal, for a specific use and at a specific time").

use of water is required by law, but it is not part of the usufructuary right. The second view, thus, breaks the sourcing of water down into three phases, which has legal consequences. I now examine each of these understandings in more detail before concluding that the first view, envisioning one continuous use from diversion to beneficial use, is the sounder one.

The first view of one continuous use from source to beneficial use can be implied from the case law. Case law provides that an individual or entity may remove water from its original source and use it in a legally cognizable manner, that is, for irrigation, industry, household uses, and so on. The individual or entity "uses" the water, first, by diverting or removing it from its source and, second, the individual or entity extends the terms of the use by putting the water to a recognized beneficial use. The famous—or infamous—public trust Supreme Court of California opinion, *National Audubon Society v. Superior Court*, advances this view:

> "It is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." Hence, the cases do not speak of the ownership of water, but only of the right to its use. Accordingly, Water Code section 102 provides that "[all] water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."[68]

In other words, there are only two property interests implicit in a discussion of water. One is ownership (which rests with the public), and the other is usufructuary (which rests with the user). The usufructuary right attaches to and travels with the water from its appropriation through its beneficial use ("the advantage of its use"). The requirement of beneficial use is thus collapsed into the appropriation requirement, and the very terms "beneficial *use*" indicate that "beneficial *use*" involves a use right. Such a right bestows an "advantage of its use," with ownership of the water remaining with the "people of the State," who have chosen to grant use rights to members of the public through the intermediary of the state permits,

68. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983) (citations omitted) (quoting Eddy v. Simpson, 3 Cal. 249, 252 (1853)); Orange County Water Dist. v. Sabic Innovative Plastics US, LLC, 14 Cal. App. 5th 343, 403 (Cal. Ct. App. 2017) (quoting *National Audubon* for the same proposition). For a spirited reaction to the *National Audubon* opinion, see, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986). Revising that reaction in part, see Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make it Right?*, 45 ENVTL. L. 1139 (2015).

under specific conditions.[69] The state may, thus, subsequently act in the public interest to regulate or control the full extent of the usufruct because each usufruct derives from "public waters."[70]

Under this approach, the emphasis is on a unified "use" and the terms of such a use. The public grants the individual the right to use a specific amount of water over time and cares about the specific uses made of that water. The key questions that follow from such a grant are: How much water has the individual withdrawn from the public over the time, and how has that water been used? Has the individual exceeded or violated the terms of the use right? As a Colorado Supreme Court opinion observes in this regard:

> Property rights in water are usufructuary; ownership of the resource itself remains in the public. Because beneficial use defines the genesis and maturation of every appropriative water right in this state, we have held that every [water rights] decree includes an implied limitation that diversions cannot exceed that which can be used beneficially, and that the right to change a water right is limited to that amount of water actually used beneficially pursuant to the decree at the appropriator's place of use.[71]

The usufructuary right thus flows from public ownership of the resource, and the public requires approved beneficial uses of its resource, which are recognized limitations placed by the public on the beneficial use of the water right.[72]

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69. The view that the usufruct merely conveys "an advantage" is supported by older but equally important California precedent, which notes that "by all the modern, as well as ancient, authorities, the right in the water is usufructuary, and consists not so much in the fluid itself as in its uses, including the benefits derived from its momentum or impetus." Lux v. Haggin, 10 P. 674, 753 (Cal. 1886) (emphasis omitted); *see also In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 332 (Cal. 1988) (explaining *Lux v. Haggin* is "widely recognized as the landmark decision holding that California adopted the riparian system of water rights when it received the common law in 1850" and "California thus became a 'dual' water rights state, recognizing both riparian and appropriative rights").

70. *See* Aerojet-Gen. Corp. v. Superior Court, 257 Cal. Rptr. 621, 629 (Cal. Ct. App. 1989) (citing *Nat'l Audubon Soc'y*, 658 P.2d at 724).

71. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999) (citation omitted).

72. Indeed, a ballot initiative upheld by the Supreme Court of Colorado to amend the Colorado constitution proposing an expansion of public control of waters in the state would have made this explicit. *See In re* Title, Ballot Title, and Submission Clause for 2011–2012 #45, 274 P.3d 576, 583 (Colo. 2012) ("(2) The use of water is a usufruct property right, granted by the public to water users, that shall require the water use appropriator to return water unimpaired to the public, after use, so as to protect the natural environment and the public's use and enjoyment of waters."); *see also* Clay v. Mo. Highway & Transp. Comm'n, 951 S.W.2d 617, 629 (citations omitted) (Mo. App. W.D. 1977) (explaining, in a previous opinion, "[w]e noted that

While the first understanding of the usufruct identifies one continued use from diversion to beneficial use, the second, on the other hand, holds that the usufruct only extends to the right to use the watercourse, and once removal or diversion of the water from its source has occurred, the right becomes possessory, or it gives rise to ownership.[73] In other words, the usufruct lies only in the right to make use of water, but once the water is diverted from the watercourse, it is transformed into a possessory property interest, which does not include an entitlement to make beneficial use of the water.[74] Commentators, thus, argue that this understanding is correct because once water has been diverted and is in the individual's possession, the right to the water is no longer usufructuary but possessory.[75] Conflating both meanings and extending their purview to include beneficial use, they argue, is erroneous because the usufructuary right only covers the entitlement to remove or divert running water from its source.[76] Once removed from the source, water is a possessory interest owned by the private holder of the water right.

They are wrong. Possession is by no means incompatible with the view of a unified usufruct, and the second view incorrectly imputes to the act of possession the creation of a possessory property water right independent of the usufructuary right. Under Roman law, a usufruct could be possessed, and the usufructuary could bring suit against the owner for violation of the terms of the usufruct—without undermining the owner's superior property interest.[77] As recent American case law states, an individual *possesses* a usufructuary right to water.[78] Other case law similarly refutes the second view of the

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the nature of a landowner's property right in the water is usufructuary, not absolute. This means that a landowner does not own subterranean percolating water, but can use the water he diverts freely 'for any purpose incidental to his beneficial enjoyment of the land.' The landowner could convey his right to use the water, but not the water itself").

73. *See* Anderson, *supra* note 27, at 488–89, 509–10; *see also* City of Santa Maria v. Adam, 149 Cal. Rptr. 3d 491, 516 (Cal. Ct. App. 2012) (relying on Anderson).

74. *See* Anderson, *supra* note 27, at 488–89, 509–10.

75. *Id.* at 489, 509–10.

76. *Id.* at 492, 509–10.

77. *See* DOMINGO, *supra* note 28, at 159 ("Although originally a usufruct could not be possessed, classical lawyers sometimes extended interdictal protection to the usufructuary. The usufructuary was protected with the *vindicatio usus fructus* (later called *actio confessoria*) against the owner or any possessor of the thing in question.").

78. *See, e.g.*, Dunwody v. Will-O-Wisp Metro. Dist., 2009 Colo. Water LEXIS 780, at *40 (Dist. Ct. Colo. 2009) ("Actual use is central to a claim for adverse

usufructuary right.[79] A California appellate case, for example, implies that possession is an extension of the usufruct: "There could be but a usufructuary right [of streams]. And that right could be acquired only by an 'appropriation' made in the manner provided by law; that is, by reducing the water to actual possession for a beneficial use."[80] In other words, appropriation, possession, and beneficial use are all implicit in the usufruct, and they constrain the nature of the usufruct itself, which is a temporary grant from the public to the private entity or individual.

The most prominent advocate of the second view, David B. Anderson, relies extensively on a seminal 1909 article by Samuel C. Wiel, "the foremost commentator on California and western water in the first part of the twentieth century," to advance the incorrect view.[81] Anderson's error is not in his reliance on an article that is over 100 years old—far from it—but in his reliance on Wiel without verifying and updating Wiel's views on everything from Roman law to the history of the usufruct.[82] Such an oversight leads to the dismissal of the usufruct's importance at common law by insisting instead that it is a civil-law artifact more than anything else, which undermines its importance for understanding the nature of a water right.[83] For example, Anderson incorrectly argues that the usufruct "is an essential construct in the civil law of continental Europe, which is followed in the United States only by the State of Louisiana."[84] No, the ancient idea of the usufruct is also followed in water-rights cases outside Louisiana, and it has a long history in American property law, as this discussion has already shown, including its Roman meanings. Anderson also does not examine the relationship between the various ancient doctrines governing water as a public resource when issuing his conclusions regarding the usufructuary nature of water.[85] In other words, these oversights undermine Anderson's view in favor of an

possession of a water right because use defines possession for a usufructuary right."); *see also In re* Application A-15738 of Hitchcock & Red Willow Irrigation Dist., 410 N.W.2d 101, 106 (Neb. 1987) ("The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Neb. Const. art. XV, § 5. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right.").

79. *See, e.g.*, Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144 (Cal. Dist. Ct. App. 1920).

80. *See id.* at 150.

81. *See* Anderson, *supra* note 27, at 462.

82. *See* Samuel C. Wiel, *Running Water*, 22. HARV. L. REV. 190 (1909).

83. *See* Anderson, *supra* note 27, at 487.

84. *Id.* at 491.

85. *See id.* at 487.

independent possessory right in water distinct from the usufruct, which is wrong because it undercuts the public's ownership of the water resource from beginning to end.

One of Anderson's analogies shows how he misconstrues the nature of a usufruct. He cites to apples and apple pie so as to teach us about the nature of a water right:

> The mind that can clearly see that the fruit of an apple tree is an apple, and not apple pie, may yet have difficulty accepting that the fruit of the watercourse is water and not water beneficially used. But the truth is, this kind of legal disjuncture is quite ordinary, and examples of it abound.[86]

In other words, the usufruct covers the right to pluck the fruit from the apple tree, and once the apple has been plucked, it is no longer usufructuary, but possessory, or it amounts to an act of ownership. If turned into apple pie, it is something entirely different, divorced from both the usufruct and the ownership interest. At that point, it has become a benefit and a legal requirement flowing from the initial water right. For its creative attempt to sever the chain in the public's ownership of its *res* by envisaging the transformation of the *res* into something else when combined with the individual's labor, Anderson's view certainly has Lockean appeal—the apple, it seems, can be transformed into apple pie. But that is the end of its appeal. When water is diverted from its source and is used beneficially in irrigation, for example, water has not been transformed into something else; it is not the equivalent of an apple becoming apple pie, but the proverbial apple, unchanged. Similarly, when water is removed from its source and is used for household uses, the nature of the *res* is untransformed, and the owner of that resource, the public, can still identify its property as being the same from the point of diversion to the point of consumption, where it is beneficially used. In other words, if we are in the business of analogizing water to apples, which we should not be, an apple is an apple is an apple, and it always belongs to the public.

The usufructuary right to water thus encompasses two understandings. The first envisions a unified use from diversion to beneficial use and the second envisages a trifurcated approach. The second is wrong, and the first is correct.

86. *Id.* at 497.

B. The American Afterlife of Roman Water Law

The usufruct is merely the beginning of the discussion of a water right. A tangle of related water doctrines has also played a part in judicial and scholarly understanding of water in the United States and its relationship to the public and the private. The oldest of the doctrines also come from Roman law. I, therefore, begin this Section first with the historical importance of water as *res publicae* and *res communes* before examining the more recent understanding of water as *publici juris*.

1. Res Publicae *and* Res Communes

A number of influential Roman sources underscore the public dimension of water. Roman law distinguished, in relevant part, between *res publicae* and *res communes*.[87] *Res publicae* are those "Things Belonging to the Public and Open to the Public by Operation of Law."[88] Perennial rivers and adjoining lands—as well as bridges, harbors, ports, and roads—were *res publicae* under Roman law, primarily for military reasons.[89] Given concerns about "congestion and underinvestment" in *res publicae*, the public was required to conduct itself in a disciplined manner when using the resource, and the public was subject to the "customary rules of usage."[90] Given oversight demands made by the *res publicae*, they required government supervision to keep things in order.[91] Even with the public dimension, *res publicae* were susceptible to private ownership.[92] The United States has continued this tradition and has similarly made many resources *res publicae* for commercial reasons.[93]

Res communes, on the other hand, are those things open to all but incapable of being objects of private property, since they cannot

87. *See* Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROB. 89 (2003); *see also* Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 801 (1979).

88. Rose, *supra* note 87, at 96.

89. *See id.* at 96–97.

90. *See id.* at 99.

91. *See id.*

92. *See id.*

93. *See id.* at 97.

be captured.[94] They are, in essence, resources common to all. *Res communes* was thus public property not the object of commerce and did not absolutely belong to the people but was used for public purposes.[95] As Justinian's *Institutes* provide, "[b]y natural law, these things are the common property of all: air, running water, the sea, and with it the shores of the sea."[96] Such things can only "be enjoyed and *used* by everyone" in their parts but not in their totality.[97] The medieval English jurist, Bracton, pursues this insight when he conceives of running water, the seas and shores, and the air as *res communes*.[98] Sixteenth-century English law similarly treated injury to the forest as an injury to *res communes*, actionable by those having rights to the forest's use.[99]

Nuisance theory and exclusive ownership subsequently replaced the action for *res communes* both in English law and American law.[100] In American law, the exclusive-ownership theory encouraged commercial exploitation of resources that were once part of the common patrimony embodied by *res communes*.[101] American law nevertheless resuscitated *res communes* when the state proved "excessively generous" to private industry, that is, it always upheld the public dimension of the property.[102] Recent case law has, therefore, continued to refer to resources that are common to all, such as air and the sea, as *res communes*.[103] In the end, "[t]he concepts of *res communes* and *res publicae* actually were very similar. But *res*

94. *See id*. at 93; *see also* Coquillette, *supra* note 87, at 800 (reinforcing the idea that *res communes* are incapable of being exclusively owned).

95. *See* Coquillette, *supra* note 87, at 801 n.187.

96. *Id.*

97. *Id.* (emphasis added).

98. *See id.* at 804.

99. *See id.*

100. *See id.* at 804, 807.

101. *See id.* at 809 (citing MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 34 (1977)).

102. *See id.*

103. *See, e.g.*, Air-Serv Grp., LLC v. Commonwealth, 18 A.3d 448, 453 (Pa. Commw. Ct. 2011) ("While air is a material substance, air has been historically treated as *res communes*, which means '[t]hings common to all; things that cannot be owned or appropriated, such as light, air, and the sea.'"); *see also* Bd. of Trs. of Internal Improvement Tr. Fund v. Webb, 618 So. 2d 1381, 1383 (Fla. Dist. Ct. App. 1993) (quoting Apalachicola Land & Dev. Co. v. McRae, 98 So. 505 (Fla. 1923)) (proposing that American Spanish possessions provided that lands under navigable waters were *res communes*); Campion v. Simpson, 659 P.2d 766, 776 (Idaho 1983) (quoting Walbridge v. Robinson, 125 P. 812 (Idaho 1912)) (proposing that "wild animals, fish, water, gas, light, and air" are *res communes*).

publicae carried the additional implication of state ownership of the concerned property. *Res publicae* constituted 'public property such as theatres, market places, rivers, harbors, etc. . . .'"[104] Therefore, both *res publicae* and *res communes* underscore the public dimension of water with *res communes* enjoying a longer afterlife in American law.

2. *Water as* Publici Juris

Water as *res communes* gave rise to the idea of water as *publici juris*, which embraces the same idea as *res communes*. *Publici juris* refers to a resource the public has a right to enjoy.[105] In its deployment of *publici juris*, an English case anticipates American water law's view of the public dimension of a water right.

The English case of *Williams v. Morland* involved an upstream defendant who built a dam and prevented stream water from reaching the downstream plaintiff in the natural and usual manner.[106] The issue was whether the plaintiff could succeed without an allegation of the defendant's interference with the plaintiff's use of the water.[107] In upholding the jury's verdict that the plaintiff had not suffered an injury, the King's Bench paid attention to the nature of water.[108] "Flowing water," the court reasoned, "is *publici juris*."[109] When "it is appropriated by an individual, his right" to it extends no farther than the benefit he immediately receives from it.[110] Subject to the exercise of that right, the remains are *publici juris*.[111] If an individual had an exclusive right to enjoyment of waters of the stream, that individual takes it "in derogation of the primitive right of the public."[112] Since the plaintiff had not appropriated the water and still had enough water to use as a member of the public, he had suffered no injury.[113] *Williams v. Morland* was cited by over two dozen nineteenth-century American cases, including the foundational California case, *Irwin v. Philips*, discussed above.[114]

104. Coquillette, *supra* note 87, at 802 n.195 (citations omitted).
105. *Id.*
106. Williams v. Morland (1824) 107 Eng. Rep. 620, 620 (KB).
107. *See id.*
108. *See generally id.* (showing that each judge discussed his view of the nature of running water as property).
109. *Id.* at 621.
110. *Id.*
111. *See id.*
112. *Id.*
113. *See id.*
114. *See* Irwin v. Phillips, 5 Cal. 140, 145 (1855).

More recent cases pursuing the notion of the *publici juris* have similarly indicated that running water is *publici juris* and, as such, is property common to all.[115] Running water, like air and light, is not capable of being private property, and an appropriator does not take title to the water.[116] Courts have also stated that *publici juris* means that riparian landowners must take the competing rights of other riparians into consideration, and no riparian landowner has "an absolute right to insist that every drop of the water flow past his land exactly as it would in a state of nature."[117] Significantly, the riparian landowner enjoys "only a right to the benefit and advantage of the water flowing past his land" consistent with the rights of others.[118] *Publici juris* means that water is within the state's regulatory power.[119]

In sum, *publici juris*, *res communes*, and *res publicae* highlight the powerful and ancient claim of the public's interest in water. Building on the nature of the usufruct, these doctrinal elements hold that no water right is absolute, and the public may intervene in matters concerning water.

C. Public Ownership of Water

Drawing implicitly on these doctrines and previous case law, a number of state constitutions and statutes have enshrined the public's interest in water. Some state laws provide that the public owns the

115. *See, e.g.*, *In re* ʻĪao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition, 287 P.3d 129, 181–82 (Haw. 2012) (Acoba, J., concurring) (citations omitted) (quoting McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1339 (Haw. 1973)) ("Consequently, '[n]o one may acquire property to running water in a natural watercourse; [] flowing water was *publici juris*; and [] it was common property to be used by all who had a right of access to it, as usufruct of the watercourse.' Therefore, water, by its nature, is inherently intended for public use, and not subject to ownership by private interests to the exclusion of the public.").

116. *See* Keating v. Pub. Power Dist., 713 F. Supp. 2d 849, 857 (D. Neb. 2010) (quoting Northport Irrigation Dist. v. Jess, 337 N.W.2d 733, 738 (Neb. 1983)); Frenchman Valley Irrigation Dist. v. Smith, 91 N.W.2d 415, 428 (Neb. 1968) ("The corpus of running water in a natural stream is not the subject of private ownership. 'Such water is classed with light and the air in the atmosphere. It is *publici juris* or belongs to the public . . . .'"); *id.* ("The appropriator of water of a stream does not acquire ownership of such water.").

117. Koch v. Aupperle, 737 N.W.2d 869, 879 (Neb. 2007) (quoting Meng v. Coffee, 97 N.W. 713, 714 (Neb. 1903)).

118. *Id.* (quoting *Meng*, 97 N.W. at 714).

119. *See* Klamath Irrigation Dist. v. United States, 277 P.3d 1145, 1154 n.10 (Or. 2010) (citing the Desert Land Act of 1877 for its provision that non-navigable waters in the federal public domain are "subject to the plenary control of the . . . states").

waters in the state, while others indicate that the people own the waters in the state. The language is susceptible to confusion. Is "people" the same as "public"? Is the language merely a nod to the confusion of the law writers? Is such language merely hortatory?

A number of western laws implicitly acknowledge that water is imbued with the attributes of *res communes*, *res publicae*, and *publici juris*.[120] Arizona's statutes, for example, provide that water from "all sources" belongs to the public and that such sources "are subject to appropriation and beneficial use."[121] California's Water Code makes "[a]ll water within the State . . . the property of the people of the State," subject to appropriation.[122] More significantly, California's constitution provides for "public use" of appropriated water "subject to the regulation and control of the State, in the manner to be prescribed by law."[123] The public-use right in California is expansive, encompassing three state constitutional provisions, which were drafted as a bulwark against the "peddling away [of the] public interest."[124] California has also codified a version of the public trust doctrine.[125] Indeed, the Supreme Court of California has elevated the public trust doctrine to "a curious and unique hybrid, borne purely of customary law but constitutional in character."[126]

Other states similarly provide that water belongs to the public or to the people. Colorado's constitution provides that unappropriated water in every natural stream in the state is "the property of the

120. I am grateful to Bret Adams et al. and Frank J. Trelease, whose overviews of state constitutions has greatly informed much of my discussion in this part. *See generally* Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73 (2002); Trelease, *supra* note 22, at 640.

121. Ariz. Rev. Stat. Ann. § 45-141 (2019). Arizona courts appear to have read the statutory provision to allow private appropriation of water. *See, e.g.*, Neal v. Hunt, 541 P.2d 559, 565 (Ariz. 1975).

122. Cal. Water Code § 102 (West 1971).

123. CAL. CONST. art. X § 5.

124. Adams et al., *supra* note 120, at 87.

125. *See* Friends of Martin's Beach v. Beach, 2014 Cal. Super. LEXIS 12477, at *24 (Sup. Ct. Cal. 2014) (reading Art. 10 § 4 of the state constitution as "a restatement or codification of the preexisting public trust doctrine as it relates to the tidelands and what rights flow from the tidelands").

126. Barton H. Thompson Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 877 (1996); *see also* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 742 (Cal. 1983) (holding, inter alia, that the state has "an affirmati[ve] . . . duty . . . to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust").

public," and is "dedicated to the use of people of the state, subject to appropriation."[127] Idaho's constitution provides that waters appropriated for private uses are also deemed a "public use, and subject to the regulations and control of the state in the manner prescribed by law."[128] Montana's constitution provides that beneficial use of appropriated water is a "public use."[129] Texas's Water Code implies that all water but groundwater is the "property of the state."[130] In Texas, such waters are "waters of the state," which are "held in trust for the public."[131] Wyoming's constitution makes "[t]he water of all natural streams, springs, lakes or other collections of still water . . . the property of the state."[132] Other states have similar provisions.[133]

Courts have interpreted such language in a number of ways. Courts have read the language as providing a state with power to grant public access to waters that would otherwise be closed to the public.[134] Courts have read the language to empower the state to decide on permitting systems regarding water distribution.[135] Courts have interpreted the language to authorize ballot initiatives that would amend the state constitution to include a version of the public trust doctrine.[136] They have interpreted such language to empower state citizens, as members of the public, to appropriate such water and put

127. COLO. CONST. art. XVI § 5.

128. IDAHO CONST. art. XV § 1.

129. MONT. CONST. art. IX § 3(2).

130. Tex. Water Code Ann. § 11.021 (West 1977) ("The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.").

131. *Id.* § 11.0235.

132. WYO. CONST. art. VIII § 1.

133. *See* Trelease, *supra* note 22, at 642 (discussing North Dakota, Nebraska, Nevada, New Mexico, South Dakota, Oregon, Utah, and Washington).

134. 2 WATERS AND WATER RIGHTS § 30.04 (Amy K. Kelley, ed., 3d ed. 2019) (discussing New Mexico, Wyoming, Idaho, Montana, and South Dakota).

135. *See, e.g.*, Tulare Lake Basin v. United States, 49 Fed. Cl. 313, 318 (2001) ("While under California law the title to water always remains with the state, the right to the water's use is transferred first by permit to DWR, and then by contract to end-users, such as the plaintiffs."); *see also* Shelley Ross Saxer, *The Fluid Nature of Property Rights in Water*, 21 DUKE ENVTL. L. & POL'Y F. 49, 79 (2010).

136. *See, e.g., In re* Title, Ballot Title, & Submission Clause for 2011–2012 #3, 274 P.3d 562, 569 (Colo. 2012); *see also* Bruce C. Walters, Note, *Student Symposium: A Comparative Discussion of the Public Trust Doctrine: Mono Lake and Groundwater in California, Citizen Initiative and Legal Adaptation in Colorado*, 18 U. DENV. WATER L. REV. 455, 459 (2015).

it to a beneficial use.[137] They have rejected the argument that such language means that the state has absolute sovereignty over the waters within its boundaries in disputes between the state and federal governments.[138] Courts have also relied on such language in determining whether a water right has been abandoned by non-use or lost through forfeiture.[139] Thus, such language has been read to uphold the state's police power when it comes to water, subject to certain limitations.

For their part, commentators have argued that such language is "meaningless."[140] They indicate that federal case law helps us understand that because water, by its very nature, is "incapable of ownership, it is meaningless to declare that it is 'owned by the people.' One might as easily (and idly) say that the air is 'owned' by the people."[141] For such commentators, the language of public ownership in water law is, thus, merely an alternative means of declaring "that there is a strong public interest in the resource and it will readily be the subject of the state's protection and stewardship in the interest of the people in the exercise of sovereign or governmental power."[142] In other words, the state may regulate uses of water within its boundaries and it may act as trustee of its waters.[143]

The language of public ownership in state law therefore provides a state with at least two options. The first is the California option, which identifies a strong public interest in water, and it underscores the state's police power to act as a trustee of water as a resource.[144] The

137. Colorado courts, for example, have read the constitutional provision making water public property to uphold the public's right to appropriate water under the constitution. *See, e.g.*, American Water Dev., Inc. v. City of Alamosa, 874 P.2d 352, 369 (Colo. 1994); *see also* People v. Emmert, 597 P.2d 1025, 1028 (Colo. 1979) ("This provision of the Colorado Constitution, upon which the defendants so heavily rely, simply and firmly establishes the right of appropriation in this state.").

138. *See* Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), *overruled in part by* United States v. Denver, 656 P.2d 1, 16–17 (Colo. 1982).

139. *See, e.g.*, *In re* Manse Spring & Its Tributaries, 108 P.2d 311, 316 (Nev. 1940).

140. *See* Trelease, *supra* note 22, at 643; Anderson, *supra* note 27, at 484 n.80.

141. Anderson, *supra* note 27, at 484 n.80 (emphasis omitted).

142. *Id.* (relying on Trelease, *supra* note 22).

143. Trelease, *supra* note 22.

144. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 716 n.11, 717–18 n.14, 719–21, 724, 729, 732 (Cal. 1983) (issuing a peremptory writ of mandate and holding (1) that "plaintiffs have standing to sue to protect the public trust"; (2) this is not an advisory opinion but a case with a "hotly contested current controversy" (justiciability interests (the public interest) require that the case be allowed to proceed); (3) the public trust extends to non-navigable waterways whose

language of public ownership in a state like California is the language of administrative and judicial discretion, subject to Takings and other constraints, since it is up to the regulatory agency and courts to enforce the state's water code. The second view is the Colorado option, which, while apportioning responsibility for enforcement of the water code between the state engineer and the water court, reads the language of public ownership to privilege citizen appropriation of unappropriated waters. California's view is thus more capacious in its embodiment of the public dimension of a water right. It is, therefore, unsurprising that Colorado has not formally adopted the public trust doctrine, which I discuss further below.[145] The difference between the two states' approaches goes to the extent of the state's police power when it comes to water as property. In this Article, I argue that the sounder view is California's, which is consistent with the history of the public element in water law.

D. Doctrines of Public Ownership

The most prominent view of water as a limited property right is advanced by Joseph Sax. Sax argues, and this Article pursues the same insight, that although water rights are subject to constitutional Takings considerations, they are more limited in scope than other property rights since they are subject to a number of public considerations that courts and regulators might deploy to restrict them.[146] Legal doctrines imbued with a public aspect include the public trust, the federal navigation servitude, state navigable waters, the public commons, and the recognized uses to which water might be put in both riparian and appropriation jurisdictions.[147] The legislature might curtail water rights in the name of environmental protection, efficient use of natural

diversion leads to damage in a navigable waterway; (4) the public trust protects scenic and recreational uses; (5) "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries" (6) "[t]he public trust doctrine and the appropriative water rights system are parts of an integrated system of water law;" (7) plaintiffs have a remedy before the state regulatory agency, the Water Board; and (8) courts have concurrent jurisdiction with the administrative agencies such that suit may be brought in court without exhausting administrative remedies).

145. *See* Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came From, and Why Colorado Does Not (and Should Not) Have One*, 16 U. DENV. WATER L. REV. 47, 48 (2012).

146. *See* Sax, *supra* note 25, at 260.

147. *See id.* at 260, 271.

resources, and efficient administration of water resources, which is not so for many other property rights.[148]

In response to Sax, other commentators have insisted that water rights are compensable property rights, except in California which has a *sui generis* approach in cases involving the public trust.[149] They insist "that attempts to preserve ecological values by eviscerating water rights are incoherent and unwise."[150] I now turn to a brief exploration of the current doctrines underscoring public ownership of water and the limitations placed on private ownership as a result.

1. *The Public Trust Doctrine*

The public trust doctrine holds that a state, as sovereign, has a fiduciary duty on behalf of its general public to safeguard the state's natural resources.[151] In a few states, like California, the public trust doctrine is constitutional.[152]

Illinois Central Railroad Co. v. Illinois, a nineteenth-century federal case, greatly influenced the development of the public trust doctrine in the United States.[153] In that case, in exchange for fixed payments, the State of Illinois granted Illinois Central Railroad title to the submerged lands under Lake Michigan in Chicago, which the railroad subsequently developed.[154] The state legislature then repealed the statute permitting the grant of title to the railroad company, which the railroad company disobeyed.[155] The Supreme Court of the United States upheld the state's right to repeal the grant.[156] As Alexandra B. Klass has noted, "*Illinois Central* stands as an early invocation of the public trust doctrine to prevent a state from placing public trust lands into private hands for short-term economic gain to the detriment of the long-term preservation of the resource for the public."[157]

148. *See id.* at 262, 267.
149. *See* Shepard, *supra* note 25, at 1068–69.
150. *Id.* at 1070.
151. *See* 2 WATERS AND WATER RIGHTS, *supra* note 134, at § 30.02.
152. *See id.*; TEX. WATER CODE § 11.021.
153. *See* 2 WATERS AND WATER RIGHTS, *supra* note 134, at § 30.02.
154. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 448 (1892).
155. *See id.* at 449.
156. *See id.* at 464.
157. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 705 (2006); Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 14 (2018) ("The *Illinois Central* decision confirmed that the PTD was a sovereign governmental

Citing extensively to *Illinois Central* for the proposition that the state has an "incontrovertible" trust obligation that it may not "abdicate," California's seminal public trust opinion, *National Audubon Society v. Superior Court*, revolutionized the doctrine's application in the state.[158] *National Audubon* involved a lawsuit by the National Audubon Society against the Department of Water and Power of the City of Los Angeles (DWP) for the environmental degradation of Mono Lake due to DWP's depletion of the Lake.[159] The question for the court was whether the appropriative water rights regime subsumed the public trust doctrine or if they functioned independently of each other.[160] The Superior Court granted summary judgment to DWP and indicated its intent to hold that the public trust doctrine was subsumed by the prior-appropriation-water-rights doctrine and that administrative exhaustion was required.[161] The California Supreme Court held, inter alia, that the public interest made the case justiciable, that "[t]he public trust doctrine and the appropriative water rights system are parts of an integrated system of water law," and that the public trust extends to non-navigable waterways whose diversion leads to damage in a navigable waterway in the state.[162] As such, the state had a duty "to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[163]

Consistent with this opinion, the public trust doctrine can operate as a defense against constitutional Takings claims.[164] The California State Water Board has, thus, "reject[ed], based on the public trust doctrine and other background principles of California law, arguments for financial compensation by water users whose water licenses were

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obligation that was largely inalienable, seemingly universal, and protected by searching judicial review.").

158. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983); Owen, *supra* note 33, at 1099. Even before the *National Audubon* opinion, California was on the "cutting edge" of the doctrine. *See id.* at 1110.

159. *See Nat'l Audubon Soc'y*, 658 P.2d at 716.

160. *See id.* at 717.

161. *See id.* at 717–18.

162. *Id.* at 717–18 n.14, 732.

163. *Id.* at 724.

164. *See* Klass, *supra* note 157, at 739; Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, 61 (2011); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 357–58 (1998).

modified by the Board to provide improved protection for trust resources."[165] Under the public trust doctrine, the public may also fish and navigate state waters without payment of compensation.[166] Nevertheless, legislatures "can confiscate private property so long as they pay just compensation."[167] That is, in some cases, the state may use the doctrine without compensation and, in others, like the state's eminent-domain rights, application of the doctrine is subject to just compensation.[168] The state might also rely on the public trust doctrine in the age of climate change to limit private water rights.[169]

Water rights are, therefore, a *sui generis* form of property rights. It might even be said that the "*National Audubon* Mono Lake case and its progeny show that water 'rights' are not property, but a kind of revocable, usufruct privilege that is and always has been subject to government redefinition to reflect the changing needs of the citizenry—to reflect changing notions of progress."[170] Indeed, the public trust doctrine is a descendant of *res communes*, that is, such rights "were simply physically incapable of being converted to private ownership. Once the *res communes* became susceptible to private ownership, but as yet unappropriated (so-called *res nullius*), the potential limitations on private ownership under the public trust doctrine became relevant."[171] The public trust doctrine imposes limitations on the nature of water rights, and it marks as subordinate the private right to use the public's resource.

2. *The Navigation Servitude*

Linked to the public trust doctrine is the navigation servitude. The navigation servitude identifies the federal government's right to

165. John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 954 (2012).

166. *See* 2 WATERS AND WATER RIGHTS, *supra* note 134, at § 61.04.

167. J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence*, 45 U.C. DAVIS L. REV. 915, 918 (2012).

168. *See* Kavounas, *supra* note 33, at 1100-01.

169. *See* Elise O'Dea, Note, *Reviving California's Public Trust Doctrine and Taking a Proactive Approach to Water Management, Just in Time for Climate Change*, 41 ECOLOGY L.Q. 435, 435 (2014).

170. David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 762 (2008); *see also* Chloe Angelis, *The Public Trust Doctrine and Sea Level Rise in California: Using the Public Trust to Restrict Coastal Armoring*, 19 HASTINGS W.-N.W. J. ENVTL. L. POL'Y 249, 267 (2013).

171. Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENVTL. L. 287, 320 (2010).

act in the public's navigation interest against riparian landowners.[172] The navigation servitude likely arose out of the public trust doctrine, and it protects the public's navigational interest against Takings concerns.[173] It also shares the same history as the public trust doctrine.[174] Both doctrines are medieval in origin, and both burden private property with the sovereign's right to uphold the public's rights.[175] Indeed, by the fifteenth century, English authorities noted that the sovereign owned the coast and that the people's right to fish could not be impeded.[176] Citizens could thus sue for the removal of a "nuisance" or "encroachment" to the public right to fish or navigate the sovereign's waters.[177] As such, an ancient public right to water has existed and has been vested in the sovereign, and subsequently in the quasi-sovereign at the state level, under the navigation servitude.

The English sovereign's power to act in the public's navigation interest subsequently passed into American law. Under the Federal Constitution's Commerce Clause, the navigation servitude permits the federal government to regulate waterways up to the high-water mark, without having to pay affected private parties under the Takings Clause of the Fifth Amendment—known as the "No Compensation Rule."[178] The federal government may act in the public interest to protect, for example, public navigation of waterways against riparian owners because such waters are "the public property of the nation."[179]

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172. *See* Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643, 1676 (2013).

173. *See* Benjamin Longstreth, Note, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and its Origins in State Public Trust Doctrine*, 102 COLUM. L. REV. 471, 472 (2002).

174. *See* James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. COLO. L. REV. 331, 361–62 (1998).

175. *See* 3 WATERS AND WATER RIGHTS, *supra* note 134, at § 61.04.

176. *See* Longstreth, *supra* note 173, at 481.

177. *Id.*

178. Chris A. Shafer, *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 WAYNE L. REV. 9, 22 (1999) (discussing the "no compensation rule"); Longstreth, *supra* note 173, at 473; *see also* Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979) (giving information on the Commerce Clause power); 2 WATERS AND WATER RIGHTS, *supra* note 134, at § 35.02 (discussing the "no compensation rule"); Eileen Monahan, Note, *The Navigational Servitude: The Role of a Categorical Exception Within a System of Ad-Hoc Review*, 40 COLUM. J. ENVTL. L. 359, 361 (2015).

179. Longstreth, *supra* note 173, at 483 (quoting Gilman v. Philadelphia, 70 U.S. 713, 725 (1866)); *see Kaiser Aetna*, 444 U.S. at 173; Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201 (1967); United States v. 30.54 Acres of Land, More or Less, 90 F.3d 790, 793 (3d Cir. 1996); Hines, Inc. v. United States, 551 F.2d 717,

The federal government may make changes to a body of water, and it may "destroy or devalue property."[180] No right to compensation exists where the flow of a body of water is affected so as to protect a navigable waterway, where the bed or the banks of the navigable waterway are affected, and where access to a navigable waterway is affected.[181]

Indeed, a number of key cases are at the basis of this view. The first American case dealing with navigation is *Gibbons v. Ogden*, which overturned as invalid a state law regarding navigation and located congressional power over navigation in the Commerce Clause under Article 1, Section 8, Clause 3, of the Constitution.[182] *Gilman v. Philadelphia* then cited extensively to *Gibbons* and rejected a riparian landowner's request to enjoin the construction of a bridge built for "public convenience" that would affect private property values around a navigable river on which coal was transported.[183] Subsequently, *Gibson v. United States* upheld the No Compensation Rule in a case in which a private property interest was affected when the federal government built a dike on a navigable river.[184] There, the Supreme Court held that "riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard."[185] Indeed, more recent cases have upheld this insight and have stated that the law is "largely settled."[186] They have held that the public right of access to private property under the navigational servitude is subject to payment of consideration in *some* cases.[187]

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720 (6th Cir. 1977); *see also* Robin Kundis Craig, *What the Public Trust Doctrine Can Teach Us About the Police Power, Penn Central, and the Public Interest in Natural Resource Regulation*, 45 ENVTL. L. REV. 519, 537 (2015).

180. Shafer, *supra* note 178, at 22; *see also* 2 WATERS AND WATER RIGHTS, *supra* note 134, at § 35.02 (discussing New Mexico, Wyoming, Idaho, Montana, and South Dakota); Rasband, *supra* note 174, at 361.

181. *See* 2 WATERS AND WATER RIGHTS, *supra* note 134, at § 35.02.

182. *See* Gibbons v. Ogden, 22 U.S. 1, 196 (1824) (explaining Congress has "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution").

183. *Gilman*, 70 U.S. at 720, 732.

184. *See* Gibson v. United States, 166 U.S. 269, 272 (1897).

185. *Id.* at 276.

186. Kaiser Aetna v. United States, 444 U.S. 164, 177, 180 (1979); *see also* 2 WATERS AND WATER RIGHTS, *supra* note 134, at § 35.02.

187. *See Kaiser Aetna*, 444 U.S. at 177.

As Sax observes, "[t]he presence of the navigation servitude effectively reduces an owner's property interest to a usufruct."[188] Like the ancient doctrines before it, the navigational servitude thus shows that the public aspect may set aside private rights concerns when those interfere with the public's right to navigation.

3. *Navigable Waters*

At the state level, the public dimension of water law is pursued in the doctrine of navigable waters. Under English law, the crown retained rights to the public lands beneath navigable waters.[189] The public rights associated with such lands "thereafter belonged to the state in trust for the people."[190] Under the doctrine of the equality of the states, which holds that each state entered the union on the same footing and with the same rights as other states, absent congressional expression to the contrary, each state received title to the navigable waters within its boundaries, and such waters have since been governed by state law.[191]

The California constitution and a number of state statutes underscore the public aspect of the navigable waters doctrine.[192] Article 10, Section 4, of the California state constitution provides that private owners of navigable waters may not exclude access to such water "whenever it is required for any public purpose," that "free navigation" is not to be impeded, and that the legislature must "give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof."[193] The California Harbor and Navigation Code provides that "[n]avigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of

188. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1452 n.91 (1993); *see generally* Shepard, *supra* note 25 (discussing navigation servitude and water property rights).

189. *See* 1 WATERS AND WATER RIGHTS, *supra* note 134, at § 6.03; *see also* GETCHES, *supra* note 10, at 218.

190. *See* 1 WATERS AND WATER RIGHTS, *supra* note 134, at § 6.03.

191. *Id.*

192. For bringing many of the laws I cite here to my attention, I am grateful to the Western Waters Canoe Club. *See* Lawrence M. Johmann, *1.3.2.1 WWCC Law Summary Fact Sheet: Citizens' Rights to California Waterway Use*, W. WATERS CANOE CLUB (1994).

193. CAL. CONST. art. X, § 4.

navigation and of such transportation."[194] The California Public Resources Code prohibits the sale, lease, or rental of public lands abutting navigable waterways that are otherwise inaccessible without reserving a public easement "to the people of the State."[195] The California Public Resources Code also grants the state commission "exclusive jurisdiction over all . . . of the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits."[196] The California Health and Safety Code prohibits the placement, depositing, or dumping of any garbage "in or upon the navigable waters of this state."[197] California thus upholds the public dimension of its navigable waters, further showing the range of rights the people of the state enjoy in the area of water rights. Significantly, the public trust doctrine governs the navigable waters of the state.[198]

Therefore, a number of water law doctrines, from the public trust doctrine to the navigability and navigable waters doctrines, underscore the public limitation impressed on each usufructuary water right and the public's dominant right over such a water right.

E. States' Police Power

Implicit in states' exercise of their power to overlay a water right with a public dimension is the general discretion states enjoy in environmental matters. The Supreme Court of the United States has upheld states' police power to protect their environmental interests.[199] As early as 1907, Justice Holmes held for the majority in *Georgia v. Tennessee Copper* that an aggrieved state could, as a quasi-sovereign, obtain an injunction to prevent a private party in an adjoining state from emitting noxious pollutants into its territory, where the pollutant destroyed crops, forests, and orchards.[200] The injunction issued even if

194. CAL. HARB. & NAV. CODE § 100 (West 1937).

195. CAL. PUB. RES. CODE § 6210.4 (West 1941).

196. *Id.* at § 6301.

197. CAL. HEALTH & SAFETY CODE § 117480 (West 1996).

198. Cal. Water Curtailment Cases, No. 2015-1-CV-285182, slip op. at 8 (Cal. Super. Ct. Apr. 3, 2018) (quoting United States v. State Res. Control Bd., 227 Cal. Rptr. 161, 171 (Cal. Ct. App. 1986)) ("In addition, the state's navigable waters are subject to the public trust doctrine, providing that 'the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders.'"). As will become clear, I rely extensively on the opinion for its synthesis and explanation of relevant history and law.

199. *See* Sax, *supra* note 25, at 274–77. While grateful to Sax for drawing my attention to these cases, the case summaries that follow are my own.

200. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230, 236–37 (1907).

the state's ownership of the affected land was negligible and thus its own economic losses were negligible.[201] Such a result was permissible because as a quasi-sovereign:

> the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.[202]

Tennessee Copper's recognition of a quasi-sovereign's ability to protect its public interests was taken up in the seminal climate change case, *Massachusetts v. Environmental Protection Agency*, where Justice Stevens relied on the language above to hold for the majority that states had Article III standing to challenge federal regulatory actions affecting their environmental interests.[203]

Almost a year after *Tennessee Copper*, Justice Holmes held again for the majority that, as a quasi-sovereign, a state's police power over its rivers could defeat the constitutional due process and contractual rights claims, among others, brought by a riparian landowner within the state wishing to transport water out of the state in violation of a statute.[204] That case, *Hudson County Water Co. v. McCarter*, allowed Justice Holmes to mirror the public interest insights he offered in *Tennessee Copper*:

> [I]t appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.[205]

Tennessee Copper and *Hudson County* can thus be read to indicate that, as a quasi-sovereign acting in the public interest, the state enjoys constitutional protection in the exercise of its police power regarding certain environmental interests, as against competing constitutional and private property claims. In other words, private assertions of property rights in such cases are overlaid with a veneer of public

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201. *See id.*
202. *Id.* at 237.
203. *See* Massachusetts v. EPA, 549 U.S. 497, 518–20 (2007).
204. *See* Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 354, 357–58 (1908).
205. *Id.* at 356.

limitation on which a state may rely to intervene in specific cases, subject, in certain cases, to payment of compensation.[206] As a recent California water rights case noted, "[a]ll water rights [in the state], even riparian and pre-1914 rights, are subject to the police powers of the state."[207]

I now turn to what a state like California should do, in a moment of public emergency, as it relies on such doctrines.

II. WATER AND PUBLIC EMERGENCIES

Here, I begin by proposing a constitutional amendment that would make explicit the public's ownership of water, which would allow the public to regulate uses of its property. Just in case the constitutional amendment fails, a legislative enactment is proposed. While similar arguments have been made by other commentators, this Part expands upon their insights, and it considers how such proposals might have helped in determining the outcome of the California drought case with which I began the Article.

A. California's Problem

Here, I focus on the specific water-rights case that arose during the longest drought in California's history—the case with which I began the Article. The case not only dramatizes the role of the State Water Board in a public emergency, but it also permits the application of the concepts that I have explored in the Article so far. I begin with an overview of the State Water Board's statutory power and function, its response during the public emergency—that is, a drought—and conclude with the constitutional and statutory responses that address the public nature of a usufructuary water right. As indicated in the introduction, very similar arguments have been made by other commentators.[208] Here, I expand upon their insights with a recent case in mind.

Established in 1913 to oversee the State's water resources and to permit the use of water, the State Water Board has seen its powers grow to encompass the supervision of reasonable use of water in

206. *See generally* James M. Olson, *Navigating the Great Lakes Compact: Water, Public Trust, and International Trade Agreements*, 2006 MICH. ST. L. REV. 1103 (2006) (discussing the public limitation on property rights).

207. Cal. Water Curtailment Cases, No. 2015-1-CV-285182, slip op. at 8 (Cal. Super. Ct. Apr. 3, 2018).

208. *See supra* note 25 and accompanying text.

California, as well as action in the public interest.[209] Its enabling statute mandates the "efficient administration" of waters in the state, including the exercise of related "adjudicatory and regulatory" functions."[210] Since its work is also quantitative, involving the identification of the amount of water available for appropriation and the determination of who has superior rights to available water, its enforcement function is limited.[211] The Board is empowered to prevent waste of the state's water resources.[212] When determining the order of priority in water-rights matters, the State Water Board's determinations are subject to the Superior Court's approval.[213]

The longest drought in California's history led to a gubernatorial "command" that the State Water Board "put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages."[214] Following the directive, the State Water Board issued an informational notice of water shortages and of potential curtailments, which it followed with another document alerting rights-holders to possible water curtailments.[215] Subsequent legislation empowered the water agency "to require curtailment of diversions when water is not available under the diverter's priority of right," and the legislation required reporting of water use or the drafting of reports.[216] The governor announced a continuing state of emergency and empowered the State Water Board to take the necessary steps to conserve water in the state, consistent with the law.[217] Carving out exceptions for power generation and health and safety, the water agency curtailed water use for all post-1914 rights-holders, and indicated it might curtail older water rights as well.[218]

Fearing non-compliance and its effects on senior rights-holders, the State Water Board then adopted emergency regulations that cited to relevant statutory authority and allowed the water agency to act during the drought, including the issuance of curtailment notices.[219]

209. *Cal. Water Curtailment Cases*, slip op. at 8–9.
210. *Id.* at 9.
211. *See id.* at 9–10.
212. *See id.* at 10.
213. *See id.*
214. *Id.* at 11.
215. *See id.*
216. *Id.* at 12.
217. *See id.*
218. *See id.*
219. *See id.* at 13; *In re* Stanford Vina Ranch Irrigation Co., No. WR 2014-0028, 2014 Cal. ENV LEXIS 148, at *58 (Sept. 23, 2014) ("For the purposes of

Over nine thousand curtailment notices were issued before the emergency regulations permitting the curtailments subsequently expired, and an executive order by the governor regarding drought conditions and the water agency's role in addressing those conditions followed.[220] Without the cover of the (expired) emergency regulations, the State Water Board issued more curtailment notices requiring cessation of diversion of water, subject to penalties for non-compliance.[221] Irrigation districts affected by the notices asked the water agency to reconsider, and lawsuits followed. The Superior Court held that the Board lacked jurisdiction to curtail water rights without clear legislative authority and that the State Water Board violated the petitioners' due process rights.[222]

California's problem, or part of its "curse," is that it is prone to recurring droughts, which will result in further emergency conditions that require a response from the executive and the judicial branches.[223] California has experienced multi-year droughts of varying durations roughly six times over the past half century.[224] How, therefore, might the state's water agency effectively rely on the powerful line of water law doctrines reaching back to antiquity that underscore the public nature of a usufructuary water right?

Thus far, the State Water Board appears to rely mainly on its statutory authority and on gubernatorial cover, in the form of executive orders, before it acts in the public interest during a drought emergency. That makes sense, since the water agency must anticipate lawsuits from private rights-holders who may have political influence, and who have already succeeded in a case challenging the agency's curtailment orders during a moment of dire public emergency.[225] Since its members are appointed by the governor and are "confirmed by the

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adopting emergency regulations under Water Code section 1058.5, an emergency regulation is appropriate during specified dry years, or when the Governor has declared a drought state of emergency. This statute also clearly establishes that emergency regulations to adopt waste and unreasonable use regulations are an appropriate response to those conditions.").

220. *Cal. Water Curtailment Cases*, slip op. at 14–15; *see also In re* Rickland E. Vicini, No. WR 2015-0040-DWR, 2015 Cal. ENV LEXIS 43, at *8 (Nov. 3, 2015).

221. *See Cal. Water Curtailment Cases*, slip op. at 16.

222. *See id.* at 25.

223. *See generally* Kavounas, *supra* note 33.

224. *Id.* at 1073–74 ("California has experienced major droughts in 1966, 1968, from 1976 to 1977, from 1987 to 1992, from 2006 to 2009, and from 2011 to the present.").

225. *See Cal. Water Curtailment Cases*, slip op. at 38; Owen, *supra* note 33, at 1118.

Senate[, and they] run the State Water Board," the agency may also fear political pressure.[226] The agency further lacks the funding and resources it needs.[227] Thus, when the governor provides it with the cover it needs, it is likely emboldened to act in the public interest—but as narrowly as possible, given the constraints it faces.

And yet, at least since the foundational *National Audubon* opinion, the State Water Board has had the public trust as a legal tool available to it. A study of the State Water Board's decisions and orders between 1984 and 2010 by Dave Owen found that "[i]n approximately half of its decisions and approximately eight percent of its orders, the Board cites the public trust doctrine as a basis for environmentally protective restrictions on water use."[228] Significantly, the State Water Board almost never relies on the public trust doctrine alone, but appeals to statutory authority in concert because "[t]he doctrine is thoroughly integrated into the state's statutory and administrative environmental law system, and has accomplished little outside of it."[229] As such, the public trust doctrine is a "factor," a reason among many, on which the State Water Board relies to protect the environment.[230] On its own, the public trust doctrine is hardly "transformative," and it has "little discernable importance."[231] Indeed, since *National Audubon* is open to interpretation regarding the scope of the agency's trust duty, the State Water Board may also fear exceeding its grant of power since the public trust doctrine and the emphatic opinion giving rise to it have caused controversy.[232] What, therefore, might be done under the circumstances?

B. Solutions

A few responses are possible. Given the likelihood of further droughts, and the foreseeable necessity of a raft of future measures to forestall the strain on the state's water resources caused by another

226. Kavounas, *supra* note 33, at 1069.

227. *See* Owen *supra* note 33, at 1117 (noting that the agency is "chronically underfunded, even by state or federal agency standards" resulting in "an enormous backlog of unprocessed water rights applications").

228. *Id.* at 1105.

229. *Id.* at 1106.

230. *See id.* at 1140.

231. *Id.*

232. *See* O'Dea, *supra* note 169, at 442.

natural emergency, measures could now be taken into consideration.[233] Such measures need legislative input, given the limitations under which the State Water Board labors and the likelihood of fierce opposition by water rights-holders offended that their property rights are being infringed upon by the regulatory state.[234]

Here, I first look at a possible amendment to the California constitution before turning to a legislative solution that might help the State Water Board during the next environmental emergency, such as a prolonged and devastating drought.

1. *Constitutional Amendment*

At least one commentator has argued that the state constitution should be amended to respond specifically to water shortages. Such a constitutional amendment to Article X, Section 2, of the California constitution would underscore the state's "legal police power to take back all types of private water use rights, including but not limited to [existing water] rights . . . in times of water shortage or at any time the State determines that water in the State is not being put to beneficial and reasonable use."[235] The proposal is indeed important, insofar as it address a gap in the state constitution, which appears to not have any provisions addressing drought, water shortages, or a similar environmental emergency.[236] The proposed amendment is unlikely to pass, however, if it makes it to the ballot for electoral ratification, given its strong language that would "take back all types of private water use rights."[237] That is, the principle underlying the proposed constitutional amendment is sound and laudable—water does belong to the public—but the proposed amendment is problematic since it comes across as a state grab of private property.

A more acceptable proposal might explicitly identify the various rights of the stakeholders when it comes to water rights but make the

233. Indeed, other commentators have proposed similar measures, but here I give particular thought to their application to the facts of the issue at hand. *See supra* note 33 and accompanying text.

234. *See* Lisa M. Krieger, *California Drought: In Historic Step, Senior Water Rights Curtailed*, MERCURY NEWS, (June 12, 2015, 7:34 AM), https://www.mercurynews.com/2015/06/12/california-drought-in-historic-step-senior-water-rights-curtailed/ [https://perma.cc/4KAM-2VCH].

235. Kavounas, *supra* note 33, at 1110.

236. I ran searches in the California constitution Deering's California Codes Annotated on LexisNexis for "environ* /7 emergen*; public /7 emergen*; "water shortage"; and "drought" and did not get any relevant results.

237. Kavounas, *supra* note 33, at 1060 n.19.

usufructuary nature of a water right much clearer. The language of such a constitutional amendment—not a revision—could borrow from proposed changes to constitutions in other states.[238] Colorado, for example, considered a constitutional amendment that would have made the usufructuary nature of water quite explicit, as well as the public's interest in maintaining its interest in its property, whose use it confers upon private citizens. As the language of the proposed amendment provided: "THE USE OF WATER IS A USUFRUCT PROPERTY RIGHT, GRANTED BY THE PUBLIC TO WATER USERS, THAT SHALL REQUIRE THE WATER USE APPROPRIATOR TO RETURN WATER UNIMPAIRED TO THE PUBLIC, AFTER USE, SO AS TO PROTECT THE NATURAL ENVIRONMENT AND THE PUBLIC'S USE AND ENJOYMENT OF WATERS."[239] I would include in the amendment language specifically providing that "[u]sufruct rights are thus the property of the people of California, and such rights are subject to regulation by the people's representatives, especially in periods of public necessity or public emergency."

Such language might seem redundant if water already belongs to the public, but redundancy may be just what's needed to uphold the public's ancient right to its waters. As discussed above, California's Water Code already makes "[a]ll water within the State . . . the property of the people of the State," subject to appropriation.[240] California's constitution itself provides for "public use" of appropriated water "subject to the regulation and control of the State, in the manner to be prescribed by law."[241] The proposed amendment would, thus, have the added benefit of implicitly making clear what *res publicae*, *res communes*, *publici juris*, the state's police power, the public trust doctrine, the federal navigation servitude, and the state navigable waters doctrines all show: water rights are limited property rights granted by the public to the usufructuary, and the public may act in the broader interest, especially during a moment of public emergency.

A number of objections will no doubt be raised. First, if the public nature of water rights is already clear, which is open to

238. California distinguishes between constitutional amendments (smaller changes to the substance of the constitution) and revisions (more substantial changes to the constitution). *See* Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1291 (Cal. 1978).

239. *In re* Title, Ballot Title, & Submission Clause for 2011–2012 No. 45, 274 P.3d 576, 583 (Colo. 2012).

240. CAL. WATER CODE § 102 (West 1943).

241. CAL. CONST. art. X, § 5.

contestation, then why be duplicative? That is, there is no need to make even more explicit what is allegedly clear from the doctrines as they stand, especially in California, which has been aggressive in its expansion of the public's role in environmental and water rights.[242] The problem with this objection is that it overlooks the fact that agencies like the State Water Board depend on abundantly clear grants of power, and, in their absence, they are constrained, which is further exacerbated by a lack of funding needed to fully discharge their duties to the public.[243] The constitutional amendment would, thus, bolster the water agency's legal position and its political clout to act on the public's behalf, which are important when it deals with very contentious water-rights issues.

It might further be contended that the state constitution is already filled with unnecessary bloat, due in no small part to changes that have made it "[e]ight times the length of the U.S. Constitution" such that it is now filled with "obfuscation, clutter and dysfunction."[244] In sum, the state constitution is "an embarrassment for an otherwise cutting-edge state," and an additional change would merely underscore the dysfunction and prolong the embarrassment of the people of California.[245] A response to this objection would be that the amendment is a direct response to the embarrassing situation in which the State Water Board (and thus the people of California) already find themselves during a public emergency—hamstrung and, thus, unable to move decisively in the public interest. The proposed measure is clear enough, and it simply makes explicit what courts have long drawn from the history of water rights laws.[246]

Amendments to the California constitution happen in one of two ways. The first is through the legislative calling of a constitutional convention by a two thirds majority before sending the amendment for ratification to the electorate.[247] The second is via a ballot initiative.[248] The more viable option, as a judge on the United States Court of Appeals for the Ninth Circuit noted in a law-review article dealing

242. *See* Owen, *supra* note 33, at 1110.

243. *See supra* note 227 and accompanying text.

244. Edward L. Lascher Jr., Floyd F. Feeney & Tim Hodson, *Too Easy to Amend*, L.A. TIMES (Feb. 4, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-feb-04-oe-hodson4-story.html [https://perma.cc/J7C5-S3EF].

245. *Id.*

246. *See* discussion *supra* Section I.B.

247. *See* CAL. CONST. art. XVIII, § 2; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1291 (Cal. 1978).

248. *See* § 3; *Amador Valley*, 583 P.2d at 1285–86.

with a different topic entirely, is likely by ballot initiative because "[o]nly in California and Colorado is it harder to amend the state's constitution through legislative action than to amend by direct voter initiative."[249] Californians thus favor constitutional amendments effected through ballot initiatives.[250] The proposed amendment regarding the public nature of water is, therefore, more likely to pass via a ballot initiative.

2. *Legislative Change*

Commentators have further identified two changes that should be made at the legislative level. First, additional funding should be allocated to the State Water Board, and second, private water rights should be "reclaimed."[251] Funding would specifically allow the State Water Board to face the eventualities of climate change and allow the agency to live up to its charge to uphold the public trust doctrine.[252] While I remain less certain about the "reclamation" of private water rights, since the public is already the owner, and it has chosen to bestow the water's usufruct on private citizens, should a constitutional amendment seem imprudent for whatever reason, then the language of the proposed amendment might be codified in a statute. Again, similar language already exists at the statutory level, and the codification of the usufructuary nature of a water right would only clarify its nature. Indeed, such language would draw on similar language in California's laws.

CONCLUSION

The question posed in the title of the Article is thus a little misleading—intentionally so. Water already belongs to the public, and private rights-holders are mere usufructuaries who enjoy a limited grant of property-use rights because the public believes it in its own interest that they do so. From *res communes* to navigability doctrines, a variety of water-rights doctrines underscore the limited nature of the use right. Such doctrines are the legal tools that the public has

249. Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of the Voters? A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. 41, 118 (2011).

250. *See id.*

251. *See* Kavounas, *supra* note 33, at 1081.

252. *See generally* O'Dea, *supra* note 169 (discussing how California can uphold the public trust doctrine).

fashioned for itself, through its judicial systems over many centuries, to guarantee that the public's continued interest in water is both recognized and upheld.

The public's interest is, thus, quite likely most imperiled during an environmental emergency like a devastating drought. The public's servants should be empowered with all the tools they need not only to protect the public during such an emergency but also the public's interest in its own property whose use it has, for a time, permitted private citizens to put to reasonable and beneficial use, consistent with relevant laws. The usufructuaries' right should, thus, in no way prevent the public's superior claim to the regulation of its property and to the imposition of restrictions on the use of such property, cognizant, of course, of the limitations of federal and state laws, such as the payment of just compensation, as required by law, in appropriate cases.

Simply put, water belongs to the public, and the public's claim *should* be treated as more emphatic during periods of public emergency. This Article's normative dimension, the *should* in the question it poses—*When Should Water Belong to the Public?*—thus implies the existence of a condition that reinforces the public's claim to its own property. That is, the public's claim to its property is heightened in moments of environmental necessity, and its claim *should* be treated as strongest in such cases.

California is prone to droughts, and it will likely encounter more damaging droughts and other environmental challenges in the future. The tools urged upon the legislature, the courts, and the people in this Article are means of facing some of the challenges ahead. When using the tools suggested here, they need only recall the nature of the relationship between the public as the dominant property rights-holder and the usufructuary as the holder of a subordinate property interest. As holders of the superior property interest, the people or public of California own the water, and their representatives should be empowered, especially during public emergencies, to act on their behalf.