

# THE WELL'S RUN DRY: CONSIDERING WATER AS A FUNDAMENTAL RIGHT USING AN INTERDISCIPLINARY APPROACH

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## INTRODUCTION

*“When the well’s dry, we know the worth of water.”<sup>1</sup>*

Water is life.<sup>2</sup> Its unique chemical properties make it indispensable to all living organisms on Earth.<sup>3</sup> Water is a fundamental human need and should therefore be a fundamental human right.<sup>4</sup> Simply put, an adequate supply of clean water is essential for a properly functioning democracy, making it “implicit in the concept of ordered liberty . . .”<sup>5</sup>

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\* Juris Doctor Candidate, May 2019, William S. Boyd School of Law, University of Nevada, Las Vegas. First and foremost, I would like to thank my wife, Gillian Griffith, for her support and encouragement—without her, my legal education and this note would not have been possible. I would also like to pay special tribute to my father-in-law, Thomas Jingoli, for his guidance and helping bring my dream of obtaining a law degree to fruition. I want to thank my mom, Maureen McKissick, for teaching me the importance of relying on sound reason and research, and lastly, I want to thank my mentor and friend, Matthew Setty, for showing me the world through the eyes of an environmental scientist. Thank you.

<sup>1</sup> *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017) (quoting BENJAMIN FRANKLIN, *POOR RICHARD’S ALMANACK* 1746 (1914)).

<sup>2</sup> As a former hydrologist, I spent my career surveying, monitoring, and enhancing water resources throughout the U.S. and abroad. I was dedicated to understanding the physical and chemical properties of water, as well as the institutions that manage it. After witnessing severe environmental injustice resulting from mismanagement and regulatory failure, I developed a deep appreciation for the laws that protect society from these abuses. Looking back on my experiences through a legal lens has caused me to reconsider whether the law should recognize access to clean water as a fundamental human right.

<sup>3</sup> See PHILIP BALL, *LIFE’S MATRIX: A BIOGRAPHY OF WATER* 222 (2000) (stating “[w]ithout water, life simply cannot be sustained”); Tia Ghose, *Why is Water so Essential for Life?*, *LIVE SCI.* (Sept. 29, 2015, 11:38 AM), <https://www.livescience.com/52332-why-is-water-needed-for-life.html> [<https://perma.cc/H5KX-4AT4>].

<sup>4</sup> LINDSAY KNIGHT, *WORLD HEALTH ORG., THE RIGHT TO WATER* 6 (2003) (referring to quote made by Kofi Annan, the United Nations Security-General).

<sup>5</sup> See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Where water is depleted, conflict inevitably ensues.<sup>6</sup> Given its undeniable importance, this result is not surprising. Water conflicts occur all over the world, particularly in developing nations, resulting in protests, warfare, and death.<sup>7</sup> The U.S. is no exception to this harsh reality and, in fact, has experienced its own share of water wars. The California Water Wars during the late nineteenth and early twentieth century, for example, resulted in farmers and ranchers in Northern California's Owens Valley attacking the Los Angeles Aqueduct.<sup>8</sup>

Those who rely on non-municipal water supplies view the economic forces on water—such as water privatization and rural-to-urban water transfers—as a direct threat to their livelihood.<sup>9</sup> Large-scale water infrastructure projects are consistently contentious for this reason. As some cities continue to expand, requiring more and more water, others (i.e., nearby rural communities) must forgo their water in order to meet the growing urban demand.<sup>10</sup>

Rural communities have grappled with this dilemma for decades, and unfortunately it may never cease. This rural-versus-urban scenario was precisely what sparked the California Water Wars,<sup>11</sup> and in fact, a contemporary example of this dispute is currently taking place between the Southern Nevada Water Authority (SNWA) and the agricultural communities throughout central-eastern Nevada.<sup>12</sup> In order to meet the growing water needs of Las Vegas, SNWA is proposing a pipeline project to convey groundwater from the aquifers near Ely to its Las Vegas facilities;<sup>13</sup> however, the project has been the subject of several lawsuits<sup>14</sup> and continues to be stalled in the courts.<sup>15</sup>

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<sup>6</sup> For an interesting analysis of this fact using contemporary cartographic techniques, see Greg Miller, *Maps Show How Water Can Be a Precious Lifeline—or a Deadly Weapon*, NAT'L GEOGRAPHIC (Aug. 8, 2017), <https://news.nationalgeographic.com/2017/08/maps-atlas-water-conflict-syria-isis/> [<https://perma.cc/V7UD-EG29>] (discussing how depleting an area of water is a war tactic used by terrorist groups).

<sup>7</sup> William Finnegan, *Leasing the Rain*, NEW YORKER (Apr. 8, 2002), <https://www.newyorker.com/magazine/2002/04/08/leasing-the-rain> [<https://perma.cc/TK6C-GEAQ>] (documenting the Chochabamba Water War in Bolivia).

<sup>8</sup> DAVID OWEN, *WHERE THE WATER GOES: LIFE AND DEATH ALONG THE COLORADO RIVER* 124–25 (2017).

<sup>9</sup> See Emily Green, *Not This Water*, LAS VEGAS SUN (June 22, 2008, 2:00 AM), <https://lasvegassun.com/news/2008/jun/22/not-water/> [<https://perma.cc/JY2K-KTYS>].

<sup>10</sup> See OWEN, *supra* note 8, at 124–25.

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

<sup>12</sup> Henry Brean, *Ranchers Criticize Southern Nevada Water Agency's Pipeline Plan*, LAS VEGAS REV. J. (Sept. 29, 2017, 5:29 PM), <https://www.reviewjournal.com/news/politics-and-government/ranchers-criticize-southern-nevada-water-agencys-pipeline-plan/> [<https://perma.cc/YJ9C-BTRD>].

<sup>13</sup> S. NEV. WATER AUTH., *WATER RESOURCE PLAN 2017*, 2, 50 (2017), <https://www.snwa.com/assets/pdf/water-resource-plan.pdf> [<https://perma.cc/2PZ8-4E5T>].

<sup>14</sup> *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 2:14-CV-00226-APG-VCF, 2017 WL 3667700, at \*1 (D. Nev. Aug. 23, 2017) (order granting in part and denying in part parties' motion for summary judgment).

As people continue to relocate from rural areas to urban cities (usually for economic reasons) water must be available for those cities to flourish. The ability to travel means nothing unless the water necessary for travelers to survive at their new destination is accessible. To complicate matters further, climate change poses a serious threat to the sustainability of many water supplies as the ability to replenish those systems becomes less reliable.<sup>16</sup> Thus, in order to avoid conflict and environmental injustice, the law must recognize access to safe, clean water as a fundamental constitutional right. This proposition is supported not only by notions of equity, but also by longstanding principles of water law that recognize the central role of water in every community and the government's historical obligation to properly manage this vital resource.

This article analyzes American water law—particularly as it has developed in the Southwest—and considers the right to water as a fundamental right through the lens of these water law doctrines. Through case law and policy considerations, this article explores the principles of federally reserved water rights and the public trust, two doctrines that acknowledge water as being both implicitly essential to society and historically recognized as a vital public resource. Ultimately, this article proposes that legal practitioners embrace an interdisciplinary approach to establish water as a fundamental right. That is, rather than relying solely on constitutional doctrines to determine if a new right is worthy of being deemed fundamental, the law should turn to doctrines that are inherently rooted in the underlying subject matter of the perceived right. By using an interdisciplinary approach, one finds that many of the questions raised in the constitutional analysis have already been answered by other doctrines.

Part I will outline the Supreme Court's process for determining whether a fundamental right exists and provides a brief overview of the constitutional analysis. Parts II and III will then describe two specific water law doctrines—federally reserved water rights and the public trust—which provide answers and insight to the constitutional analysis.

## I. THE FUNDAMENTAL RIGHT TO WATER

As the Supreme Court has made clear, some individual liberties are so important that they are deemed fundamental rights. And the government cannot violate fundamental rights unless state action is necessary to fulfill a compelling governmental interest.<sup>17</sup> In other words, the government must adopt the least restrictive means to fulfill its compelling interest—strict scrutiny—if its

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<sup>15</sup> Henry Brean, *Ruling on Southern Nevada Water Agency's Pipeline Project Months Away*, LAS VEGAS REV. J. (Sept. 28, 2017, 4:15 PM), <https://www.reviewjournal.com/news/politics-and-government/ruling-on-southern-nevada-water-agencys-pipeline-project-months-away/> [<https://perma.cc/6CPM-HALP>].

<sup>16</sup> See Aris Georgakakos et al., *Chapter 3: Water Resources*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: U.S. NATIONAL CLIMATE ASSESSMENT 69–76 (2014).

<sup>17</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 954 (5th ed. 2017).

actions infringe a fundamental right.<sup>18</sup> Generally, this means the government loses.<sup>19</sup> Only governmental interests that are truly compelling enough to supersede fundamental rights (i.e., national security<sup>20</sup>) are capable of satisfying this stringent standard of judicial review.

In many ways, fundamental rights are the cornerstone of American justice. They not only provide the legal foundation by which citizens may challenge the actions of their government, they also represent the values that we as a society deem most important. Put another way, fundamental rights define who we are. They represent our most core values, making them worthy of the highest level of legal protection.

As Americans, we cherish our fundamental rights, holding them out to the world as symbols of our country's identity. The right to travel,<sup>21</sup> the right to marry,<sup>22</sup> and the right to an equal vote<sup>23</sup> are all examples of individual liberty interests we protect as fundamental rights. However, these fundamental rights were not always recognized by American jurisprudence—or at least not in the same way they are today.<sup>24</sup> The Supreme Court recognizes new fundamental rights to reflect society's evolving stance on the issues associated with those rights.<sup>25</sup> In the same manner that we now look back upon slavery as being irreconcilable with our modern understanding of fundamental rights, perhaps one day we will look back upon the government's refusal to afford its people with a basic right to water with similar disdain.

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<sup>18</sup> *Id.*

<sup>19</sup> *United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (explaining that strict scrutiny implies “near-automatic condemnation”); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (explaining that “it is the rare case in which we have held that a law survives strict scrutiny”).

<sup>20</sup> *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional . . . . Pressing public necessity may sometimes justify the existence of such restrictions”), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>21</sup> *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

<sup>22</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>23</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966).

<sup>24</sup> *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015) (explaining that “[t]he ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.”) (emphasis added).

<sup>25</sup> *See id.* at 2608 (holding “the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage . . . on the ground of its same-sex character”).

*A. The Constitutional Analysis of Implied Fundamental Rights*

Rights not explicitly stated in the Constitution must be inferred from its text.<sup>26</sup> These are the so-called *implied* fundamental rights, and their creation remains as contentious today as it was when they were first recognized.<sup>27</sup> Some find the very practice of inferring fundamental rights as being repugnant to what the Constitution stands for.<sup>28</sup> To them, the federal government is purely one of enumerated powers, and therefore, the Supreme Court simply lacks the authority to recognize a right that is not directly described in the Constitution.<sup>29</sup> However, the Constitution itself recognizes rights not explicitly described in its text when, for example, it explains those rights not enumerated are “retained by the people.”<sup>30</sup> Thus, it is clear the Constitution does in fact encompass rights not explicitly stated therein—but how and where do we find them?

To answer this, the Supreme Court relies on the Constitution’s Fifth and Fourteenth Amendments, which guarantee that no person shall be deprived of “life, liberty, or property, without due process of law”<sup>31</sup> The rights conferred to individuals through these clauses are premised on due process, resulting in a substantive due process right.<sup>32</sup> Due process not only prescribes the procedures the government must follow,<sup>33</sup> it is also the basis of the underlying rights that the government must recognize as well. Since its inception in the 1930s, substantive due process remains an elusive and controversial legal theory.<sup>34</sup> However, this controversy has not stopped the Supreme Court from finding several rights that fall within the scope of liberty protected by the Constitution. For example, the Supreme Court has repeatedly held that the liberty interest protected by the Constitution encompasses the right of privacy,<sup>35</sup> which consequently includes the right to have access to an abortion<sup>36</sup> and receive contraceptives.<sup>37</sup>

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<sup>26</sup> See CHEMERINKSY, *supra* note 17, at 951 (describing how “the Ninth Amendment is used to provide a textual justification for the Court to protect nontextual rights”).

<sup>27</sup> See *id.* at 952–53 (discussing the “constitutional interpretation debate” and the various approaches to finding fundamental rights).

<sup>28</sup> See *id.* (explaining that “originalists take the position that fundamental rights are limited to those liberties explicitly stated in the [Constitution’s] text or clearly intended by the framers”).

<sup>29</sup> See *id.*

<sup>30</sup> U.S. CONST. amend. IX.

<sup>31</sup> U.S. CONST. amends. V, XIV.

<sup>32</sup> CHEMERINKSY, *supra* note 17, at 951 (explaining that the term “liberty” in the Due Process Clause has been interpreted as granting parents with the fundamental right to maintain custody of their children).

<sup>33</sup> *Id.* (discussing how procedural due process requires the government to provide notice and a hearing before terminating a parent’s custody rights).

<sup>34</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999) (explaining that “[t]here is no concept in American law that is more elusive or more controversial than substantive due process”).

<sup>35</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (explaining that “the right of privacy . . . is a legitimate one”); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (discussing that “the Court

The lack of a defined methodology for determining which rights fall within the scope of substantive due process—thus becoming fundamental through the Fifth and Fourteenth Amendments—is one of the primary reasons for the controversy surrounding its application. To this day, legal scholars debate what the proper inquiry should be when determining what rights are fundamental.<sup>38</sup> Originalists contend that the Court improperly usurps the democratic process when it declares rights are fundamental without any legislative foundation.<sup>39</sup> Nonoriginalists (functionalists), on the other hand, counter that the Supreme Court may protect fundamental rights not enumerated in the Constitution.<sup>40</sup> Some argue the Court should only recognize rights that are essential to the operation of the political process,<sup>41</sup> while others maintain that the Court should rely only on natural law principles in determining fundamental rights.<sup>42</sup>

To a certain extent, the Supreme Court takes most of these aspects into consideration when it engages in the process of finding fundamental rights. The landmark opinions where a new fundamental right is established generally dedicate a considerable amount of text to describing the Court's changing view of the right at issue.<sup>43</sup> Typically, these cases are extremely fact-specific, relying on the nuances of how the story unfolds—so much so that some creative litigants have gone to extreme lengths to ensure the narrative of a case clearly demonstrates a violation of a perceived fundamental right.<sup>44</sup>

Generally, rights that by their very nature implicate the ability of the human race to sustain itself are viewed as fundamental, and consequently worthy of constitutional protection.<sup>45</sup> For example, in explaining how marriage qualifies as a fundamental right, the Supreme Court in *Loving* described the right as being “fundamental to our very existence and survival.”<sup>46</sup> Language like this suggests that access to safe water should easily qualify as a fundamental right,

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has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution”).

<sup>36</sup> *Roe*, 410 U.S. at 153.

<sup>37</sup> *Griswold*, 381 U.S. at 485, 499.

<sup>38</sup> CHEMERINKSY, *supra* note 17, at 952.

<sup>39</sup> *Id.* at 952–53.

<sup>40</sup> *Id.* at 953.

<sup>41</sup> *Id.* (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)).

<sup>42</sup> *Id.* (citing HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION* (1994)).

<sup>43</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–96 (2015) (describing how the right to marry was traditionally viewed as being between a man and a woman but noting how that concept has evolved over time).

<sup>44</sup> See David Oshinsky, *Strange Justice: The Story of Lawrence v. Texas*, by Dale Carpenter, N.Y. TIMES (Mar. 16, 2012), [www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html](http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html) [https://perma.cc/JR42-NM5G] (describing DALE CARPENTER, *FLAGRANT CONDUCT* (2012)).

<sup>45</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (explaining that “[m]arriage is . . . fundamental to our very existence and survival”).

<sup>46</sup> *Id.*

as obviously no one can survive without it. However, the Court's approach to finding fundamental rights throughout the second half of the twentieth century was widely criticized as being too subjective,<sup>47</sup> leading the Court to formulate a new fundamental rights analysis capable of being both objective and consistent.

Today, the Supreme Court usually addresses at least two important questions when considering a new fundamental right: (1) is the right or activity implicit in the concept of ordered liberty,<sup>48</sup> and (2) is the right or activity "deeply rooted in [the Nation's] history and traditions"?<sup>49</sup> This two-pronged analysis represents somewhat of a compromise between the originalist and functionalist perspectives. It asks the Court to recognize a right that society is likely to believe is simply a part of our American way of life (the functionalist view), while also requiring that right be historically recognized in accordance with the Founders' intentions (the originalist view). How the right is defined is another important consideration. That is, the Supreme Court requires a "careful description" of the asserted fundamental right.<sup>50</sup>

For the purposes of this article, we may define the right as the individual's right to an adequate supply of safe, potable water necessary for human survival. Any discussion on whether this definition satisfies the Court's requisite level of clarity would be purely speculative, and therefore the remainder of this article will focus on the two-pronged constitutional analysis. To answer these questions, this article relies on the principles already established by two longstanding water law doctrines: the federally reserved water rights doctrine and the public trust doctrine. Before embarking on this analysis, however, it is worth discussing the fact that states have already begun to address this fundamental right on their own, which provides further support for the article's ultimate proposition.

### B. California's Historic Step

In 2013, California became the first state to explicitly make access to clean water a fundamental right.<sup>51</sup> Commonly referred to as the Human Right to Water Bill, California Assembly Bill 685 provides that "every human being" has "the right to safe, clean, affordable, and accessible water adequate for human

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<sup>47</sup> See Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 445 (1984).

<sup>48</sup> *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) (discussing how those rights that are "so fundamental to our concept of constitutionally ordered liberty . . . are protected by the Fourteenth Amendment").

<sup>49</sup> *Id.* at 703 (explaining that "the Court has regularly observed that the [Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition").

<sup>50</sup> *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)) (explaining, for example, the difference in describing the right to doctor-assisted euthanasia as the "right to die" or the right to "determin[e] the time and manner of one's death").

<sup>51</sup> See CAL. WATER CODE § 106.3 (West 2018).

consumption, cooking, and sanitary purposes.”<sup>52</sup> The Bill was meant to not only express the public policy goal of universally making access to water a human right, but also to create an administrative duty for agencies involved in water allocation to consider this policy when making decisions that impact water use.<sup>53</sup>

Members of the United Nations praised the passage of California’s Human Right to Water Bill.<sup>54</sup> Catrina de Albuquerque, a United Nations independent expert and Special Rapporteur on the human right to safe drinking water and sanitation, declared the Bill an “inspiring example” for the rest of the world and congratulated California on its “historic step.”<sup>55</sup> In discussing its passage, de Albuquerque explained that she couldn’t help but recall the tragedies she witnessed for the farmworkers in the San Joaquin Valley “who were condemned to drinking the water from their polluted wells because they did not have the money to purchase bottled water.”<sup>56</sup> Since climate change is likely to heavily affect California in the upcoming decades, the effort “to adopt a comprehensive policy on the human right to water” is particularly important for a state with such a large population.<sup>57</sup>

Opponents of the Human Right to Water Bill feared its enactment would lead to higher water bills overall if water agencies were prohibited from shutting off service to customers who defaulted on their bills, thereby forcing paying customers to subsidize the customers who cannot afford to pay.<sup>58</sup> They also pointed out the dangerous ambiguity in the term “affordable,” which they claimed was likely to lead to ongoing litigation.<sup>59</sup>

Despite these concerns, California courts have seen almost no lawsuits based on the Human Right to Water Bill—only one case uses the policy set forth by the Bill to support arguments that rely on other statutory provisions.<sup>60</sup>

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<sup>52</sup> *Id.* (“(a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes. (b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.”).

<sup>53</sup> Skylar Marshall, *California Declares a Human Right to Water*, U. DENV. WATER L. REV. BLOG (June 10, 2013), <http://duwaterlawreview.com/ca-human-right-to-water/> [<https://perma.cc/UW82-N5YP>].

<sup>54</sup> *California Law on Human Right to Water Sets Example for Others – UN Expert*, UN NEWS (Sept. 28, 2012), <https://news.un.org/en/story/2012/09/421852> [<https://perma.cc/2LSZ-FUJD>].

<sup>55</sup> *Id.* (quoting Catarina de Albuquerque).

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

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

<sup>58</sup> Marshall, *supra* note 53.

<sup>59</sup> *Id.*

<sup>60</sup> Verified Petition for Writ of Mandate and Complaint for Declaratory Relief at 13, *Zamora v. Cent. Coast Reg’l Water Quality Control Bd.*, No. 15CV-0247, 2015 WL 2359800 (Cal.



Additionally, the Bill places no affirmative obligation on water agencies to provide water,<sup>61</sup> and thus its opponents' fear that the Bill would result in the overnight subsidization of low-income communities never came to fruition.

## II. THE FEDERALLY RESERVED WATER RIGHTS DOCTRINE

The doctrine of federally reserved water rights stands for the proposition that when the federal government reserves land, it also implicitly reserves a supply of water necessary to satisfy the purpose of the reservation.<sup>62</sup> Reservations have been enacted through both presidential executive orders and acts of Congress.<sup>63</sup> Generally, the priority date of this implicit water right is the date the reservation was established.<sup>64</sup>

The Supreme Court first developed this doctrine in 1908 in *Winters v. United States*.<sup>65</sup> The Court held that the creation of the Fort Belknap Indian Reservation implicitly reserved water for future use in the amount necessary to fulfill the purpose of that tribal reservation, which included uses such as irrigating crops, bathing, and consumption.<sup>66</sup> The Court granted the Tribe a priority date corresponding to the treaty date used to establish the reservation.<sup>67</sup> As a result of this decision, this doctrine is now commonly referred to as the *Winters* doctrine, and the rights created under it as *Winters* rights.<sup>68</sup>

*Winters* was a landmark case. It was this decision that marked the recognition that when the federal government holds natural resources on behalf of a community, it must provide enough water for that community to be sustainable.<sup>69</sup> In other words, access to water is implicit in the concept of civilization itself.

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Super. Ct. May 8, 2015). At this time this article was written, *Zamora* was the only case to cite the California Water Code provision making water a fundamental right within the Westlaw database.

<sup>61</sup> CAL. WATER CODE § 106.3(c) (West 2018) (“This section does not expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure beyond the obligations that may exist pursuant to subdivision (b).”).

<sup>62</sup> BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 1025 (5th ed. 2013).

<sup>63</sup> See *id.* at 1022–23; *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017) (explaining that “[t]he bulk of the Agua Caliente Reservation was formally established by two Presidential Executive Orders”).

<sup>64</sup> See THOMPSON, JR. ET AL., *supra* note 62, at 1023.

<sup>65</sup> See *Winters v. United States*, 207 U.S. 564, 577 (1908).

<sup>66</sup> *Id.* at 576–76.

<sup>67</sup> *Id.* at 575, 577 (holding that the case turned on the agreement of May 1888).

<sup>68</sup> *Agua Caliente*, 849 F.3d at 1268 (introducing “what has become known as the *Winters* doctrine”).

<sup>69</sup> *Winters*, 207 U.S. at 577 (holding that the government reserved enough water that would be “necessarily continued through years” so that the tribe could “continu[e] their old habits”).

By the 1960s, the Supreme Court extended the *Winters* doctrine to national forests<sup>70</sup> and monuments,<sup>71</sup> finding the doctrine's rationale equally applicable to other governmental purposes. Today, *Winters*' rights can be asserted on most lands managed by the federal government, and the doctrine continues to expand to accommodate new circumstances and water sources.

A. *Expanding the Doctrine: the Agua Caliente Decision*

March 7, 2017, marked the next step in the long evolution of the *Winters* doctrine.<sup>72</sup> In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, the U.S. Court of Appeals for the Ninth Circuit extended *Winters* rights to groundwater for the first time in American history.<sup>73</sup> Prior to this decision, *Winters* rights were only applied to surface waters.<sup>74</sup> To understand how *Winters* rights are applied today, it is helpful to understand the events that lead to the *Agua Caliente* decision and the policy considerations that guided the Court's analysis.

The *Agua Caliente* case, in an unusual procedural posture, has been trifurcated.<sup>75</sup> At the time this article was written, the final holdings of the case were yet to be determined. The 2017 opinion marked the first of this three-step process.<sup>76</sup> First, the court had to determine whether the Tribe had a reserved right to groundwater at all, which required extending their *Winters* rights to a water source it had never been applied to.<sup>77</sup> Having answered that question in the affirmative, the next two steps of the case will determine: (1) whether the Tribe beneficially owns the "pore space" of the groundwater aquifer underlying the reservation and whether the right includes the right to receive water of a certain quality, and (2), what quantity of groundwater the right secures.<sup>78</sup> Before we discuss these topics, one must first understand the origin of the Agua Caliente Tribe and the historical context in which their rights developed.

B. *History of the Agua Caliente Tribe*

The Agua Caliente Band of Cahuilla Indians have resided near present-day Palm Springs for over 5,000 years.<sup>79</sup> Originally, the Cahuilla Indians named the

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<sup>70</sup> *United States v. New Mexico*, 438 U.S. 696, 718 (1978).

<sup>71</sup> *Cappaert v. United States*, 426 U.S. 128, 139–41 (1976).

<sup>72</sup> *See Agua Caliente*, 849 F.3d at 1262, 1271.

<sup>73</sup> *Id.* at 1271 (holding "[w]e can discern no reason to cabin the *Winters* doctrine to appurtenant surface water. As such, we hold that the *Winters* doctrine encompasses both surface water and groundwater").

<sup>74</sup> *See id.*

<sup>75</sup> *Id.* at 1267.

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

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Cultural History*, AGUA CALIENTE BAND OF CAHUILLA INDIANS <http://www.aguacaliente>.

Palm Springs area Sec-he, meaning “boiling water,” in reference to the life-giving force of the mineral hot spring that now bears the name of the Tribe.<sup>80</sup> The Agua Caliente Mineral Hot Spring provided the Tribe with a source of clean water, which they used for consumption and bathing, and a spiritual connection point.<sup>81</sup> The Hot Spring was used for healing purposes, and the Tribe relied on it for numerous ceremonies, marking nearly every important milestone in life.<sup>82</sup>

Like most early tribal reservations, the Agua Caliente Reservation was formally established by Presidential Executive Order. On May 15, 1876, President Ulysses S. Grant declared that the land that would become the Agua Caliente Reservation was “withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in [S]outhern California.”<sup>83</sup> The following year, President Rutherford B. Hayes signed another Executive Order which set aside additional lands for “Indian purposes.”<sup>84</sup> Together, these Executive Orders created the bulk of the Agua Caliente Reservation, which consists of approximately 31,396 acres throughout Southern California.<sup>85</sup>

As the Court of Appeals for the Ninth Circuit noted, the Executive Orders were “short in length, but broad in purpose.”<sup>86</sup> Executive Orders such as these were the result of a national agenda to assimilate Native American communities into American life.<sup>87</sup> Detailed government reports identified the urgent need to reserve land for Native American use to encourage tribes to “build comfortable houses, improve their acres, and surround themselves with home comforts.”<sup>88</sup> These reports highlighted settlers’ concerns that conflict amongst American settlers and Native Americans would never end until Native Americans were granted land for their own exclusive use and enjoyment.<sup>89</sup> In the end,

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org/content/History%20and%20Culture/ [https://perma.cc/7993-DK9E] (last visited Oct. 5, 2018).

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

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Agua Caliente*, 849 F.3d at 1265.

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

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

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

<sup>87</sup> *See generally id.*

<sup>88</sup> *Id.* (citing COMMISSIONER OF INDIAN AFF., ANN. REP. 224 (1875)).

<sup>89</sup> COMMISSIONER OF INDIAN AFF., ANN. REP. 224 (1875) (“If white settlers are permitted to remain on these lands set apart for Indian occupation, I cannot see that anything whatever [would] be gained in the settlement of these difficulties. If these pre-emptions are allowed to go on, most surely all these conflicts and difficulties will go on. What these people want, and what they ought to have, is just enough tillable land for their gardens and range for their stock. The Government should own and hold the lands, protecting them in all their rights of exclusive possession, [as] long as they occupy.” Recommendation of D.A. Dryden, United States Special Agent).

the United States sought to protect both Americans and tribal members by “secur[ing] the Mission Indians permanent homes, with land *and water enough*.”<sup>90</sup>

C. *Applying Winters to the Agua Caliente Tribe*

The purpose behind the creation of the Agua Caliente Tribe’s reservation is critical to understand how the *Winters* doctrine applies. For well over a century, the Supreme Court has recognized that when the United States “withdraws its land from the public domain and reserves it for a federal purpose, the Government, *by implication*, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.”<sup>91</sup> The federal government’s implicitly reserved water rights are directly applicable “to Indian reservations . . . encompassing water rights[.]”<sup>92</sup>

The *Winters* doctrine rests on the notion that the federal government, when negotiating with Native American tribes to create reservations, “intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.”<sup>93</sup> *Winters*’ rights are premised on the fact that life, particularly in the West, simply cannot exist without water.<sup>94</sup> As the *Agua Caliente* court noted, in an area such as Palm Springs, “survival is conditioned on access to water.”<sup>95</sup>

Under the *Winters* doctrine, the Agua Caliente Tribe’s implicit right is limited to the amount of water necessary to fulfill the purpose of their reservation.<sup>96</sup> As previously mentioned, the 1876 Executive Order declared the reservation was “for the permanent use and occupancy” of the Agua Caliente Tribe,<sup>97</sup> and therefore the amount of water the Tribe is entitled to is the amount necessary for the Tribe to permanently establish a livelihood upon the reservation. This analysis is the heart of the *Winters* doctrine and was the first consideration for the court in *Agua Caliente*.<sup>98</sup>

The *Agua Caliente* Court held that the United States did in fact intend to reserve water for the Tribe.<sup>99</sup> Before addressing groundwater, the Court first analyzed whether the Agua Caliente Reservation carried with it a reserved right

<sup>90</sup> *Agua Caliente*, 849 F.3d at 1265–66 (emphasis added) (citing COMMISSIONER OF INDIAN AFF., ANN. REP. 37 (1877)).

<sup>91</sup> *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (emphasis added).

<sup>92</sup> *Id.*

<sup>93</sup> *Arizona v. California*, 373 U.S. 546, 600 (1963).

<sup>94</sup> *Id.* at 598–99 (describing how “[i]t is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised”).

<sup>95</sup> *Agua Caliente*, 849 F.3d at 1271.

<sup>96</sup> *Id.* at 1268.

<sup>97</sup> *Id.* at 1265.

<sup>98</sup> *Id.* at 1268.

<sup>99</sup> *Id.*

to water generally.<sup>100</sup> After finding it did, the Court's next step was to determine the purposes which must be fulfilled.<sup>101</sup> The United States only reserves "that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>102</sup> "Where water is only valuable for a secondary use of the reservation, . . . the United States [must] acquire water in the same manner as any other public or private appropriator."<sup>103</sup>

"*Winters* itself established that the purpose of the reservation is controlling,"<sup>104</sup> and *Winters* provided the Ninth Circuit with an almost identical fact-pattern for applying its holding to *Agua Caliente*. As previously mentioned, in *Winters* the Fort Belknap Indian Reservation was created by the federal government "for a permanent home" for the several tribes.<sup>105</sup> The Supreme Court noted that, without irrigation, the arid tribal land would be "practically valueless" and a civilized community "could not be established thereon."<sup>106</sup> Since the purpose of the reservation was for a "permanent home," the United States reserved water "for a use which would be necessarily continued through years."<sup>107</sup>

The permanency of the Folk Belknap Indian Reservation is directly analogous to the permanency intended for the Agua Caliente Reservation, and the Court applied it accordingly. "Water is inherently tied to the Tribe's ability to live permanently on the reservation. Without water, the underlying purpose—to establish a home and support an agrarian society—would be entirely defeated."<sup>108</sup> Accordingly, the Court held that the primary purpose of the Agua Caliente Reservation was to create a home for the Tribe, which necessarily implicates the need for water.<sup>109</sup>

#### D. Extending *Winters* Rights to Groundwater

After concluding that the United States government envisioned rights encompassing water use when it created the Agua Caliente Reservation, the court then turned to the issue of whether that right included the use of groundwater.<sup>110</sup> This issue addressed the other limitation of the *Winters* doctrine—that only "appurtenant" water is included in the government's reservation of land.<sup>111</sup> For the first time, the Ninth Circuit held that "appurtenant" water is not limited

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

<sup>101</sup> *Id.* at 1270.

<sup>102</sup> *Id.* at 1268 (quoting *Cappaert v. United States*, 426 U.S. 128, 141 (1976)).

<sup>103</sup> *Id.* at 1268–69 (quoting *United States v. New Mexico*, 438 U.S. 696, 702 (1978)).

<sup>104</sup> *Id.* at 1269.

<sup>105</sup> *Winters v. United States*, 207 U.S. 564, 565 (1908).

<sup>106</sup> *Id.* at 576.

<sup>107</sup> *Id.* at 577.

<sup>108</sup> *Agua Caliente*, 849 F.3d at 1270.

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

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1271.

to surface water.<sup>112</sup> Thus, the United States' implicitly reserved water right for the Agua Caliente Reservation (their *Winters* right) included groundwater.<sup>113</sup>

The court came to this logical conclusion by noting the fact that appurtenance includes any water that is attached to the land itself.<sup>114</sup> In other words, any water that comes into contact with the land, regardless of where that contact takes place, is appurtenant to the reservation. Thus, appurtenance is not limited to surface water only.<sup>115</sup> Rather, appurtenant water includes all water flowing through the subsurface of the reservation as well.<sup>116</sup> In *Cappaert*, the Supreme Court contemplated this result when it stated, "the United States can protect its water from subsequent diversion, whether the diversion is of surface water or groundwater."<sup>117</sup> If the United States can—and does—protect against groundwater diversions, it can logically protect the groundwater itself.<sup>118</sup> Thus, groundwater may be included as one of the physical assets of the federal reservation.

The *Agua Caliente* Court also rested its decision on the fact that many communities throughout the West rely solely on groundwater as their only viable water source.<sup>119</sup> The Tribe, in the court's view, was no different, finding that "such reliance exists here, as surface water in the Coachella Valley is minimal or entirely lacking for most of the year."<sup>120</sup> Survival in such arid regions is conditioned on access to water, and therefore "a reservation without an adequate source of surface water must be able to access groundwater."<sup>121</sup> Therefore, the court held that the creation of the Agua Caliente Reservation included an implied right to use water from the Coachella Valley aquifer.<sup>122</sup>

In sum, *Agua Caliente* stands for the proposition that the *Winters* doctrine no longer distinguishes surface water from groundwater.<sup>123</sup> Rather, *Winters*' rights are only limited by the government's intent in withdrawing the land for a public purpose and the location of the water in relation to the reservation.<sup>124</sup>

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

<sup>113</sup> *Id.* at 1271–72.

<sup>114</sup> *Id.* at 1271.

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.* (emphasis added) (quoting *Cappaert v. United States*, 426 U.S. 128, 143 (1976)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* See also *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739, 746 (Ariz. 1999) (explaining that "[t]he reservations considered in [*Winters* and *Arizona*] depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life").

<sup>120</sup> *Agua Caliente*, 849 F.3d at 1271.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1271–72.

<sup>123</sup> *Id.* at 1271.

<sup>124</sup> *Id.* at 1272.

Until *Agua Caliente*, implicitly reserved rights, like *Winters*' rights, were only applied to surface water.<sup>125</sup> This decision, if followed by other jurisdictions, could have far-reaching consequences, particularly in the arid Southwest where many groundwater aquifers are already over-appropriated and several Native American reservations reside.

*E. Linking the Doctrine to Fundamental Rights*

The doctrine of federally reserved water rights sheds light on the first question in the constitutional analysis—is the right to access an adequate supply of safe, clean water “implicit in the concept of ordered liberty[?]”<sup>126</sup> Using the rationale of the courts in applying this doctrine, the answer appears to be in the affirmative; however, rather than applying it to a tribal reservation, national forest, park, or monument, we must apply it to the nation as a whole.

The *Agua Caliente* court's logic—that “[w]ater is inherently tied to the . . . ability to live permanently”<sup>127</sup>—is equally applicable to the nation, since without it our way of life “would be entirely defeated.”<sup>128</sup> Water's inherent role in sustaining communities is so undeniable that courts are left with no choice but to logically conclude that water is a fundamental part of the community itself—an inference so strong that it justifies the creation of *new implicit rights*. In the same way that the *Agua Caliente* Tribe's survival was premised on access to water, so too is our own. Thus, the same logic should apply to all those living in the U.S., and we should all be afforded with a similar implied right to water.

As previously mentioned, the “purpose of the reservation is controlling[.]” and in *Agua Caliente*, the purpose was to establish “a permanent home.”<sup>129</sup> This emphasis on permanency makes the conclusion that all Americans have an implicit right to water even more compelling. We can assume that the Founders did not intend for our democracy to be a temporary venture. If one accepts this view, then there is no way to differentiate a permanent tribal reservation from the nation itself. They are both permanent sovereigns. The U.S. is the permanent home of its people, and the purpose behind its creation was “to form a more perfect Union.”<sup>130</sup> Unless the Founders did not intend for our Union to last through the ages, one simply cannot avoid the inescapable conclusion that people in the U.S. have an implicit right to water for the same reasons that tribal members have an implicit right to water—it's necessary to fulfill the purpose behind the creation of the sovereignty.

No human being—Native American, European, or otherwise—can survive without water. This fact is so obvious, so incontrovertible that, in general,

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<sup>125</sup> See *id.* at 1270–71.

<sup>126</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>127</sup> *Agua Caliente*, 849 F.3d at 1270.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1269 (quoting *United States v. Winters*, 207 U.S. 564, 565 (1908)).

<sup>130</sup> U.S. CONST. pmbl.

courts are forced to rule in favor of tribal communities when applying the doctrine of federally reserved water rights. Returning to the constitutional analysis, is the right to water implicit in the concept of ordered liberty? The doctrine of federally reserved water rights answers this question with a resounding “yes”—if you live in a tribal sovereignty. Under this article’s interdisciplinary approach, the first constitutional question has already been answered.

### III. THE PUBLIC TRUST DOCTRINE

The public trust doctrine stands for the principle that the government holds all the natural resources under its control—including water—under special trust obligations for the benefit of the public.<sup>131</sup> The government, as trustee, has a duty to manage the trust in a manner that is in the public’s best interest.<sup>132</sup> Where the doctrine of federally reserved water rights recognizes water’s importance in sustaining communities, the public trust doctrine recognizes the public’s inherent interest in water generally.

Rooted in Roman law, the public trust doctrine was originally articulated by Emperor Justinian when he proclaimed, “[T]he following things are by natural law common all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore . . . .”<sup>133</sup> From its earliest iteration, the doctrine emphasizes the importance of humanity’s shared essential resources, and therefore special treatment of these resources is warranted to ensure they are not degraded or controlled entirely by private interests. Applying this logic, many states, including Nevada, have incorporated this idea into their statutory framework by enacting legislation that explicitly makes water a public resource.<sup>134</sup> Consequently, water resources cannot be privatized in the same manner as other real property.

Once integrated into Anglo-American jurisprudence, courts generally limited the application of the public trust doctrine to situations involving commerce, navigation, and fishing.<sup>135</sup> The judiciary viewed these circumstances as invoking the strongest public interest considerations, and they were fixed to ar-

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<sup>131</sup> See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475, 478 (1970). Professor Sax’s article is often regarded as the seminal document that first identified the public trust doctrine as being the appropriate legal foundation for the newly emerging field of environmental law. See Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J. L. & POL’Y 281, 281 (2014) (referring to Professor Joseph Sax as the “father of environmental law” and explaining that “he is the person most responsible for giving us the modern expression of the public trust doctrine.”).

<sup>132</sup> See *id.* at 478.

<sup>133</sup> J. INST. 2.1.1.

<sup>134</sup> NEV. REV. STAT. § 533.025 (2017) (“The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.”).

<sup>135</sup> THOMPSON, JR. ET AL., *supra* note 62, at 654.



eas of law that fell within the scope of traditional government authority.<sup>136</sup> Given the relative abundance of water and other natural resources prior to the nineteenth century, there were few occasions for dispute; however, just as the doctrine of federally reserved water rights was expanded to accommodate new circumstances, so too was the public trust.<sup>137</sup> The doctrine was extended to protect resources once considered outside its scope and even incorporated notions of ecological integrity into the analysis.<sup>138</sup> To understand just how far the doctrine has developed, it is important to understand how it began.

#### A. History of the Public Trust Doctrine

The public trust doctrine gained significant attraction in American law when it was applied by the Supreme Court in *Illinois Central Railroad v. Illinois*.<sup>139</sup> In 1869, the Illinois legislature granted a large tract of submerged land to the Illinois Central Railroad.<sup>140</sup> That grant included land underneath Lake Michigan from the shoreline to one mile out into open water along Chicago's central business district.<sup>141</sup> This land grant effectively placed nearly all of Chicago's commercial waterfront property—over “one thousand acres of incalculable value”—in private hands, allowing the railroad company to control access to the water as well.<sup>142</sup> By 1873, the Illinois legislature came to regret its excessive generosity to the Illinois Central Railroad and repealed the 1869 grant.<sup>143</sup> It also initiated an action to have the original grant declared invalid.<sup>144</sup>

The Supreme Court upheld the state's claim.<sup>145</sup> In doing so, the Court opined one of the few decisions where a state's express conveyance of trust lands was found to be “beyond the power of a state legislature.”<sup>146</sup> The decision did not completely prohibit the sale of trust lands to private parties altogether.<sup>147</sup> Instead, the Court held that a government action such as this, which grants the entire waterfront of a major city to a private party, constitutes an impermissible abdication of legislative authority over navigation.<sup>148</sup> This abdication, the Court explained, amounts to the state divesting itself of authority to

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<sup>136</sup> *Id.*

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

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

<sup>139</sup> *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436 (1892).

<sup>140</sup> Sax, *supra* note 131, at 489.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

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

govern an area over which it has a duty to exercise its police power, and is therefore invalid.<sup>149</sup>

Even though the state could still have exercised a substantial amount of regulatory authority over the private land, the Court found the state has *special* regulatory obligations over this public trust resource—obligations which are simply incompatible with large-scale private ownership.<sup>150</sup> The Court explained that the title under which Illinois holds the waters of Lake Michigan is:

[D]ifferent in character from that which the state holds in lands intended for sale . . . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interferences of private parties.<sup>151</sup>

*Illinois Central* articulated the guiding principle behind the public trust doctrine: when the government holds a resource that is intended for the public's use, courts will apply considerable scrutiny to any action that either restricts the public's use of that resource or subjects the public's use to the interests of private parties.<sup>152</sup> Consequently, private property rights are generally inferior to the public's interest over resources within the public trust,<sup>153</sup> and now the doctrine even prevents private appropriators from diverting water from its natural course if the diversion is detrimental to the waterway's ecology.<sup>154</sup>

#### B. *Expansion of the Public Trust Doctrine*

During the twentieth century, the public trust doctrine was expanded to cover new circumstances and new waters. By 1983, in *National Audubon Society v. Superior Court*, the doctrine was extended to tributaries (non-navigable waterways, like streams and creeks) for the first time in American history.<sup>155</sup> This case marked the first major deviation from decades of jurisprudence that limited the doctrine's application to waters that fell squarely within the government's control—navigable waters, such as rivers, lakes, and coastal zones, used for commerce and fishing.<sup>156</sup> As the court in *National Audubon Society*

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 489–90 (quoting *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)).

<sup>152</sup> *Id.* at 490.

<sup>153</sup> *Glass v. Goeckel*, 703 N.W.2d 58, 66 (2005).

<sup>154</sup> See *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (explaining 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 . . . . This public interest is omnipresent . . . 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”).

<sup>155</sup> *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cty.*, 658 P.2d 709, 712 (Cal. 1983).

<sup>156</sup> *Id.* at 719 (noting “[e]arly English decisions generally assumed the public trust was limited to tidal waters and the lands exposed and covered by the daily tides”) (citation omitted).

explained, “[T]he public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries.”<sup>157</sup>

Following *National Audubon Society*, California courts may now apply the principles of the public trust to navigable waterways, as well as waterways that connect to a navigable waterway.<sup>158</sup> This ruling placed nearly all of California’s waterways within the scope of the public trust (since most of California’s waters flow to the ocean), allowing most nonnavigable diversions to be scrutinized under public trust considerations.<sup>159</sup> That is, the only waters that fall outside the public trust doctrine are those that have no hydrological connection to any navigable or nonnavigable waterways.

*National Audubon Society* had another important impact on American water law—it solidified the idea of defining harm in terms of environmental harm, building upon previous cases recognizing the protection of ecological values as a legitimate exercise of the government’s public trust duty.<sup>160</sup> The plaintiffs in *National Audubon Society* successfully demonstrated that diverting the tributaries of Mono Lake was causing the lake’s water level to drop, triggering a domino effect of detrimental environmental impacts.<sup>161</sup> These environmental impacts fell within the scope of the public trust doctrine, allowing the court to take corrective action against the private appropriator.<sup>162</sup>

In 2005, the public trust doctrine was expanded again to include the public’s right to walk along the shoreline of public trust waters. In *Glass v. Goeckel*, the Supreme Court of Michigan, applying *Illinois Central*, found that private ownership of the shores of the Great Lakes cannot diminish the right of the public to access and walk along those privately-owned shores.<sup>163</sup> In other words, the public trust not only encompasses the public’s right to use water, it also includes the public’s right to access it. This ruling directly applied the principle that private rights are inferior to the public’s right to access the resources held in the public trust. The *Glass* court explained:

[W]hen a private party acquires littoral property from the sovereign, it acquires only the *jus privatum*. Our courts have continued to recognize this distinction between private title and public rights when they have applied the public trust

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<sup>157</sup> *Id.* at 721.

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

<sup>159</sup> *Id.*

<sup>160</sup> *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). (explaining how “[t]here is growing public recognition that one of the most important public uses of [public trust waters] . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area”).

<sup>161</sup> The decreased water level of the lake caused water quality to become hyper-saline, killing brine shrimp. The lowered lake level also exposed a land bridge from the shoreline to an island in the middle of the lake, allowing coyotes to prey upon an established bird refuge. *Nat’l Audubon Soc’y*, 658 P.2d at 711.

<sup>162</sup> *Id.* at 712.

<sup>163</sup> *Glass v. Goeckel*, 703 N.W.2d 58, 62 (Mich. 2005).

doctrine . . . . Under the public trust doctrine, the sovereign never had the power to eliminate those rights, so any subsequent conveyance of littoral property remain subject to those public rights.<sup>164</sup>

After explaining the public trust doctrine generally, the court went on to determine its scope and whether walking the lakeshore was the type of activity the public trust doctrine was meant to encompass.<sup>165</sup> The court noted that the traditional rights protected under the public trust include activities such as “fishing, hunting, and navigation for commerce or pleasure[,]” and therefore the public must necessarily have an implied “right of passage” over land to engage in these activities.<sup>166</sup> The court explained that it “can protect traditional public rights under [the] public trust doctrine only by simultaneously safeguarding activities inherent in the exercise of those rights.”<sup>167</sup> Since accessing the shores is required to undertake those traditionally recognized rights, “[T]he public has always held a right of passage in and along the lakes.”<sup>168</sup> This conclusion closely parallels Emperor Justinian’s logic when he stated, “no one is barred access to the seashore.”<sup>169</sup> for essentially the same reasons roughly fifteen-hundred years ago.

### C. *Linking the Doctrine to Fundamental Rights*

The public trust doctrine answers the second constitutional question—is the public’s right to access water “deeply rooted in this Nation’s history and tradition[?]”<sup>170</sup> Applying the powerful public policy considerations of the public trust doctrine, which themselves are rooted in ancient Roman law, the answer appears to be in the affirmative.

The public trust doctrine is not only deeply rooted in our nation’s history and traditions, it actually pre-dates the nation itself. From the time Emperor Justinian first enacted this policy, the doctrine survived through the common law, remaining intact within the legal frameworks upon which our own justice system is based. The *Glass* Court’s explanation that “the sovereign never had the power to eliminate those rights”<sup>171</sup> is illustrative in this regard. The public’s rights encompassed within the public trust doctrine have always existed—not requiring any legislative foundation to be recognized—and the government is incapable of revoking them. In other words, public trust rights are *fundamental* within our system of government.

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<sup>164</sup> *Id.* at 66.

<sup>165</sup> *Id.* at 61.

<sup>166</sup> *Id.* at 74 (citations omitted).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 64 (citations omitted).

<sup>170</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

<sup>171</sup> *Glass*, 703 N.W.2d at 66.

The public policy considerations of the doctrine remain as relevant today as they were in ancient times. As trustee of the nation's waters, the government has a special obligation to not allow this vital resource to become impaired or fall into private hands. Following the doctrine's modern expansion, it seems the majority of the nation's waters likely fall within the scope of public trust considerations—considerations which now include environmental concerns. Water is simply too important to be controlled by private interests or substantially diminished. This policy is as applicable now as it was fifteen-hundred years ago, as water is no less important to society today than it was in the times of Emperor Justinian.

The fact that the public trust doctrine specifically recognizes *access* to water directly ties into our definition of the proposed fundamental right. The public's "right of passage"<sup>172</sup> to access water to engage in public trust activities supersedes any private property right which might prevent such access—this right should include drinking. The doctrine even provides the basis for revoking private water rights when weighed against the public's rights encompassed by the trust.<sup>173</sup> As *National Audubon Society* explained, "[our] cases amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought [to be] free of the trust."<sup>174</sup> Thus, the doctrine's broad authority, flexibility, and policy make it the ideal legal foundation for recognizing the public's fundamental right to water when weighed against private property rights.

The interdisciplinary approach, once again, sheds light on the second constitutional question. The public's right to access water is, in fact, deeply rooted in the Nation's history and traditions through the government's administration of the public trust. The doctrine not only answers the constitutional question, it provides the basis of the fundamental right itself.

#### CONCLUSION

The Supreme Court's need to recognize the public's fundamental right to water grows more pressing with each passing day. Climate change, water pollution, and increasing populations pose a serious threat to the nation's (and planet's) water supply.<sup>175</sup> Communities across the globe are facing the dire situation of having more cups than water to fill them. Places like Mexico City<sup>176</sup> and

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<sup>172</sup> *Id.* at 74 (citing *Town of Orange v. Resnick*, 109 A. 864, 866 (Conn. 1920)).

<sup>173</sup> *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cty.*, 658 P.2d 709, 721 (Cal. 1983).

<sup>174</sup> *Id.* at 723.

<sup>175</sup> See Kenneth R. Weiss, *Some of the World's Biggest Lakes Are Drying Up. Here's Why.*, NAT'L GEOGRAPHIC (Mar. 2018), <https://www.nationalgeographic.com/magazine/2018/03/drying-lakes-climate-change-global-warming-drought/> [https://perma.cc/4MSR-ESN8].

<sup>176</sup> Karla Zabłudovsky, *These Women Are the Only Reason Some People in Mexico City Get Any Water*, BUZZFEED NEWS (Feb. 22, 2018, 2:02 PM), <https://www.buzzfeednews.com/article/karlazabłudovsky/parts-of-mexico-city-have-already-run-dry> [https://perma.cc/FR2Z-WR

Cape Town, South Africa, where civilians prepare for “Day Zero”<sup>177</sup> (the day the city runs out of water) provide a glimpse into our inevitable future if the Court refuses to establish water as a fundamental right. In these cities, police officers guard water trucks as they wind their way through neighborhoods to deliver the critical resource to people struggling to survive. Children, mothers, and fathers all wait for a vital, life-sustaining resource that so many of us take for granted every single day—creating a scene that looks more like the set of a dystopian science-fiction movie than a modern metropolis.<sup>178</sup>

In sum, the well is drying up. Unless we are prepared to face the horrific conditions created when there is not enough water to go around, the judiciary must recognize the right to water as a fundamental human right. Enacting a policy like California’s Human Right to Water Bill on the federal level is essential to ensure that national water resources do not become diminished or impaired, thereby threatening the livelihood of the country. Such a tragedy would render established fundamental rights moot—we cannot travel, marry, or vote if we’re unable to sustain daily life. Water is the foundation of our civilization, and access to clean, safe water is a national problem that requires a national solution.

To be effective, the right need not create an affirmative duty on the government. Adopting a national policy that guarantees each individual the minimum amount of water needed to maintain their daily lives simply places a duty on the government to account for every community’s water needs—needs that must be considered when allocating water resources or resolving water disputes.

To a large extent, the right would act as an administrative mechanism within the existing water law framework, allowing it to address both water *quantity* and water *quality* concerns. Requiring a minimum amount of water to remain in places where people currently reside provides a safeguard to rural communities threatened by urban water projects, while simultaneously forcing cities to curb development unless there is enough water to satisfy the forecasted expansion. Private parties may not simply purchase all the private water rights from a given source, as the public’s right to access that water would then supersede the private interest. This an even-handed solution that does not tip the scales too far in favor of urban or rural communities. Rather, it provides an equitable solution for people all across the nation—and, most importantly, places the public good above any private right.

Additionally, by defining the right in terms of “safe” or “clean” water, the policy places greater importance on water quality standards, forcing local governments to maintain their water infrastructure and water treatment facilities

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<sup>177</sup> Tamerra Griffin, *This City Has 4 Million People and Might Become the First in the World to Run Out of Water*, BUZZFEED NEWS (Feb. 1, 2018, 1:49 PM), <https://www.buzzfeednews.com/article/tamerragriffin/a-massive-drought-could-leave-four-million-people-without> [<https://perma.cc/ZQ5A-JZW5>].

<sup>178</sup> Zabludovsky, *supra* note 176.

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and avoid scenarios like the Flint Water Crisis.<sup>179</sup> It would also force the Environmental Protection Agency to re-evaluate national drinking water standards periodically to keep pace with the growing number of chemical pollutants being developed in various industries.

The interdisciplinary approach discussed in this article streamlines the constitutional fundamental rights analysis. There is simply no need to limit the inquiry solely to fundamental rights cases if other areas of law have already addressed the very same considerations and shed light on the issues for which we are trying to find solutions. Water law exemplifies this concept. There is no need to reinvent the wheel when it comes to these types of analyses—the groundwork has already been laid by the credible, reliable, scholarly sources presented in this article. The various doctrines that comprise American water law provide insightful answers to the constitutional analysis and should be the first place that legal practitioners turn to when determining if water is worthy of becoming America's next fundamental right.

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<sup>179</sup> Merrit Kennedy, *Lead-Laced Water in Flint: A Step-by-Step Look at the Makings of a Crisis*, NPR (Apr. 20, 2016, 6:39 PM), <https://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis> [<https://perma.cc/DVL3-2LYF>].

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