THE RULE OF CAPTURE IN TEXAS—STILL SO MISUNDERSTOOD AFTER ALL THESE YEARS

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The authors wish to dedicate this article to the late Professor Corwin W. Johnson, Edward Clark Centennial Professor Emeritus at the University of Texas School of Law, who passed away in late July 2004. Professor Johnson exhibited an unyielding work ethic, sharing his knowledge and wisdom on the development of groundwater law in Texas at the Texas Water Development Board's Groundwater Symposium: *100 Years of the Rule of Capture: From* East *to Groundwater Management*, just one month prior to his passing. Were it not for his tireless and dedicated efforts over some six decades to discern and describe the field of Texas water law and then to pass on his passion and keen insight on the topic to over half a century of law students at the University of Texas, this article and many others would not have been possible.

I. INTRODUCTION

June 13, 2004 marked the one hundredth anniversary of the recognition of the English common law rule of capture by the Supreme Court of Texas (Court) in *Houston & Texas Central Railway Co. v. East.*[1] During the one hundred years since *East* was decided, the public,[2] the Texas Legislature (Legislature),[3] the Attorney General,[4] both state[5] and federal courts,[6] as well

1. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904). To commemorate the occasion, the Texas Water Development Board (TWBD) hosted a symposium, which explored the rule of capture's history, examined the effects of its implications, and pondered its future. Symposium, *100 Years of the Rule of Capture: From* East *to Groundwater Management*, TEX. WATER DEV. BD. REP. 361, 1 (June 15, 2004), http://www.twdb.state.tx.us/publications/reports/GroundWaterReports/GWReports/Report%20361/361_ROCindex.htm [hereinafter *100 Years of the Rule of Capture*].

2. TEX. CONST. art. XVI, § 59 (amended 2003). This is also referred to as the Conservation Amendment. *See* GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 800 (1977).

3. **2000 to present**: *see, e.g.*, Act of May 28, 2003, 78th Leg., R.S., ch. 1032, 2003 Tex. Gen. Laws 2979 (relating to the acquisition of water rights by political subdivisions through the exercise of eminent

domain and damage assessment during related condemnation proceedings); Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991 (enrolling S.B. 2);

1990-99: *see, e.g.*, Act of May 28, 1999, 76th Leg., R.S., ch. 1331, 1999 Tex. Gen. Laws 4536 (creating thirteen groundwater conservation districts); Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610 (enrolling S.B. 1); Private Real Property Rights Preservation Act (PRPRPA), 74th Leg., R.S., ch. 517, 1995 Tex. Gen. Laws 3267; Act of May 18, 1995, 74th Leg., R.S., ch. 309, 1995 Tex. Gen. Laws 2693 (relating to the underground storage of appropriated surface water that is incidental to a beneficial use and its storage), *see* discussion *infra* Part IV.B.3.a; Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, *amended by* Act of May 16, 1995, 74th Leg., R.S., ch. 524, 1995 Tex. Gen. Laws 3280, Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Law 2505, Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634, Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991, Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696 [hereinafter Edwards Aquifer Authority Act] (providing legislation enabling and amending the Edwards Aquifer Authority); Act of May 27, 1991, 72d Leg., R.S., ch. 701, 1991 Tex. Gen. Laws 2506 (providing statutory guidance for the operation, creation, and administration of underground water conservation districts);

1980-89: *see, e.g.*, Act of May 29, 1989, 71st Leg., R.S., ch. 936, 1989 Tex. Gen. Laws 3981 (enrolling a complete revision of Chapter 52 of the TEX. WATER CODE ANN. as Chapter 36 of the TEX. WATER CODE ANN.); Act of May 8, 1985, 69th Leg., R.S., ch. 133, 1985 Tex. Gen. Laws 617 (relating to conservation, subsidence control, recharge, and water quality protection of groundwater);

1970-79: *see, e.g.*, Act of May 12, 1975, 64th Leg., R.S., ch. 284, 1975 Tex. Gen. Laws 672 (establishing the Harris-Galveston Coastal Subsidence District); Act of May 26, 1973, 63d Leg., R.S., ch. 598, 1973 Tex. Gen. Laws 1641 (adding subsidence control to the list of purposes for the creation of an underground water conservation district);

1960-69: *see, e.g.*, Act of May 11, 1961, 57th Leg., R.S., ch. 493, 1961 Tex. Gen. Laws 1095 (relating to the closing or capping of open or uncovered wells);

1950-59: *see, e.g.*, Act of April 9, 1959, 56th Leg., R.S., ch. 99, 1959 Tex. Gen. Laws 173 (creating the Edwards Underground Water District (EUWD)—predecessor to the Edwards Aquifer Authority); Act of May 24, 1955, 54th Leg., R.S., ch. 496, 1955 Tex. Gen. Laws 1239 (amending several sections of the 1949 act);

1940-49: *see, e.g.*, Act of May 23, 1949, 51st Leg., R.S., ch. 306, 1949 Tex. Gen. Laws 559 (enabling the creation and organization of underground water conservation districts), *repealed by* Act of May 29, 1995, 74th Leg., R.S., ch. 933, 1995 Tex. Gen. Laws 4673;

1930-39: *see, e.g.*, Act approved May 28, 1931, 42d Leg., R.S., ch. 261, 1931 Tex. Gen. Laws 432 (establishing the Texas State Board of Water Engineers), *see* Bd. of Water Eng'rs v. McKnight, 111 Tex. 82, 229 S.W. 301 (1921);

Pre-1930: *see, e.g.*, Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-80 (Austin, Gammel Book Co. 1898) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002)) (adopting and recognizing the common law of England).

4. *See* Op. Tex. Att'y Gen. No. DM-054 (1991) (stating section 28.011 of the Texas Water Code was a proper delegation of legislative authority to Texas Water Commission to manage groundwater resources) (overruling former Op. Tex. Att'y Gen. No. O-3205-A (1941)); Op. Tex. Att'y Gen. No. JM-827 (1987) (stating the creation of the Anderson County Underground Water Conservation District did not work an unconstitutional taking without just compensation), *cf.* Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 625 (Tex. 1996) (rejecting a facial challenge to the constitutionality of the Edwards Aquifer Authority Act); Op. Tex. Att'y Gen. No. V-1060 (1950) ("Section C, Article 7880-3c of the Texas Revised Civil Statutes, provides separate procedures for designating underground water reservoirs and creating underground water conservation districts and requires notice and hearing as a condition precedent to those designations and alterations of reservoir boundaries anticipated by the Act."); Op. Tex. Att'y Gen. No. O-2402 (1940) (citing California courts, which by that time had adopted a correlative rights groundwater regulatory scheme, for the proposition that all percolating groundwater not moving solely by force of gravity is subject to public ownership).

5. **Supreme Court of Texas**: *see, e.g.*, Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729, 737-38 (Tex. 2002) (holding that because the regulatory actions under dispute were legislatively mandated, the

Edwards Aquifer Authority was not required to perform a takings impact assessment as mandated under the PRPRPA); FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 888 (Tex. 2000) (striking down a Water Code provision passed by the Legislature, which the Court found was an unconstitutional delegation of legislative power to private landowners), *see* TEX. CONST. art XVI, § 59 (amended 2003); Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 83 (Tex. 1999) (declining to alter the rule of capture in light of the passage of S.B. 1); Maple Run at Austin Mun. Util. Dist. v. Monaghan, 931 S.W.2d 941, 947 (Tex. 1996) ("[A]ll Texans have an interest in protecting this State's natural resources . . . ."), *cf.* TEX. CONST. art XVI, § 59 (amended 2003) (expressly placing the duty to manage the State's natural resources in Texans' hands via the Legislature); Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 626 (Tex. 1996) (upholding the constitutionality of the Edwards Aquifer Authority, but declining to "definitively resolve the clash between property rights in water and regulation of water"); *In re* Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 252 (Tex. 1984) ("The primary source of the law of Colonial Spain is the *Recopilacion de las leyos de Indias* . . . [which] provides that when colonial law is silent on a topic, one must look to the laws of Peninsular Spain."); City of Sherman v. Pub. Util. Comm'n of Tex., 643 S.W.2d 681, 686 (Tex. 1983) (reaffirming the Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) decision, and the Court's adherence to the "absolute ownership theory"); *In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 441 (Tex. 1982) ("The story of water law in Texas is also the story of its droughts."); Quincy Lee Co. v. Lodal & Bain Eng'rs, Inc., 602 S.W.2d 262, 263-64 (Tex. 1980) (holding that a district formed under authority from Section 59, Article 16 of the Texas Constitution "can exercise no authority that has not been clearly granted by the Legislature"); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) (adding "negligence as a ground of recovery in subsidence cases"); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) ("Water, unsevered expressly by conveyance or reservation, has been held to be a part of the surface estate."); Shaddix v. Kendrick, 430 S.W.2d 461, 464 (Tex. 1968) (reversing a decision that required county commissioners to pay the costs of advertising an underground water conservation district, which failed to be confirmed by the voters); S. Pac. Co. v. Porter, 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960) (reiterating that Texas adopted English common law); Hawley v. Ground Water Conservation Dist. No. 2, 157 Tex. 643, 643, 306 S.W.2d 352, 353 (1957) (per curiam) (upholding the court of appeals's finding that Article 7880-3c of the Texas Revised Civil Statutes, which excluded grazing tracts greater than a square mile in size from inclusion in district boundaries, was an unconstitutional discrimination between large and small landowners), *see* TEX. CONST. art XVI, § 59 (amended 2003); Bryson v. High Plains Underground Water Conservation Dist., 156 Tex. 405, 407, 297 S.W.2d 117, 120 (1956) (holding the district board was "not . . . a State Board or Commission, and appellant's attack upon its orders does not constitute grounds for a direct appeal to this Court"); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 294, 276 S.W.2d 798, 801 (1955) (recognizing "the only limitations . . . [to] the 'English' rule are that the owner may not maliciously take water for the sole purpose of injuring his neighbor . . . or wantonly and willfully waste it") (citations omitted); McLendon v. City of Houston, 153 Tex. 318, 322-23, 267 S.W.2d 805, 807 (1954) ("The law should be settled, so far as possible, especially where contract rights and rules of property have been fixed."), *see* discussion *infra* Part IV.C.3; Harned v. E-Z Fin. Co., 151 Tex. 641, 649, 254 S.W.2d 81, 86 (1953) ("Our very first statute declares that the common law of England, when not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision and shall continue in force until altered or repealed by the Legislature."); Elliff v. Texon Drilling Co., 146 Tex. 575, 582, 210 S.W.2d 558, 562 (1948) (theorizing that the rule of capture is actually "another way of recognizing the existence of correlative rights"), *see* discussion *infra* Part IV.B.1.c; Corzelius v. Harrell, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945) (stating that the "law of capture . . . is recognized as a property right"); State v. Balli, 144 Tex. 195, 248, 190 S.W.2d 71, 99 (1944) ("The Spanish law was taken from the Institutes of Justinian . . . ."); Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann, 135 Tex. 280, 285, 142 S.W.2d 945, 948 (1940) ("Governmental agencies, or bodies corporate such as . . . Districts . . . can exercise no authority that has not been clearly granted by the Legislature."); Evans v. Ropte, 128 Tex. 75, 79, 96 S.W.2d 973, 974 (1936) ("It seems almost universally recognized that a right created by a grant to enter upon land and take and appropriate the waters of a spring or well thereon amounts to an interest in real estate . . . . In all events, it is an interest in land."); Turner v. Big Lake Oil, 128 Tex. 155, 170, 96 S.W.2d 221, 228 (1936) (declaring that:

> [T]he right of a landowner to the rainwater which falls on his land is a property right which vested in him when the grant was made . . . . Being a property right, the Legislature is without power to take it from him or to declare it public property and subject by appropriation or otherwise to the use of another.

Id.), *see* discussion *infra* Part IV.C.3; Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935) (citing *East* as authority for the "law of capture"); Manry v. Robison, 122 Tex. 213, 223, 56 S.W.2d 438, 442 (1932) ("The Roman law, including the Institutes of Justinian, was the basis of the *Partidas* and the laws of Spain and Mexico."); Tex. Co. v. Burkett, 117 Tex. 16, 28-29, 296 S.W. 273, 278 (1927) (discussing the lack of restrictions against landowners exporting percolating groundwater off the land from which it was pumped); Hoefs v. Short, 114 Tex. 501, 505-11, 273 S.W. 785, 786-89 (1925) (defining the characteristics of a stream), *see* discussion *infra* Part III.E.1.a.i; Stephens County v. Mid-Kan. Oil & Gas Co., 113 Tex. 160, 167-70, 254 S.W. 290, 292-93 (1923) (citing *East* as supporting correlative rights) ("'But the owner of the surface is an owner downward to the centre . . . . The air and the water he may use.'" (quoting Hague v. Wheeler, 27 A. 714, 719 (1893))), *see* discussion *infra* Parts III.C, III.D.2, IV.A.2-3; Bd. of Water Eng'rs v. McKnight, 111 Tex. 82, 90, 97, 229 S.W. 301, 303, 307 (1921) (invalidating statute that gave an administrative board the power to "adjudicate vested water rights" because it unconstitutionally attempted "to confer on persons belonging to the executive department powers which properly attach to another department [the judicial branch]"); Tex. Co. v. Daugherty, 107 Tex. 226, 237, 176 S.W. 717, 720 (1915) (declaring that:

> [T]he analogy between deposits of oil and gas and things ferae naturae is, at best, a limited one . . . [t]he difference between them is that things ferae naturae are public property, and all have an equal right to reduce them to possession and ownership, while the right to [capture] . . . is an exclusive and private property right in the landowner, [and] . . . may not be deprived without a taking of private property.

Id.), *see* discussion *infra* Part IV.A.1; *East*, 81 S.W. at 280 (1904) (adopting the doctrine announced in *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843));

Texas Commission of Appeals: *see, e.g.*, Prairie Oil & Gas Co. v. State, 231 S.W. 1088, 1090 (Tex. Comm'n App. 1921, judgm't adopted) (quoting JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND § 291 (2d ed. 1891) for the proposition that "'[p]etroleum, oil, . . . like water, . . . is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie'"), *see* discussion *infra* Part IV.A.2-3;

District Courts of Appeal: *see, e.g.*, City of San Marcos v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 264, 270 (Tex. App.—Austin 2004, pet. denied) (asserting that "[t]he common-law rule of capture is based on the concept that ownership of a migratory resource occurs when one exerts control over it and reduces it to possession") (the City filed a motion for rehearing on September 27, 2004, and on October 5, 2004, the Court requested that the respondents file a response to the motion for rehearing); Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 272-74 (Tex. App.—El Paso 2001, pet. denied) (sustaining a summary judgment in favor of Phillips Petroleum because the landowner did not file his groundwater contamination suit within two years of the initial injury), *overruled on other grounds by In re* Estate of Swanson, 130 S.W.3d 144, 147 (Tex. App.—Amarillo 2001, pet. denied) (denying Apache's motion to abate and holding that the landowner could pursue suit in trial court of contamination of underlying aquifer, even though the Texas Railroad Commission already instituted administrative proceedings); Senn v. Texaco, Inc., 55 S.W.3d 222, 225-26 (Tex. App.—Eastland 2001, pet. denied) (denying plaintiff's standing to bring suit because the alleged injury to the aquifer occurred prior to purchase); S. Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1, 52 S.W.3d 770, 779 (Tex. App.—Amarillo 2001, no pet.) (invalidating an underground water district's restriction of a landowner's "pumping of a disproportionate amount of water as it relates to the tract size" as "contrary to the rule of capture as applied to underground water in . . . *East*") (it is worth noting here that a possible explanation as to why no petition for review was filed by the district in this case is because the Court clearly reaffirmed the rule of capture just two years earlier in *Sipriano*); Tex. Rivers Prot. Ass'n v. Tex. Natural Res. Conservation Comm'n (*TRPA*), 910 S.W.2d 147, 155 (Tex. App.—Austin 1995, writ denied) (dealing with injection of surface water into an aquifer, the court held that the only requirement needed to be fulfilled by the permittee was that the same "*quantity* of water put into the aquifer can be recovered and put to [a beneficial] use"), *see* discussion *infra* Part IV.B.4.a.i; Creedmoor Maha Water Supply Corp. v. Barton Springs-Edwards Aquifer Conservation

Dist., 784 S.W.2d 79, 85 (Tex. App.—Austin 1989, writ denied) (upholding the constitutionality of user fees charged by the district); Denis v. Kickapoo Land Co., 771 S.W.2d 235, 238-39 (Tex. App.—Austin 1989, writ denied) (reasoning that:

> Under the English rule of the common law, percolating waters tributary to springs were treated the same as all other percolating waters as a part of the soil where found and belonged absolutely to the owner thereof, who could do what he pleased with them, even though in abstracting the water it dried up the springs, to which the water was tributary, on the land of another . . . provided that the water was intercepted while it was still percolating through the soil before it had reached the surface of the ground at the springs.

Id. (quoting C.S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS 2167 (2d ed. 1912))); *In re* The Contests of the City of Laredo to the Adjudication of Water Rights in the Middle Rio Grande Basin & Contributing Tex. Tributaries, 675 S.W.2d 257, 259 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (tracing the origin of Spanish law to that of the Romans, "and, more particularly, from the Institutes of Justinian"), *see* discussion *infra* Part III.A; Beckendorff v. Harris-Galveston Coastal Subsidence Dist., 558 S.W.2d 75, 78-81 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (upholding the constitutionality of the act creating the Harris-Galveston Coastal Subsidence District) (*Beckendorff* was the precursor court of appeals case to the *Friendswood* decision handed down one year later); Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation Dist. No. 1, 538 S.W.2d 659, 663 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) (holding that underground water districts stand on the same footing as counties and that neither the statute of limitations, laches, nor estoppel was available to prevent enforcement of a spacing order delayed by seven years); Bartley v. Sone, 527 S.W.2d 754, 760 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (presuming that the springs at issue were of such character that plaintiff had the right to use their waters for any purpose) (in dicta later distinguished by the Austin Court of Appeals in *Denis*, the court surmised that the rule of capture was "not applicable to springs which form the source of a flowing stream or which add perceptibly to the flow of water in a stream"), *Denis*, 771 S.W.2d at 238; State v. Valmont Plantations, 346 S.W.2d 853, 857 (Tex. Civ. App.—San Antonio 1961, writ granted) (recognizing that peninsular Spanish law "borrowed extensively from . . . Justinian's sixth century code"), *aff'd*, 163 Tex. 381, 383, 355 S.W.2d 502, 503 (1962), *see* discussion *infra* Part III.A; Ground Water Conservation Dist. No. 2 v. Hawley, 304 S.W.2d 764, 767 (Tex. Civ. App.—Amarillo 1957, writ ref'd n.r.e.) (holding a former statute unconstitutional that allowed district exemptions for large landowners, owners of more than 640 acres, and not for small landowners); Pecos County Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.) (groundwater user had no liability to downstream appropriators for depletion of surface stream flow due to groundwater pumping); Cantwell v. Zinser, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ) (amplifying *East* by recognizing that no right exists to "*waste* percolating water to the detriment of an adjoining owner"); Aelvoet v. Schutz, 181 S.W.2d 1011, 1013 (Tex. Civ. App.—San Antonio 1944, no writ) (upholding a deed that conveyed a one-half fee simple interest in a well, in addition to the water in it); Farb v. Theis, 250 S.W. 290, 292 (Tex. Civ. App.—San Antonio 1923, no writ) (upholding the absolute right to withdraw percolating ground water even though this withdrawal . . . results in the destruction of [another's] water supply").

6. **United States Supreme Court**: *see, e.g.*, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 954 (1982) (finding that groundwater, once pumped, is an article of commerce); Cappaert v. United States, 426 U.S. 128, 143 (1976) ("[T]he United States can protect its water from subsequent diversion, whether the diversion is of surface or ground water." (albeit the Court so held while construing state law from a state that followed the prior appropriation doctrine)); Hudson Water Co. v. McCarter, 209 U.S. 349, 356-57 (1908) (stating "the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs"), *see* discussion *infra* Part IV.B.1.a; Ohio Oil Co. v. Indiana, 177 U.S. 190, 204 (1900) (construing an earlier decision that applied only to oil and gas to now include water and that all three "'belong to the owner of the land, and are a part of it, so long as they are on or in it'" (quoting Brown v. Spillman, 155 U.S. 665, 670 (1895)));

United States Circuit Courts of Appeal: *see, e.g.*, Anthony v. Chevron USA, Inc., 284 F.3d 578, 583 (5th Cir. 2002) (reiterating that under Texas law, "the holder of an oil and gas lease . . . has the legal right . . . to use as much of the surface estate as is reasonably necessary to comply with the terms of the lease and to carry out its purposes"), *see* discussion *infra* Parts III.E, IV; Sierra Club v. City of San Antonio, 112

as numerous commentators[7] and treatises[8] have relied upon the rule of capture

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F.3d 789, 794 (5th Cir. 1997) (citing *Barshop* as support for the principle that aquifer management satisfies constitutional, social, and economic demands to conserve water); United States v. Shurbet, 347 F.2d 103, 106 (5th Cir. 1965) (holding that an Ogallala aquifer irrigator was allowed to claim an income tax deduction under the federal cost depletion statute dealing with oil and gas wells); Hendler v. United States, 952 F.2d 1364, 1367 (Fed. Cir. 1991) (holding that the installation of groundwater monitoring wells, put in place to measure groundwater pollution, constituted a compensable taking);

United States District Courts: *see e.g.*, Sierra Club v. Lujan, No. MO-91-CA-069, 1993 WL 151353, at *34 (W.D. Tex. Feb. 1, 1993) (mandating that the Texas Legislature and the Texas Water Commission (one of the forerunners to the TCEQ) establish a conservation plan that abides by the tenets of the Endangered Species Act); City of Altus, Okla. v. Carr, 255 F. Supp. 828, 839 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966) (holding that the Texas statute requiring legislative permission before the exportation of groundwater, which had been pumped from the ground for use in another state, was an unconstitutional burden upon interstate commerce).

7. **2000 to present**: *see, e.g.*, Jason T. Hill, Note, *A Piece to a Different Puzzle: The Junior Priority Provision and its Place in the Texas Water Law Picture*, 34 ENVTL. L. J. 290, 302 (2004) (erring in citing section 36.002 of the Texas Water Code as guaranteeing ownership of groundwater only to those who "produce and capture" it); Renea Hicks, *Groundwater District Powers*, *in* TEXAS WATER LAW ch. E1, E1-1 (2004) (surmising that *Sipriano* stands for the proposition that the rule of capture is "a tort law, not a property law, concept"); Russell S. Johnson, *Groundwater Districts: Evolution or Revolution?*, *in* TEXAS WATER LAW ch. E2, E2-1 (2004) [hereinafter *Evolution or Revolution?*] (quoting the *East* decision's use of language from *Pixley v. Clark*, 35 N.Y. 520, 527 (1866), wherein the Court agreed that:

> An owner of soil may divert percolating water, consume or cut it off, with impugnity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil of percolating water, which is a part of, and not different from, the soil.

Id. (citations omitted)); Carolyn Ahrens, *Water Resources in the 78th Legislative Interim*, *in* THE SIXTEENTH ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE tab 7, 10 (2004) (recognizing the overlapping and conflicting use of the doctrines of the rule of capture, prior appropriation, and correlative use currently followed in Texas groundwater districts); Douglas G. Caroom & Susan M. Maxwell, *The Rule of Capture —"If It Ain't Broke . . .", in 100 Years of the Rule of Capture*, *supra* note 1, at 45 (clarifying that the rule of capture grants the surface owner a vested property right in water; "so long as it is located beneath his land"); Gregory M. Ellis, *The Future of the Rule of Capture*, *in 100 Years of the Rule of Capture*, *supra* note 1, at 92 ("Any attempt to quantify the water right as the area of the aquifer beneath the surface estate ignores the fact that the water flows."); Rhonda G. Jolley, *Drafting Collateral Loan Documents for a Water Deal*, *in* THE CHANGING FACE OF WATER RIGHTS IN TEXAS 2004 tab 9, 1-2, 5 (Texas Bar CLE, 2004) (discussing the legal confusion surrounding the classification of groundwater rights as real or personal property); Robert E. Mace et al., *Groundwater Is No Longer Secret and Occult—A Historical and Hydrogeologic Analysis of the* East *Case*, *in 100 Years of the Rule of Capture*, *supra* note 1, at 70 ("Although most (if not all . . .) modern hydrogeologists would likely agree that groundwater is no longer secret and occult, the devil is in the details."); Harry Grant Potter III, *History and Evolution of the Rule of Capture*, *in 100 Years of the Rule of Capture*, *supra* note 1, at 92 ("Today, Texas stands alone as the only Western state that continues to follow the rule of capture."); Judon Fambrough, *Look Before You Lease Groundwater*, 67 TEX. B.J. 249, 249 (2004) (listing some areas to be wary of when executing a groundwater lease); Ronald Kaiser, *Water Concerns in Texas: A Problem in Search of a Solution*, 67 TEX. B.J. 188, 191 (2004) [hereinafter *In Search of a Solution*] (describing current problems with groundwater districts and cataloguing issues likely to be addressed by the 79th Legislature); Chris Lehman, Comment, *Hung Out to Dry?: Groundwater Conservation Districts and the Continuing Battle to Save Texas's Most Precious Resource*, 35 TEX. TECH L. REV. 101, 128 (2004) (theorizing that "when local regulation is in place, an essential ingredient of the rule of capture no longer exists"); Dylan O. Drummond, Comment, *Texas Groundwater Law in the Twenty-First Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH J. TEX. ADMIN. L. 173, 224 (2003) (proposing adoption of correlative rights doctrine); Judon Fambrough, *Groundwater Leases: What Texas Landowners Need to Know*, 10 TIERRA GRANDE 1-3 (Publication 1628, July 2003), http://recenter.tamu.edu/pdf/1628.pdf (describing the as-yet untested powers that a groundwater district may wield in its regulation of the transport

and marketing of groundwater); Eric Opiela, Comment, *The Rule of Capture in Texas: An Outdated Principle Beyond its Time*, 6 U. DENV. WATER L. REV. 87, 90-92 (2002) (proposing that the *Acton* court actually based its holding on tort principles and not on property rights); JUDON FAMBROUGH, REAL ESTATE CENTER, SECRETS FOR NEGOTIATING TEXAS GROUNDWATER LEASES 1-2 (Technical Report 1593, November 2002), http://recenter.tamu.edu/pdf/1593.pdf [hereinafter Technical Rep. 1593] (describing the relative dearth of both common law and common practice controlling the development of the water marketing industry in Texas); Todd H. Votteler, *Raiders of the Lost Aquifer? Or, the Beginning of the End to Fifty Years of Conflict Over the Texas Edwards Aquifer*, 15 TUL. ENVTL. L.J. 257, 276-96 (2002) [hereinafter *Raiders*] (describing the creation and purview of the Edwards Aquifer Authority); Judon Fambrough, *Water Stored Underground: Who Owns It?*, 8 TIERRA GRANDE 1-2 (Publication 1458, April 2001), http://recenter.tamu.edu/pdf/1458.pdf [hereinafter Publ'n 1458] (citing a natural gas case for the dual propositions that groundwater is comparable to wild game and that pumped water stored in an aquifer remains personalty of the original pumper and would not be subsequently subject to the rule of capture); Cynthia DeLaughter, Comment, *Priming the Water Industry Pump*, 37 HOUS. L. REV. 1465, 1468-72, 1489-90 (2001) (summarizing the provisions of S.B. 1 and recommending further refinements); Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 27 TEX. TECH. L. REV. 249, 253 (2001) ("The core groundwater management issues that must be addressed are: (1) how to resolve the conflicts over domestic well interference caused by high capacity wells; (2) how to prevent aquifer overdrafting and promote safe, sustainable aquifer yields; and (3) how to address aquifer mining."); RUSSELL S. JOHNSON, REAL ESTATE CENTER, TEXAS WATER LAW: THE NEXT CENTURY 22-23 (Technical Report 1469, May 2001), http://recenter.tamu.edu/pdf/1469.pdf [hereinafter Technical Rep. 1469] (listing the great variances in groundwater lease prices per acre-foot); Judon Fambrough, *Who Owns Groundwater?*, 8 TIERRA GRANDE 1 (Publication 1377, April 2000), http://recenter.tamu.edu/pdf/1377.pdf [hereinafter Publ'n 1377] (asserting that Texas landowners "do not own the water beneath their land");

1990-99: *see, e.g.*, Charles E. Gilliland, *Got Water? Tapping A New Texas Market*, 7 TIERRA GRANDE 1-2 (Publication 1357, January 2000), http://recenter.tamu.edu/pdf/1357.pdf (quoting Justice Hecht's concurring opinion in *Sipriano*, 1 S.W.3d at 82); Charles E. Gilliland, *Before the Well Runs Dry*, 6 TIERRA GRANDE 1, 3 (Publication 1270, January 1999), http://recenter.tamu.edu/pdf/1270.pdf (predicting the elimination of the rule of capture); David Hartman, Comment, *Risky Business: Vested Real Property Development Rights—The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law*, 30 TEX. TECH L. REV. 297, 303 (1999) ("Abrogating [vested property] rights may be recognized as a compensable 'taking' of private property."); John R. Pitts & Janet Hamilton, *Texas Water Law for the New Millenium*, 14 NAT. RESOURCES & ENV'T 35, 39-40 (1999) (discussing how, for the first time, S.B. 1 directed the Texas Commission on Environmental Quality (TCEQ) to take into consideration the amount of groundwater available to a landowner through the rule of capture before granting surface water rights to the landowner); Martin Hubert & Bob Bullock, *Senate Bill 1, The First Big and Bold Step Toward Meeting Texas's Future Water Needs*, 30 TEX. TECH L. REV. 53, 54 (1999) (describing S.B. 1 as "the most exhaustive rewrite of Texas water law in the last thirty years"); Stephanie E. Hayes Lusk, Comment, *Texas Groundwater: Reconciling the Rule of Capture With Environmental and Community Demands*, 30 ST. MARY'S L.J. 305, 360-64 (1998) (recommending that the Legislature vest ownership of groundwater in the state); Todd H. Votteler, *The Little Fish that Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide Over the Texas Edwards Aquifer*, 28 ENVTL. L. 845, 854 (1998) [hereinafter *Fish that Roared*] ("With the exception of the Gulf Coast Aquifer in the Houston and Galveston areas, and now the Edwards Aquifer, groundwater use in Texas is governed by the 'rule of capture,' also known as 'the law of the biggest pump.'"), *see* discussion *infra* Part IV.A; Edmond R. McCarthy, Jr., *1997 Update on Innovative Water Supply Solutions for Texas: Developments Affecting Aquifer Storage & Recovery and Wastewater Reuse Alternatives in Texas*, *in* TEXAS WATER LAW CONFERENCE 13 (CLE Int'l 1997) (comparing the prior "prevailing commercial potable water rate" of $240 per acre-foot with the "'adjusted rates'" of $50 to $100 per acre-foot, applied to recycled water); Matthew Carson Cottingham Miles, Comment, *Water Wars: A Discussion of the Edwards Aquifer Water Crisis*, 6 S.C. ENVTL. L.J. 213, 223-24 (1997) (describing the ineffectiveness of the former EUWD); Gary Linn Evans, Comment, *Texas Landowners Strike Water—Surface Estate Remediation and Legislatively Enhanced Liability in the Oil Patch—A Proposal for Optimum Protection of Groundwater Resources From Oil and Gas Exploration and Production in Texas*, 37 S. TEX. L. REV. 477, 496-97 (1996); Ronald A. Kaiser, *Texas Water Marketing in the Next Millenium: A Conceptual and Legal Analysis*, 27 TEX. TECH L. REV. 181, 259 (1996) (stating that

the "Texas capture rule" does not provide certainty nor security to potential water marketers); Benjamin R. Vance, Comment, *Total Aquifer Management: A New Approach to Groundwater Protection*, 30 U.S.F. L. REV. 803, 808 (1996) (describing the inconsistency among differing states's groundwater management doctrines, focusing on Florida and Texas); Matthew C. Urie, *Share and Share Alike? Natural Resources and Hazardous Waste Under the Commerce Clause*, 35 NAT. RESOURCES J. 309, 334-39 (1995) (analyzing various federal decisions that have touched upon groundwater management); Robert A. McCleskey, Comment, *Maybe Oil and Water Should Mix—At Least in Texas Law: An Analysis of Current Problems with Texas Ground Water Law and How Established Oil and Gas Law Could Provide Appropriate Solutions*, 1 TEX. WESLEYAN L. REV. 207, 213 (1994) ("*East* influenced early oil and gas law as well as water law."); R. Tim Hay, Comment, *Blind Salamanders, Minority Representation, and the Edwards Aquifer: Reconciling Use-Based Management of Natural Resources with the Voting Rights Act of 1965*, 25 ST. MARY'S L.J. 1449, 1487-98 (1994) (exploring whether the old EUWD was supplanted or de facto abolished with the creation of the Edwards Aquifer Authority); Eric A. Albritton, Comment, *The Endangered Species Act: The Fountain Darter Teaches What the Snail Darter Failed to Teach*, 21 ECOLOGY L.Q. 1007, 1064-65 (1994) (arguing that "the federal judiciary is insulated from politics" and allows "more direct input than . . . the legislature" because of the federal courts' "centralized" decisionmaking), *see* discussion *infra* Part IV.B.1.b; M. Diane Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexican-United States Border Area*, 24 ST. MARY'S L.J. 639, 695 (1993) (calling for "a federal statute recognizing groundwater conservation and management as a priority"); Kevin Smith, Comment, *Texas Municipalities' Thirst for Water: Acquisition Methods for Water Planning*, 45 BAYLOR L. REV. 685, 712 (1993) ("Arguably, diversion of groundwater into the river bed created a flowing river in an amount sufficient for irrigation and thus, the groundwater became state water subject to prior appropriation."), *see* discussion *infra* Part IV.B.3.b; Ronald C. Griffin & Fred O. Boadu, *Water Marketing in Texas: Opportunities for Reform*, 32 NAT. RESOURCES J. 265, 279-80 (1992) (proposing that "[w]ith respect to water marketing, the landowner does not hold title to specific units of water beneath his land" but instead "may 'reduce groundwater to ownership' by pumping it after which it can be sold and transported"); David Todd, *Common Resources, Private Rights and Liabilities: A Case Study on Texas Groundwater Law*, 32 NAT. RESOURCES J. 233, 261-62 (1992) (describing the failure of both Texas statutory and caselaw to address the practical concerns attendant to groundwater management); J. David Aiken, *Well Interference and Ground Water Mining: The Legal Framework in* UNCOVERING THE HIDDEN RESOURCE: GROUNDWATER LAW, HYDROLOGY AND POLICY IN THE 1990S at 1-2, 7, 10-11 (University of Colorado at Boulder, 1992) (describing the various common law groundwater regimes present in the United States); Lana Shannon Shadwick, Note, *Obsolescence, Environmental Endangerment and Possible Federal Intervention Compel Reformation of Texas Groundwater Law*, 32 S. TEX. L. REV. 641, 692-703 (1991) (proposing the adoption of prior appropriation for groundwater management) ("Today, Texas is the only western state that continues to rely exclusively on the English rule of absolute ownership to govern capture and use of one of its most precious natural resources—groundwater."); Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After* Sporhase, 70 NEB. L. REV. 754, 768 (1991) ("In the final analysis, the [U.S. Supreme] Court determined Nebraska's [greater ownership] argument was based on a legal fiction of state ownership." (citing Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 951 (1982)); Eric Behrens & Matthew G. Dore, *Rights of Landowners to Percolating Groundwater in Texas*, 32 S. TEX. L. REV. 185, 198-202 (1991) (revealing that no Texas court has ever found the presence of an underground stream); Karen H. Norris, *The Stagnation of Texas Ground Water Law: A Political v. Environmental Stalemate*, 22 ST. MARY'S L.J. 493, 506-16 (1990) (recommending the adoption of any other groundwater use doctrine besides the English rule);

1980-89: *see, e.g.*, Judon Fambrough, *Use Not Automatic: Ownership Governs Water Rights*, 3 Tierra Grande 10, 12 (Publication 715, August 1989), http://recenter.tamu.edu/pdf/715.pdf (positing that a "landowner can make . . . reasonable, beneficial use of" "privately owned spring water"); Robert A. Pulver, Comment, *Liability Rules as a Solution to the Problem of Waste in Western Water Law: An Economic Analysis*, 76 CAL. L. REV. 671, 688 n.91 (1988) (stating that courts rarely find waste because there is no clearly defined standard for measurement of waste); Jacque L. Emel, *Groundwater Rights: Definition and Transfer*, 27 NAT. RESOURCES J. 653, 661-65 (1987) (describing a "stock" and "flow" system of assigning property rights in a "common pool"); Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L.J. 1281, 1288-89 (1986) [hereinafter *Continuing Voids*] (discussing how the terms "absolute ownership" and the "English rule" have

been interchangeable in Texas jurisprudence); Paula K. Smith, *Coercion and Groundwater Management: Three Case Studies and a "Market" Approach*, 16 ENVTL. L. 797, 807 (1986) ("Groundwater supplies are often linked to surface water supplies."), *see* discussion *infra* Part III.E.1.a; Hans W. Baade, *The Historical Background of Texas Water Law—A Tribute to Jack Pope*, 18 ST. MARY'S L.J. 1, 57-87 (1986) (examining the history of water law in Spanish and Mexican Texas), *see* discussion *infra* Part III.A; Albert E. Utton, *In Search of an Integrating Principle for Interstate Water Law: Regulation Versus the Market Place*, 25 NAT. RESOURCES J. 985, 986 (1985) (describing *Sporhase* as the first federal groundwater case); Richard Ausness, *Water Rights Legislation in the East: A Program for Reform*, 24 WM. & MARY L. REV. 547, 551-53 (1983) (discussing effects of the English rule); Kenneth A. Hodson, Comment, *The Dormant Commerce Clause and the Constitutionality of Intrastate Groundwater Management Programs*, 62 TEX. L. REV. 537, 557 (1983) (noting that the United States Supreme Court's decision in *Sporhase* "put the states on notice that their groundwater management programs are not beyond [federal] judicial scrutiny"); Corwin W. Johnson, *Texas Groundwater Law: A Survey and Some Proposals*, 22 NAT. RESOURCES J. 1017, 1026 (1982) (recommending the adoption of the prior appropriation doctrine to manage groundwater in Texas);

1970-79: *see, e.g.*, George W. Pring & Karen A. Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-1, 25-18 (1979) ("The cases reveal a remarkable judicial tolerance for waste despite rhetoric to the contrary."); John Teutsh, *Controls and Remedies for Ground Water-Caused Land Subsidence*, 16 HOUS. L. REV. 283, 283 (1979) (discussing the land subsidence in Galveston Bay caused by excessive ground water withdrawals); George D. Cisneros, Note, *Water Law—Underground Water Users Are Liable for Subsidence Proximately Caused by Negligent Drilling or Production*, 10 TEX. TECH L. REV. 1193, 1203 (1979) (terming the holding from *Friendswood* the "Negligent Use" doctrine and warning of the need for a "clearer statement of [the Court's] dual policies of water conservation and prevention of subsidence"); Ed L. Huddleston, Note, *Water Law—Subsidence of Land Caused by Withdrawal of Percolating Water Is Actionable on the Theories of Negligence and Nuisance in Fact*, 9 TEX. TECH L. REV. 392, 401 (1978) (calling into question the scientific, economic, commercial, and societal justifications for the English rule); David A. Wright, Note, *Establishing Liability for Damage Resulting From the Use of Underground Percolating Water:* Smith-Southwest Industries v. Friendswood Development Company, 15 HOUS. L. REV. 454, 464 (1978) (explaining that recognition of liability for negligent subsidence of neighboring parcels would have a large impact upon the rights of both groundwater users and landowners in Texas); Garland F. Smith, *The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future*, 8 TEX. TECH L. REV. 577, 632 (1977) (chastising groundwater pumpers for relying "on the false premise [of the English rule] on which the *East* holding hinged"); Roger Tyler, *Underground Water Regulation in Texas*, 39 TEX. B.J. 532, 535 (1976) ("Among the ancients, Seneca did not believe that rainfall was the source of springs; and while Homer, Thales and Plato believed the spring water came from the ocean, they erroneously thought that a direct return flow takes place through subterranean channels." (citing C. F. TOLMAN, GROUND WATER, 15-16 (1st ed. 1937)); Robert Emmet Clark, *Ground Water Law: Problem Areas*, 8 NAT. RESOURCES J. 377, 377 (1975) (failure of groundwater law in general to "recognize adequately the physical or hydrological relationship between most surface and ground water sources"); James N. Castleberry, Jr., *A Proposal for Adoption of a Legal Doctrine of Ground-Stream Water Interrelationship in Texas*, 7 ST. MARY'S L.J. 503, 504 (1975) (calling for Texas to recognize the hydrologic "interrelationship between the waters of a flowing stream and those ground waters which feed or contribute to the flow of that stream"); Stephen E. Snyder, Note, *Ground Water Management: A Proposal for Texas*, 51 TEX. L. REV. 289, 308 (1973) (citing a single United States Supreme Court case for the supposition that the Constitution would "present no serious problem" to the judicial change of groundwater management regimes in Texas); Alan E. Friedman, *The Economics of the Common Pool: Property Rights in Exhaustible Resources*, 18 UCLA L. REV. 855, 887 (1971) ("Indeed, the world is a common pool rife with externalities so complex and interdependent that man has not begun to comprehend their full measure. Until man does, this Article is offered as a pair of kindergarten scissors with which to nick the Gordian knot."); Dudley D. Johnson, *An Optimal State Water Law: Fixed Water Rights and Flexible Market Prices*, 57 VA. L. REV. 345, 374 (1971) ("The inability of existing systems to make users bear the true social cost of their activities has led to overuse, shortages, and nonmarket rationing."); Robert H. Steelhammer & John G. Garland, *Subsidence Resulting from the Removal of Ground Waters*, 12 S. TEX. L.J. 201, 213 (1970) ("With the ever increasing demand for land, the unique quality of each tract becomes more important and the law in this area as developed in the 1800's is no longer acceptable or realistic . . . .");

1960-69: *see, e.g.*, Robert Emmet Clark, *Background and Trends in Water Salvage Law*, 15 ROCKY MTN. MIN. L. INST. 421, 461 (1969) (explaining that the waste concept is "poorly defined . . . hesitantly applied and rarely enforced"); Corwin W. Johnson, *Condemnation of Water Rights*, 46 TEX. L. REV. 1054, 1071 (1968) ("It is hazardous to generalize about the existence of authority in Texas to condemn water rights for the purpose of acquiring a water supply. Litigation will probably be required to resolve many of the doubts."); Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1, 26 (1965) ("If a water right is to serve its owner and the public effective[ly] as a right of property, it is essential that the right be sufficiently defined to identify the property and differentiate it from the property of others."); Richard S. Harnsberger, *Nebraska Ground Water Problems*, 42 NEB. L. REV. 721, 727 (1963) ("Almost all of the contiguous seventeen Western states originally accepted the English rule by dictum or decision, but today only Texas appears to follow it."); Edgar S. Bagley, *Water Rights Law and Public Policies Relating to Ground Water "Mining" in the Southwestern States*, 4 J.L. & ECON. 144, 163-64 (1961) (describing the implementation of the first groundwater management districts in Texas in 1949); Robert Emmet Clark, *Ground Water Legislation in the Light of Experience in the Western States*, 22 MONT. L. REV. 42, 49-51 (1960) (analyzing the groundwater law statutory trends in the western states);

1950-59: *see, e.g.*, Wells A. Hutchins, *Ground Water Legislation*, 30 ROCKY MTN. L. REV. 416, 417 (1958) [hereinafter *Ground Water Legislation*] ("[T]he English rule of absolute ownership—sometimes termed the common law doctrine—is the earliest in American jurisprudence."); Harbert Davenport & J. T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 138, 173 (1956) (explaining that under Spanish law, "the springs and sources of waters belong to him who owns the lands where they are located" (quoting MARIANO GALVAN RIVERA, ORDENANZAS DE TIERRAS Y AGUAS, 158 (Mexico 1844))); Wells A. Hutchins, *Trends in the Statutory Law of Ground Water in the Western States*, 34 TEX. L. REV. 157, 166 (1955) (revealing that "the earliest legislation in the West concerning the rights of use of ground water was enacted in 1866 by the Territory of Dakota"); Hon. Joe R. Greenhill & Thomas Gibbs Gee, *Ownership of Ground Water in Texas: The* East *Case Reconsidered*, 33 TEX. L. REV. 620, 623 (1955) (commenting the Court "apparently rejected" the Attorney General's findings in opinion No. 2402 by refusing writ n.r.e.), *see supra* text accompanying note 4; Edward P. Woodruff, Jr. & James Peter Williams, Jr., Comment, *The Texas Groundwater District Act of 1949: Analysis and Criticism*, 30 TEX. L. REV. 862, 872, 874 (1952) (forecasting, even fifty-two years ago, that "serious problems [with local districts might] be occasioned by the bias and inertia of local officials" and calling instead for "a comprehensive groundwater code providing for statewide management by a central administrative board"); A.W. McHendrie, *Underground Water Legislation*, 23 ROCKY MTN. L. REV. 439, 439-43 (1950) (urging legislative action to regulate underground water);

1940-49: *see, e.g.*, William F. Hughes, *Proposed Groundwater Conservation Measures in Texas*, 1 TEX. J. OF SCI. 35, 36 (1949) (describing how the scientific knowledge present at the time of *Acton* and *East* was "meager," but how "marked advances in groundwater hydrology" have been made since), *see* discussion *infra* Part IV.C.3; Marion Rice Kirkwood, *Appropriation of Percolating Water*, 1 STAN. L. REV. 1, 2 (1948) ("The court [in *Acton*] is . . . obviously asserting a doctrine of ownership of the corpus of the water by the owner of the overlying land and recognizing the usual broad rights and privileges of use that accompany ownership."); A.W. McHendrie, *The Law of Underground Water*, 13 ROCKY MTN. L. REV. 1, 4 (1940) (recognizing the academic debate as to whether the English Rule was "a rule at common law");

1930-39: *see, e.g.*, A. W. Walker, Jr., *Property Rights in Oil and Gas and Their Effect Upon Police Regulation of Production*, 16 TEX. L. REV. 370, 375 (1938) (lamenting the rising prevalence of the term "law of capture"); David G. Thompson & Albert G. Fielder, *Some Problems Relating to Legal Control of Use of Ground Waters*, 30 J. AM. WATER WORKS 1049, 1061-69 (1938) ("At the time when certain leading decisions were handed down, the physical laws that govern the occurrence and recovery of groundwater were not sufficiently understood, and the time was not ripe to propose legal viewpoints which today seem not only desirable but necessary."), *see* discussion *infra* Part IV.C.3; Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 409 n.24 (1935) (*East* "really follows the American rule of reasonable and beneficial use . . . , although the case is *sometimes cited* as following the English rule without any modifications or limitations whatever." (emphasis added));

1920-29: *see, e.g.*, Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. CAL. L. REV. 358, 362 (1929) ("[C]onnection between surface streams and groundwater is . . . never absent."), *see* discussion *infra* Part III.E.1.a.

and have evaluated its merits ad infinitum.[9] Indeed, the rule of capture and its underpinnings were the subject of learned analysis long before *East* was handed down in 1904,[10] not only in England,[11] but also throughout the United States, both at the federal[12] and state levels,[13] including Texas.[14]

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8. *See* ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS 35 (2002); DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §§ 4.6-.7 (1998 ed., 2003 replacement vol.); JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 343-459 (3d ed. 2000); Douglas G. Caroom & Lynn R. Sherman, *Water Development and Water Rights*, *in* 45 TEXAS PRACTICE: ENVIRONMENTAL LAW §§ 13.1, .2, .23 (Jeff Civins et al. eds., 1997); R. DAVID G. PYNE, GROUNDWATER RECHARGE AND WELLS: A GUIDE TO AQUIFER STORAGE RECOVERY, §§ 1.4, 5.1-.3 (1995); WATER AND WATER RIGHTS §§ 20.02-.09 (Robert E. Beck ed., 1991 ed., 2003 replacement vol.); MICHAEL C. MEYER, WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY 1550-1850 3, 106-07 (1984); R. ALLEN FREEZE & JOHN A. CHERRY, GROUNDWATER §§ 8.1-.13 (1979); R. WARD, PRINCIPLES OF HYDROLOGY §§ 7.1-.22 (1975); William M. Champion, *Ground Water Rights*, *in* WELLS A. HUTCHINS, 2 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 631-64, 668-87 (1974) [hereinafter WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES]; WELLS A. HUTCHINS, THE TEXAS LAW OF WATER RIGHTS 557-600 (1961) [hereinafter TEXAS LAW]; BETTY EAKLE DOBKINS, THE SPANISH ELEMENT IN TEXAS WATER LAW 3-131 (1959); DAVID KEITH TODD, GROUND WATER HYDROLOGY 297-306 (1959); C. F. TOLMAN, GROUND WATER 15-16 (1st ed. 1937); KINNEY, *supra* note 5, at 2167; SAMUEL C. WIEL, 2 WATER RIGHTS IN THE WESTERN STATES 743, 970-73 (3d ed. 1911); HENRY PHILIP FARNHAM, 3 THE LAW OF WATER AND WATER RIGHTS 2710-55 (1904); GOULD, *supra* note 5, § 291.

9. *See supra* notes 3-8 (providing a shelf-checker's definition of ad infinitum).

10. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

11. *See, e.g.*, Chasemore v. Richards, 157 Eng. Rep. 71, 81 (1857) (allowing the sinking of a well on one's own land, without malice, which produces underground water that would have flowed into an adjacent river); Acton v. Blundell, 152 Eng. Rep. 1223, 1235 (1843) (originating the aptly named "English rule"); Hammond v. Hall, 59 Eng. Rep. 729, 731 (1840) (providing the first English case dealing with the property rights attendant to percolating waters, but in which the question of ownership of such waters was not reached).

12. *See, e.g.*, Ohio Oil Co. v. Indiana, 177 U.S. 190, 211 (1900) (holding that the regulation of oil, gas, and water is left to the "lawful discretion of the legislature of the State").

13. *See, e.g.*, Hanson v. McCue, 42 Cal. 303, 309 (1871) (*Hanson* stands as an intriguing decision where the court held that:

> Water filtrating or percolating in the soil belongs to the owner of the freehold—like the rocks and minerals found there. It exists there free from the usufructuary right of others . . . . The owner may appropriate the percolations and filtrations as he may choose, and turn them to profit if he can.

Id. This came from a state that famously adopted the correlative rights doctrine thirty-two years later in *Katz v. Walkinshaw*, 74 P. 766 (Cal. 1903)); Roath v. Driscoll, 20 Conn. 533, 542-44 (1850) (citing *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117 (1836) and *Acton* in adopting a principle that allows "'the owner of land [to] dig a well on any part thereof, notwithstanding he thereby diminishes the water in his neighbor's well'" (quoting *Greenleaf*, 35 Mass. (18 Pick.) at 117)); New Albany & Salem R.R. v. Peterson, 14 Ind. 112, 114 (1860) (adopting expressly the *Acton* rationale of *damnum absque injuria*); *Greenleaf*, 35 Mass. (18 Pick.) at 122-23 (deciding a fascinating case that actually adopted the principle of *damnum absque injuria* seven years before the *Acton* decision, based on the writing of Jean Domat and John Ayliffe). *Contra* Bassett v. Salisbury Mfg., 43 N.H. 569, 573-79 (1862) (rejecting expressly the tenets of absolute ownership, as laid out in *Acton*, and founding what is now known as the American branch of the Reasonable Use doctrine);Village of Delhi v. Youmans, 45 N.Y. 362, 363 (N.Y. 1871) ("But if merely prevent the water from reaching the spring or open, running stream, by intercepting its percolation or underground currents, by digging a well upon the defendant's own land, . . . this action will not lie."); Pixley v. Clark, 35 N.Y. 520, 527-32 (1866) (reviewing the *Acton*, *Chasemore*, *Chatfield v. Wilson*, 28 Vt. 49 (1855), and *Roath* decisions but deciding a flooding damages case on surface water law grounds); Frazier v. Brown, 12 Ohio St. 294, 311 (1861) ("[T]he law recognizes no correlative rights in respect to underground waters percolating, oozing

To better serve as an easy reference for landowners, legislators, jurists, and academics, this article catalogues, in laborious detail, much if not all of the pertinent jurisprudential authority, legal commentary, and legislative enactments dealing with the legal categorization and management of groundwater in Texas.[15] This disquisition reveals that, despite the many academic jeremiads lamenting the rule of capture,[16] Texas courts have shown remarkable consistency in their interpretation and application of it[17] and have recognized exceptions only in very rare circumstances.[18] In addition, despite the voluminous amount written, no treatise, article, comment, or note has ever truly traced the origin of the rule of capture back to its source and then followed it forward to the present day,[19] and the authors of this article are now painfully aware as to why this is so. However, this article undertakes the difficult task of explicating this history because[20]—before any significant, foundational changes to the rule of capture are considered by the Legislature or by the courts[21]—the authors believe that a full understanding of the doctrine, its origins, interpretations, applications, and current viability is

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or filtrating through the earth; and this mainly from considerations of public policy."), *overruled by* Cline v. Am. Aggregates Corp., 474 N.E.2d 324, 327 (Ohio 1984); Wheatley v. Baugh, 25 Pa. 528, 530, 532 (1855) (citing *Acton*, Domat, and Justinian as the reasoning for accepting the maxim *cujus est solum ejus est usque ad coelum et ad infernos*); *Chatfield*, 28 Vt. at 55 ("'[W]ater, whether moving or motionless, in the earth, is not, in the eye of the law, distinct from the earth.'" (quoting *Roath*, 20 Conn. at 541)); Ellis v. Duncan, 21 Barb. 230, 235 (N.Y. Gen. Term 1855) (allowing a landowner to drain a spring on his own land which lowered the stream on his neighbor's land).

14. *See, e.g.*, Groesbeck v. Golden, 7 S.W. 362, 365 (Tex. 1887) ("[W]here property rights are shown to have grown up under the decision, the rule will rarely be changed for any reason . . . ."), *see* discussion *infra* Part IV.C.3; Tex. & Pac. Ry. v. Durrett, 57 Tex. 48, 51 (1882) (ruling that an instrument that granted a railroad company "the use of the wood, timber, water, etc." was "an interest in land which could only be created by deed or grant"); Fleming v. Davis, 37 Tex. 173, 198 (1873) (describing the ownership interests of water once it has emerged from the ground via a spring); Tolle v. Correth, 31 Tex. 362, 365 (1868) (recognizing, some thirty-six years prior to *East*, that vested property rights are subject to the maxim *damnum absque injuria*), *see* discussion *infra* Part III.D.1; Toyaho Creek Irrigation Co. v. Hutchins, 21 Tex. Civ. App. 274, 282, 52 S.W. 101, 105 (1899, writ ref'd) ("It must certainly be held that the owner of lands owns also all ordinary springs and waters arising thereon.").

15. *See supra* notes 1-8.

16. *See supra* note 7.

17. *See, e.g.*, Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75 (Tex. 1999); Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

18. *See* Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 638 (Tex. 1996) (upholding the constitutionality of the Edwards Aquifer Authority); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) (recognizing a limitation on the absolute ownership rule where an owner's negligent pumping of groundwater causes subsidence of neighboring land).

19. *See supra* notes 8-9. *Contra* Norris, *supra* note 7, at 506-13 (footnoting the influence of Roman law upon that of the English but not describing it in great detail). *See generally* Greenhill & Gee, *supra* note 7.

20. *See supra* notes 3-14.

21. *See* Ahrens, *supra* note 7, at 10; Robert Elder, Jr., *Senate to Tackle Pumping of Water*, AUSTIN AM.-STATESMAN, Nov. 13, 2003, at A1 (reporting the establishment of the Texas Senate Select Committee on Water Policy).

imperative in order to ascertain exactly what rights the rule of capture has historically conferred and currently guarantees Texas landowners.

The rule of capture is one of the most well-developed areas of law of any kind in Texas—spanning some twenty statutes, approximately fifty cases,[22] and premised upon the recognition and adoption of the entire body of English common law,[23] which itself adopted *en masse* the whole of the Roman law pertaining to water.[24] Altogether, the rule of capture is a doctrine solidly founded upon the compilation of roughly 1600 years of property law.[25]

As a group, the coauthors of this article are well-suited to undertake such an analysis of the rule of capture, because they hold opposing views on groundwater management.[26] One of the authors advocated the abolishment of the rule of capture in Texas in favor of the adoption of the doctrine of correlative rights,[27] while the others have been longtime, staunch supporters of the rule of capture.[28] Despite the contrasting positions, however, the authors agree: (1) that the rule of capture is a misnomer that has been misconstrued, almost since its inception;[29] (2) that the rule of capture, for over 1600 years,[30] has guaranteed a property right in groundwater,[31] vesting at the moment of ownership of the overlying land;[32] and (3) that substantially altering the rule of capture one hundred years after its implementation presents considerable takings implications for the state.[33]

II. ANCIENT LEGAL HISTORY AND DEVELOPMENT[34]

While some have traced property rights back "to the original gift of the creator," the authors do not presume to attach such a divine origin to the rule

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22. *See supra* notes 3, 5.

23. *See* Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002)) (adopting and recognizing the common law of England).

24. The English common law itself adopted the whole of the Roman water law before it. *See* Davenport & Canales, *supra* note 7, at 157.

25. *See* discussion *infra* Parts II, III.A-D.

26. *See supra* notes *-*** (noting the author's experience regarding the rule of capture).

27. *See* Drummond, *supra* note 7, at 224; Caroom & Maxwell, *supra* note 7, at 60 n.87.

28. *See supra* notes **, *** (noting the author's experience regarding the rule of capture).

29. *See* discussion *infra* Part IV.A.

30. Water rights were first aligned with property rights in 397 A.D. *See* CODE THEOD. 15.2.7 *in* THE THEODOSIAN CODE AND NOVELS AND SIRMONDIAN CONSTITUTIONS 431 (Clyde Pharr et al. trans., 1952) [hereinafter CODE THEOD.]; discussion *infra* Part II.B.3.

31. The authors acknowledge that "groundwater" is a sufficiently broad legal term that includes several forms of subterranean water. For purposes of this discussion, all "groundwater" discussed in this article refers to "water percolating below the surface of the earth." TEX. WATER CODE ANN. § 36.001(5) (Vernon 2000).

32. *See* discussion *infra* Parts II, III.

33. *See* discussion *infra* Part IV.C.4.

34. Mr. Drummond's coauthors wish to recognize and congratulate him on the exhaustive research he performed to develop the thorough history of the legal foundation of our modern day rule of capture.

of capture.[35] The authors do not even seek the "general consent of mankind" as the Supreme Court of Connecticut did in *Roath v. Driscoll* in stating that "each person must be left to enjoy any natural advantage belonging to his own land; and water, appearing and standing, either naturally or by artificial means, but never constituting a running stream, is such a natural advantage."[36] The authors merely attempt to trace the concept of groundwater ownership back to its earliest mortal origins.[37] Throughout the last two thousand years, the rule of capture has not only been recognized, it has been expressly described as a property right, vesting at the moment of ownership of the property, not—as the name might suggest—at the moment of capture.[38] Indeed, no other property doctrine exists which could have been devised from the foundational texts of the Romans other than the rule of capture.

A. Greek Law

The first known codifications of law arose between 2100 and 1728 B.C.[39] Within one millennia of these first formal recognitions of law, the Greeks began to refine and develop the law as it then existed,[40] and their advancements of both legal and scientific understanding bore a direct influence on later Roman Law and, in turn, on that of Western Europe.[41]

The Greeks differentiated written law from unwritten law, viewing written law as more authoritative because of its fixed nature.[42] Most Greek scholars bent their considerable intellects towards the vagaries of property law,[43] and some even wrote specifically on water ownership.[44] During the time of the Greek poet Homer, who is believed to have lived circa 1000 B.C.,[45] every free person had the right to alienate and dispose of property without limitation.[46] Homer may have the distinction of being the first legal scholar[47]

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35. Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67, 75 (1985) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2-3).

36. Roath v. Driscoll, 20 Conn. 533, 542 (1850).

37. *See* discussion *infra* Part II.A.

38. *See* discussion *infra* Parts II-III.

39. Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 477 (1996).

40. GEORGE TOUMBOUROS, PARALLEL LEGISLATIONS OF ENGLAND, U.S.A., FRANCE, GERMANY, ITALY AND COMPARATIVE LAW: VOLUME I: THE LAWS OF THE ANCIENT GREECE 21 (1959).

41. *Id.*

42. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1539-40 (1995).

43. *See* TOUMBOUROS, *supra* note 40, *passim*.

44. Tyler, *supra* note 7, at 535; *see* ARTHUR FAIRBANKS, THE FIRST PHILOSOPHERS OF GREECE 4 (1898).

45. *See* Mace et al., *supra* note 7, at 66; TOUMBOUROS, *supra* note 40 at 52.

46. *See* TOUMBOUROS, *supra* note 40, at 93. During this period, there were no laws in the literal sense that we understand today—organized into codes and constitutions—but instead there existed only defined ideas of what one must do and what one must not do. *Id.* at 297. The prevailing "legal" framework within which disputes were resolved during this time has been referred to as "voluntary arbitration." *Id.* at

to describe the field of groundwater law,[48] at least as it developed in Europe and later in America. He believed that spring water not only flowed from the ocean, but was returned to it as well through subterranean channels.[49] This theory is known as the Oceanus theory, and Homer first coined the term in Book 21 of the *Iliad*, where he wrote of "'the deep-flowing Oceanus, from which flow all rivers and every sea and all springs and deep wells.'"[50]

However, Homer may not have been the first to posit the Oceanus theory. A passage from Ecclesiastes, widely thought to have been written by Solomon around the tenth century B.C.,[51] envisions much the same hydrological relationship:

> All streams flow into the sea,
> yet the sea is never full.
> To the place the streams come from,
> there they return again.[52]

Thales, who was born in 640 B.C., was described by Aristotle as the founder of Greek Philosophy because he resisted the age-old practice of attributing mythical explanations to events in favor of divining a physical commonality instead.[53] He was also a devotee of the Oceanus theory[54]—built on Homer's first inklings of the existence of something akin to aquifers[55]—but greatly expanded the concept to encompass the notion that the entire earth rested on water.[56] Thales placed a paramount value on water, believing it to be the "first principle of all things . . . from [which] all things come, and to it they all return."[57] Aristotle, who is believed to have lived between 384 and 322 B.C., introduced a new hydrologic theory, now referred to as the condensation theory, which more closely approximates a modern understanding of the hydrologic cycle.[58] In *Meteorologicia*, he explained the precepts of the theory by stating that:

298.

47. At this stage of the development of western civilization, it appears that the distinct disciplines of engineering, philosophy, biology, art, mathematics, and law were not yet so disparate as they are today and were often pursued and mastered simultaneously by the leading pontificators of the day. *Id.* at 19-20.

48. Tyler, *supra* note 7, at 535

49. *Id.*

50. Mace et al., *supra* note 7, at 66 (quoting HOMER, THE ILIAD, Book 21).

51. THE QUEST STUDY BIBLE, NEW INTERNATIONAL VERSION 911 (Marshall Shelley ed., 1994).

52. *Ecclesiastes* 1:7; *see* GLENNON, *supra* note 8, at 35.

53. FAIRBANKS, *supra* note 44, at 1.

54. Mace et al., *supra* note 7, at 66.

55. Tyler, *supra* note 7, at 535.

56. *See* FAIRBANKS, *supra* note 44, at 4.

57. *Id.* at 5.

58. Mace et al., *supra* note 7, at 66-67.

> [T]he air surrounding the earth is turned into water by the cold of the heavens and falls as rain . . . [and] . . . the air which penetrates and passes the crust of the earth also becomes transformed into water owing to the cold which it encounters there. The water coming from the earth unites with rain water to produce rivers. The rainfall alone is quite insufficient to supply the rivers of the world with water.[59]

B. Roman Law

While the Greek contribution to modern groundwater law centered more around the first organized legal understanding of property ownership and the scientific underpinnings of hydrology, the Romans expanded upon the Greek foundational concepts by recording them in the Twelve Tables, exploring their effects juristically, and later codifying the newly-formed Roman common law in the *Theodosian Code* and the *Digest of Justinian*.[60]

1. The Twelve Tables

Although Romulus founded Rome in 753 B.C.,[61] the first Roman codification of the law was not undertaken until 462 B.C. and it was not completed until eleven years later in 451 B.C.[62] This first written code is referred to as the Twelve Tables after the twelve bronze tablets upon which it was inscribed.[63] A commission, charged with the task of "'writing down the laws,'" produced the Twelve Tables in order to settle authoritatively many controversial cases that had arisen under the application of the unwritten, customary law of the time.[64] The Twelve Tables were so crucial to the later development of modern property law that they have been called "'the foundation of modern Western jurisprudence.'"[65]

This section reviews the Twelve Tables because they contain an early instance of written water law, perhaps the first in the Western world.[66] The Twelve Tables provided a remedy when one party's diversion of rain water resulted in injury to another party's land.[67] The Twelve Tables also contained

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59. *Id.* (quoting C.W. Fetter, Jr., *Historical Knowledge of Ground Water*, ¶ 16 (2001), *at* http://www.appliedhydrogeology.com/history.htm); *see* A.K. BISWAS, HISTORY OF HYDROLOGY 61-69 (1970).

60. *See* discussion *infra* Part II.B.

61. ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 10 (1970); *see* PHARR ET AL., THE THEODOSIAN CODE AND NOVELS AND SIRMONDIAN CONSTITUTIONS xxiii (1952).

62. *See* WATSON, *supra* note 61, at 13.

63. *Id.*

64. *See* Stein, *supra* note 42, at 1540 (citations omitted).

65. *See* Wise, *supra* note 39, at 492-93 (quoting Alan Watson, Rome of the XII Tables: Persons and Property 3 (1975)).

66. *See* WATSON, *supra* note 61, at 10.

67. *Id.* at 27.

four servitudes, defined as "rights vested in a person as owner of one piece of land over another piece, effective not only against its owner, but against all."[68] Notably, of the four earliest defined servitudes, one of them concerned water—that of "*aquaeductus*"—which made the land over which a Roman aquaduct was constructed "*servire*" to, or burdened by, the existence and maintenance of the aquaduct.[69]

2. *The Early Jurists*

The next major advancement in the evolution of Roman law came around the first century B.C., when a system of nationally renowned jurists interpreted the original Twelve Tables and the many edicts of the Roman emperors.[70] Written legal critiques of these jurists were given authoritative weight and were actually followed by Roman judges of the day, thereby becoming legally binding as well.[71] These juristic writings became one of the major sources of Roman jurisprudence for the next five hundred years until the *Theodosian Code* was drafted in 438 A.D.[72] Indeed, they were deemed so important that they were eventually catalogued and made the basis of Justinian's complete recodification of Roman Law in 533 A.D.[73]

3. *The* Theodosian Code

The Roman Empire split in two during the fourth century A.D.[74] between the time of Domitus Ulpianus, a famed first century A.D. jurist commonly referred to as Ulpian,[75] and the Emperor Theodosius II.[76] Two distinct yet

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68. *See* W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 261-62 (3d ed. 1966).

69. *See id.* at 261-63.

70. *See id.* at 21-23; WATSON, *supra* note 61, at 26-27.

71. It is believed that the Emperor Augustus, who ruled from 31 B.C. to 14 A.D. and whose reign marked the end of the old Roman Republic and the beginning of the Roman Empire in 27 A.D., *see* PHARR ET AL., *supra* note 61, at xxiii, xxvi, issued the right of *publice respondere* (referring to the Juristic Responses to the Imperial Edicts) to certain jurists, making their *responsa* binding. *See* BUCKLAND, *supra* note 68, at 23. Apparently by the time of the rule of the Emperor Hadrian (117-138 A.D., *see* WATSON, *supra* note 61, at 27) a difficulty arose where jurists of equal stature would issue conflicting opinions. *See* BUCKLAND, *supra* note 68, at 23. Hadrian settled this quandary by making the *responsa* binding only if they were in agreement with each other. *Id.*

72. *See* PHARR ET AL., *supra* note 61, at xvii.

73. *See* WATSON, *supra* note 61, at 93.

74. *See* PHARR ET AL., *supra* note 61, at xxiv. This schism began around 305 A.D. under the rule of the Emperor Diocletian and was finalized in 395 A.D. during the reign of Theodosius I. *Id.*

75. Ulpian is believed to have been born around 172 A.D. and was murdered by his own guards in 228 A.D. *See* SAMUEL PARSONS SCOTT, THE CIVIL LAW: INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTIONS OF LEO 14 (1932); WATSON, *supra* note 61, at 90.

76. Theodosius II ruled the Eastern Empire from 408-50 A.D. *See* PHARR ET AL., *supra* note 61, at xxiv, xxvi.

connected empires resulted, which were ruled from two capitals—Constantinople in the East and Rome in the West—until the fall of the Western Empire in 476 A.D.[77]

Theodosius II issued a decree at Constantinople on March 26, 429 A.D. appointing a commission of nine scholars to collect and combine all of the previous imperial edicts, constitutions, and the three then-existing codes —*Gregorianus*, *Hermogenianus*, and *Theodosianus*[78]—and then to publish them together in one single code.[79] The *Theodosian Code*, as it is now known, was completed nine years later and was formally adopted by the Empire on Christmas Day, 438 A.D.[80]

The *Theodosian Code* provides a glimpse of the precursory knowledge of water and water rights present during this period.[81] Specifically, in Book XV, concerning public works, the bulk of the discussion concerning water deals primarily with aquaducts—their use, care, and penalties for the illegal diversion of water from them.[82] However, in Section 7 of Book XV, an edict issued by Augustus to "Asterius, Count of the Orient" on November 1, 397 A.D. decreed that "ancient water rights that are established by long ownership shall remain the property of the several citizens and not be disturbed by any innovation. Thus each man shall obtain the amount that he has received by ancient right and by custom lasting to the present day."[83] This passage is crucial to the author's analysis in that it appears to be the very first alignment of water rights with the concept of property rights.[84] Significantly, this imperial recognition of property rights in water was issued contemporaneously with many other provisions in the *Theodosian Code* that expressly dealt with usufructory rights.[85] This leads to the conclusion that the Romans intentionally thought of water owned by its citizens as a vested property right and not merely as a right to use or capture the water.[86]

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77. *Id.* The Eastern Empire, founded by the Emperor Constantine in 330 A.D., survived until 1453 A.D. when the Turks captured Constantinople. *See id.*

78. A.M. Honore, *The Background to Justinian's Codification*, 48 TUL. L. REV. 859, 866 (1974).

79. *See id.*; PHARR ET AL., *supra* note 61, at xvii.

80. PHARR ET AL., *supra* note 61, at xvii.

81. *See* discussion *supra* Part II.A.

82. CODE THEOD. 15.2.

83. CODE THEOD. 15.2.7.

84. *Id.*

85. CODE THEOD. 3.8.3, 3.9, 5.1.8, 8.12.8-9, 8.18.1, 8.18.3, 9.14.3.

86. *See* CODE THEOD. 15.2.7.

4. *The* Digest of Justinian

a. Mechanics of Formulation

After the fall of the Western Empire in 476 A.D.,[87] the Roman Empire survived for nearly another century, albeit confined to its eastern imperial boundaries.[88] Justinian I became emperor of the remaining eastern half of the Empire on April 1, 527 A.D.[89] and ruled until 565 A.D.[90] Almost immediately after taking power, Justinian set about reforming Roman law, which had become cluttered with many codes, constitutions, edicts, juristic writings, *responsa*, and the like.[91] In February 528 A.D.,[92] Justinian undertook this Herculean effort by appointing a ten-member commission to compile and update the many imperial constitutions.[93] The Commission successfully issued a code fourteen months later[94] in April 529 A.D.,[95] but it was replaced in 534 A.D. by a second code because the inordinate amount of legislation passed during the intervening years had already made the first code obsolete.[96] Then, on December 15, 530 A.D.,[97] Justinian began organizing and recodifying the remaining legal texts, mainly the juristic writings, into both a legal textbook for students, the *Institutes of Justinian* (*Institutes*),[98] and the *Digest of Justinian* (*Digest*)—sometimes referred to as the *Pandects*,[99] which was a comprehensive codification of all prior juristic literature,[100] including the *Theodosian Code*.[101] Justinian gave instructions to one of his trusted legal advisors to

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87. After the fall, Rome and Italy came, effectively if not actually, under barbarian rule. Honore, *supra* note 78, at 863.

88. *See* PHARR ET AL., *supra* note 61, at xxiv.

89. Honore, *supra* note 78, at 864. Justinian officially became emperor in April 527 A.D., but he was forced to share his reign until the death of the former emperor (his uncle Justin) on August 1, 527 A.D. *Id.* It should be noted here that the common recognition of April Fool's Day did not come into modern usage until much later, and so Justinian's initial ascension to the throne was not marred by irony. *See* David Johnson, *April Fool's Day Has Serious Origins*, *at* http://www.infoplease/com/spot/aprilfools1.html (last visited Oct. 27, 2004).

90. *See* PHARR ET AL., *supra* note 61, at xxvi.

91. *See* BUCKLAND, *supra* note 68, at 40; WATSON, *supra* note 61, at 92-93. "*Responsa*" is a term used to refer to the writings of the jurists, named so because the juristical writing was drafted mainly as a critique of or response to the Imperial Edicts. *See supra* note 71 and accompanying text.

92. Honore, *supra* note 78, at 866; *see* WATSON, *supra* note 61, at 92.

93. BUCKLAND, *supra* note 68, at 40; *see* WATSON, *supra* note 61, at 92.

94. WATSON, *supra* note 61, at 92.

95. Honore, *supra* note 78, at 866.

96. BUCKLAND, *supra* note 68, at 47; *see* WATSON, *supra* note 61, at 93.

97. WATSON, *supra* note 61, at 92.

98. *See* BUCKLAND, *supra* note 68, at 28; WATSON, *supra* note 61, at 93. The Institutes, although issued as an imperial statute, were actually intended as a rudimentary textbook for elementary legal education, akin to the level of a present-day first-year law casebook. *See* BUCKLAND, *supra* note 68, at 28; WATSON, *supra* note 61, at 17.

99. BUCKLAND, *supra* note 68, at 41.

100. *See id.* at 40; WATSON, *supra* note 61, at 92-93.

101. BUCKLAND, *supra* note 68, at 39-41.

organize another commission to accomplish this task, and the result was a sixteen-member body comprised of some of the greatest legal minds of the day.[102] Justinian's aim in this pursuit was not to alter or even modernize the old writings, but to conflate them and make the law less unwieldy.[103] As such, Justinian instructed the commission to delete only that which was obsolete or superfluous.[104] This goal of staying true to the original texts was evidenced by the express citation to each jurist's work in the *Digest*.[105] Throughout the following three years, the Commission accomplished the monumental task of reducing some 3,000,000 lines of legal text, taken from around 2000 separate books,[106] to just some 150,000 lines comprised of 800,000 words[107] eventually included in the *Digest*.[108] The result of this labor was the issuance of the *Institutes* and the *Digest* on December 30, 533 A.D.[109]

b. Groundwater-Related Juristical Excerpts

The writings of several jurists helped to develop both Roman water law, and, later, water law in Europe and in the United States.[110]

i. Marcellus's Writing

The most pertinent jurist to the exploration of current groundwater law is Marcus Claudius Marcellus, who died in 45 B.C. and was a contemporary of Cicero.[111] The seminal passage in the *Digest*, as far as modern groundwater law is concerned, is based on the writings of both Ulpian and Marcellus and is translated to read: "Next, Marcellus writes that no action, not even the action for fraud, can be brought against a person who, while digging on his own land, diverts his neighbor's water supply."[112] This *responsa* was not groundbreaking when it was first issued, but it became vitally important later when it was included in the *Digest*[113] and, thereafter, cited by the British court in *Acton v. Blundell*.[114] Because the rule of capture in Texas is uniquely traced

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102. *See id.* at 41; WATSON, *supra* note 61, at 91.
103. *See* BUCKLAND, *supra* note 68, at 41; WATSON, *supra* note 61, at 92-93.
104. WATSON, *supra* note 61, at 92.
105. *See id.* at 93.
106. *See* Honore, *supra* note 78, at 866; WATSON, *supra* note 61, at 92-93.
107. Honore, *supra* note 78, at 879.
108. *See* WATSON, *supra* note 61, at 93
109. *Id.*; *see* BUCKLAND, *supra* note 68, at 40-41.
110. *See* discussion *infra* Part II.B.4.b.i-iii.
111. COLUM. ENCYCLOPEDIA 1752 (6th ed. 2000). Marcellus was made Curule Aedile in 56 B.C. (the sixth-highest elected office in Rome) and was named Consul five years later in 51 B.C. (the second-highest elected office in Rome). *Id.*
112. *See* DIG. 39.3.1.12 (Ulpian, Ad Edictum 53) (as translated in 3 THE DIGEST OF JUSTINIAN 396 (Theodor Mommsen & Paul Krueger trans., Alan Watson ed., 1985)).
113. *See* discussion *supra* Part II.B.4.a.
114. Acton v. Blundell, 152 Eng. Rep. 1223 (1843); *see* discussion *infra* Part III.C.

back to *Acton*, which expressly based the bulk of its reasoning on Marcellus's passage in the *Digest*, this passage is the most ancient, direct source of the rule of capture.[115] Accordingly, the import of this excerpt from the *Digest*, originally written some 2050 years ago, cannot be overstated in light of the development of an entire body of law based on this one writing.[116]

ii. Other Jurists' Writings

While only one passage from the *Digest* is expressly relied upon some thirteen centuries later by the British court in *Acton v. Blundell* to justify the adoption of the concept of absolute ownership,[117] the *Digest* is replete with groundwater law commentary from several Roman jurists.[118] The writings of these jurists may have even been acknowledged and referred to in *Acton*[119] as well.[120]

aa. Ulpian

One of the most celebrated jurists during antiquity was Ulpian.[121] Not only do his works form the basis for approximately one third[122] to one half[123] of the *Digest*, the name Ulpian was almost synonymous with Roman law in general during the Middle Ages.[124] While Ulpian reprinted many of the earlier jurists' works on water law,[125] he also added some of his own commentary as well. He applied Trebatius's liability writings to well interference and even

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115. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904); *see Acton*, 152 Eng. Rep. at 1235.

116. *See, e.g.*, Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999); *East*, 81 S.W. at 280; *Acton*, 152 Eng. Rep. at 1235.

117. *Acton*, 152 Eng. Rep. at 1235.

118. *See* Marcellus (DIG. 39.3.1.12 (Ulpian, Ad Edictum 53)); Pomponius (DIG. 39.3.21 (Pomponius, Quintus Mucius 32)); Proculus (DIG. 39.2.26 (Ulpian, Ad Edictum 81)); Trebatius (DIG. 39.2.24.12, 39.3.3.1 (Ulpian, Ad Edictum 81, Ad Edictum 53)), and Ulpian (DIG. 39.2.24.12, 2.26, 3.1.12, 3.3.1, (Ulpian, Ad Edictum 81, Ad Edictum 53)). One reviewer cited some thirty-eight jurists as being cited to "in the Pandects with respect to the law of water," though not all wrote specifically on groundwater law. *See* EUGENE F. WARE, ROMAN WATER LAW: TRANSLATED FROM THE PANDECTS OF JUSTINIAN 23 (1905).

119. *Acton*, 152 Eng. Rep. at 1235.

120. *See* discussion *infra* Part III.C.

121. *See* WATSON, *supra* note 61, at 93. ("Ulpian was the most popular jurist."); BUCKLAND, *supra* note 68, at 32-33.

122. *See* BUCKLAND, *supra* note 68, at 32 (stating that his edicts—he served as the *Praefectus Praetorio* for a time just before his murder at the hands of his own guards and, therefore, possessed the ability to issue edicts—accounted for nearly one third of Justinian's *Digest*).

123. *See* WATSON, *supra* note 61, at 93 (recounting that "about one half of the *Digest* comes from [Ulpian]").

124. BUCKLAND, *supra* note 68, at 33.

125. Ulpian excerpted the earlier works on water law of Marcellus (DIG. 39.3.1.12 (Ulpian, Ad Edictum 53)); Proculus (DIG. 39.2.26 (Ulpian, Ad Edictum 81)); and Trebatius (DIG. 39.2.24.12, 39.3.3.1 (Ulpian, Ad Edictum 81, Ad Edictum 53)).

subsidence,[126] he modified Trebatius's assertion of hot springs liability by stating that a landowner who fails to protect himself against an anticipated injury has only himself to blame,[127] and he added to Proculus's text—which espoused nonliability for a landowner who carries out work legally on his own property—by applying this concept to the diversion of water.[128] Ulpian was among five noted jurists whose writings were made authoritative due to their inclusion in the *Law of Citations*,[129] which was issued in 426 A.D.[130] He is also considered to be one of the three "principal writers on water law" featured in the *Digest*.[131] After Ulpian's death in 228 A.D.,[132] the study and development of Roman law went into decline until the publication of the *Theodosian Code* in the fifth century A.D.[133]

In Section 3 of Book 53 in his *Ad Edictum*, Ulpian declares that "*anyone who fails to protect himself* in advance . . . *against anticipated injury* [by work carried out on neighboring land] *has only himself to blame*."[134] While this section refers only to work done on public land which might harm a nearby private landowner,[135] it does—whatever the original intention—presciently and fairly describe the "pump or be pumped" *modus operandi* required under the rule of capture as it later developed in England and, thereafter, in Texas.[136] In fact, as is discussed later, this passage may have been cryptically referred to in the court's decision in *Acton v. Blundell* as well.[137]

Other excerpts from Ulpian in the *Digest* are not as obscure in their reference to private property rights where water is concerned.[138] Specifically, one excerpt reads:

> Again, let us consider when injury is held to be caused; for the stipulation covers such injury as is caused by defect of house, site, or work. Suppose that I dig a well in my house and by doing so I cut off the sources of your well. Am I liable? Trebatius says that I am not liable on a count of anticipated injury since I am not to be thought of as having caused you injury as a result of any defect in the work that I carried out, seeing that the matter

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126. *See* DIG. 39.2.24.12 (Ulpian, Ad Edictum 81).

127. *See* DIG. 39.3.3.1 (Ulpian, Ad Edictum 53).

128. *See* DIG. 39.2.26 (Ulpian, Ad Edictum 81).

129. *See* WATSON, *supra* note 61, at 91; BUCKLAND, *supra* note 68, at 32. This group of honored jurists was sometimes referred to as the "favoured five." *See* BUCKLAND, *supra* note 68, at 32.

130. *See* WATSON, *supra* note 61, at 91; Honore, *supra* note 78, at 862.

131. *See* WARE, *supra* note 118, at 23.

132. *See* WATSON, *supra* note 61, at 90.

133. *See id.* at 90-91; *see* BUCKLAND, *supra* note 68, at 33.

134. DIG. 39.3.3.3 (Ulpian, Ad Edictum 53) (emphasis added).

135. *See id.*

136. *See e.g.*, Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 75 (Tex. 1999); Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904); Acton v. Blundell, 152 Eng. Rep. 1223, 1235 (1843).

137. *See Acton*, 152 Eng. Rep. at 1235; discussion *infra* Part III.C.

138. *See, e.g.*, DIG. 39.2.24.12 (Ulpian, Ad Edictum 81).

> is one in which I was exercising my rights. However, if I dig so deeply on my land that one of your walls cannot stand upright, a stipulation against anticipated injury will become operative.[139]

This passage is notable for several reasons. First, it recounts Trebatius's early assertion that if a landowner's work is the kind that he has a right to do, and he completes his work without defect, no action can lie against him.[140] This is the essence of the rule of capture currently in effect today in Texas.[141] Next, Ulpian expands upon this concept by applying it specifically to what is now known as well interference, saying that no liability attaches to a landowner whose development of groundwater causes another landowner's well to become dry.[142] This description of events not only tracks what purportedly occurred between Bart Sipriano, Harold and Doris Fain, and Ozarka Natural Spring Water Co. exactly 1466 years later, it even predicts the decision reached by the Court in the case as well.[143]

Ulpian even conceives of land subsidence problems caused by overpumping and thereby foretells the Texas Supreme Court's ruling in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*[144] In the last sentence of this passage in the *Digest*, Ulpian allows for an action if a neighbor's walls cannot stand upright because of the depth to which a landowner has dug his well.[145]

bb. Quintas Mucius

Quintas Mucius was a jurist who reached the zenith of his influence during his service as Consul around 95 B.C.[146] He propounded the same thoughts on groundwater-caused injury as did his contemporary, Marcellus,[147] writing that a downstream property owner would have no recourse against a

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139. *Id.*

140. *See id.*

141. *Sipriano*, 1 S.W.3d at 75-76.

142. *See* DIG. 39.2.24.12 (Ulpian, Ad Edictum 81).

143. *See id.*; *Sipriano*, 1 S.W.3d at 75. In *Sipriano*, the Court held that Ozarka was not liable to Sipriano or to the Fains for its groundwater production. *Sipriano*, 1 S.W.3d at 75. The authors do not purport to ascribe any Nostradamus-like abilities to Ulpian, but instead merely attempt to show the remarkable similarities between the ancient theoretical underpinnings of the rule of capture and its legal application and construction more than a millennia later.

144. *See* DIG. 39.2.24.12 (Ulpian, Ad Edictum 81); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) (adding "negligence as a ground of recovery in subsidence cases").

145. *See* DIG. 39.2.24.12 (Ulpian, Ad Edictum 81).

146. *See* Stein, *supra* note 42, at 1544; Alan Watson & Khaled Abou El Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 AM. J. COMP. L. 1, 21 (2000).

147. *See* discussion *supra* Part II.B.4.b.i.

spring owner who diverts or uses the water before it reaches the downstream property owner's land.[148]

cc. Vitruvius

Another Roman scholar named Vitruvius, who lived from around 80 B.C. until 20 B.C., was not a jurist per se, but he developed a new hydrologic theory —now called the Percolation theory.[149] His theory revealed—for the first time in Western thought—the manner in which rain and snow that falls on the mountains percolates through the rock strata to the base of the hills, and then reemerges as streams and springs in the plains.[150] By being the first to describe the role that groundwater plays in the hydrologic cycle, "Vitruvius set the foundation of modern hydrogeology."[151]

dd. Trebatius

Another jurist that helped to develop later Roman writings concerning water law was Trebatius, who lived from 84 B.C. to 4 A.D.[152] In Book 53 of Ulpian's *Ad Edictum*, Ulpian specifically cites Trebatius when stating that "[t]he same Trebatius holds that somebody who sustains harm from a flow of hot water can bring an action to ward off rainwater. This is incorrect since hot water is not rainwater."[153] As Ulpian points out, Trebatius might have been somewhat enthusiastic in his interpretation of the original Twelve Tables when he drafted this passage regarding hot springs,[154] but whatever the accuracy of Trebatius's application of a tort action to damage caused by hot springs, it appears that Ulpian corrected this legal assertion by adding a short, yet direct, rebuke to the idea.[155] Later in Book 81, and more applicable to the tenets of the rule of capture, Trebatius determined that a landowner is not liable for injury to a neighboring landowner due to work done on the original landowner's property, provided that the work was not defective nor was done pursuant to a right held by the original landowner.[156] This passage is significant because, as mentioned above, the lack of liability incurred by a landowner under Trebatius's formulation is precisely analogous to the liability

148. *See* DIG. 39.3.21 (Pomponius, Quintas Mucius 32).
149. Mace et al., *supra* note 7, at 67.
150. *Id.*
151. *Id.*
152. Watson & El Fadl, *supra* note 146, at 21.
153. DIG. 39.3.3.1 (Ulpian, Ad Edictum 53).
154. *See* DIG. 39.3.3.1 (Ulpian, Ad Edictum 53); discussion *supra* Part II.B.1.
155. *See* DIG. 39.3.3.1 (Ulpian, Ad Edictum 53).
156. DIG. 39.2.24.12 (Ulpian, Ad Edictum 81).

limitations afforded a modern landowner under the rule of capture currently in effect in Texas.[157]

ee. Seneca

Lucius Annaeus Seneca was a Roman statesman believed to have lived between 4 B.C. and 65 A.D.[158] During the reign of Emperor Augustus, Seneca was an influential jurist who worked tirelessly to align his *responsa* with that of the other jurists, thereby making his own de facto authority.[159] He, like Aristotle before him,[160] was an adherent to the Condensation theory and believed that rainfall alone could not account for all the water present in rivers and surface watercourses.[161] He posited that groundwater must originate from three possible sources: (1) moisture being continuously forced out by the Earth itself, (2) air within the soil being condensed by the darkness and cold of the strata, or (3) the Earth slowly converting itself to water.[162]

ff. Pomponius

Pomponius was another first century A.D. jurist who, along with Ulpian, was one of the "principal writers on water law" that appear in the *Digest*.[163] His contributions to groundwater law mainly center around his commentary[164] describing the legal theories of Quintus Mucius Scaevola from more than a century earlier.[165] Specifically, Pomponius wrote of Quintas Mucius's earlier *responsa*, recounting that:

> If water which has its sources on your land bursts onto my land and you cut off those sources with the result that the water ceases to reach my land, you will not be considered to have acted with force, provided that no servitude was owed to me in this connection, nor will you be liable to the interdict against force or stealth.[166]

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157. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999).

158. *See* SENECA: THYESTES, PHAEDRA, THE TROJAN WOMEN, OEDIPUS, WITH OCTAVIA 7 (E.F. Watling trans., 1966); *see also* Mace et al., *supra* note 7, at 67.

159. *See* BUCKLAND, *supra* note 68, at 24; *supra* note 71 and accompanying text.

160. Mace et al., *supra* note 7, at 66; *see also* discussion *supra* Part II.A (reviewing Greek law).

161. Tyler, *supra* note 7, at 535; *see* Mace et al., *supra* note 7, at 67.

162. *See* Mace et al., *supra* note 7, at 67.

163. *See* WARE, *supra* note 118, at 23.

164. DIG. 39.3.21 (Pomponius, Quintus Mucius 32).

165. *See* Stein, *supra* note 42, at 1544; Watson & El Fadl, *supra* note 146, at 21.

166. DIG. 39.3.21 (Pomponius, Quintus Mucius 32).

Here Pomponius and Quintus Mucius made clear that the Romans thought of groundwater as rightly belonging to the landowner on whose land it emerged, a position the Texas Supreme Court adhered to some 1500 years later in *Texas Co. v. Burkett*.[167]

gg. Proculus

The last jurist whose works bore some influence on the later development of groundwater law was Proculus, who was active in the first century A.D.[168] His writings were held in such high regard around 27 A.D. that one of the two dominant schools of judicial thought in Rome—the more liberal and interpretative school—was named after him.[169] In Book 81 of Ulpian's *Ad Edictum*, he cites to Proculus when he relates that:

> Proculus says that when somebody carries out work legally on his own property, even if he has made an undertaking to this neighbor against anticipated injury, nonetheless, he is not bound by this stipulation; for example, if you have buildings next to buildings of mine and you increase their height in accordance with your rights *or if you divert my water supply by means of a canal, open or closed, on a field of yours, even though* in the latter case *you deprive me of my water* and in the former case you block my light, nonetheless, *no action is available to me under this stipulation*; the grounds for this are that a person who prevents somebody from enjoying an advantage which he has hitherto enjoyed should not be held to be causing injury, there being a great difference between the causing of injury and the prevention of enjoyment of an advantage previously enjoyed. I consider Proculus's view to be correct.[170]

This excerpt from Proculus, which was endorsed by Ulpian, subtly describes the fine point on which the rule of capture today faces much of its blunt opposition.[171] It succinctly defines why a landowner is not liable to his

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167. Tex. Co. v. Burkett, 117 Tex. 16, 28-29, 296 S.W. 273, 278 (1927). The Court held that the percolating waters at issue "were the exclusive property of Burkett," that he "plainly had the right to grant access to them and the use of their waters for any purpose," and that he possessed "all the rights incident to them one might have to any other species of property." *Id.*

168. Watson & El Fadl, *supra* note 146, at 25.

169. *See* Stein, *supra* note 42, at 1545. Around 27 A.D., at the inception of the Empire, two contrasting schools of legal thought became dominant, the Proculians and the more conservative, textualist Sabinians. *See id.*; BUCKLAND, *supra* note 68, at 27. Although the Proculians took their name from Proculus, the school was actually founded by Antistius Labeo (who was a republican—in the Roman sense) who died around 21 A.D. Watson & El Fadl, *supra* note 146, at 25; *see* BUCKLAND, *supra* note 68, at 27. In fact, Proculus was a follower of Nerva, who was himself a follower of Labeo. BUCKLAND, *supra* note 68, at 27.

170. DIG. 39.2.26 (Ulpian, Ad Edictum 81) (emphasis added).

171. *See generally supra* note 7 (highlighting the amount of opposition to the rule of capture in Texas).

neighbor for diverting his water or blocking out his light; because the landowner is merely preventing his neighbor from enjoying an advantage he previously enjoyed, the landowner is not injuring him outright.[172]

iii. Construction Together

Charged with drafting the *Institutes* and the *Digest*, while under explicit instructions not to abrogate previous codes, edicts, and juristical writings, the Commission had the authority and instruction to choose the best view, regardless of the number or name of jurists adhering to it, and to eliminate all contradictions and dissensions therefrom.[173] This effort to harmonize Roman law is apparent even in the groundwater-related passages.[174] The excerpts from Marcellus, Pomponius, Proculus, Quintus Mucius, Trebatius, and Ulpian combined almost seamlessly to negate any action against a landowner for rightful, non-defective work done on his land, even if it resulted in the loss of stream flow, loss of a well, or other damage to a neighbor's property.[175]

This conceptual alignment in the juristic passages is most apparent in the hot springs musing of Trebatius.[176] His writing goes against the grain of the general trend of landowner immunity from liability (in all but subsidence injuries), and thus, Ulpian curtly rebukes his view, saying it "is incorrect."[177] The whole of the *Digest*, taking all of the juristical writings together, makes it apparent that the Romans viewed groundwater as an element of property.[178] Accordingly, when a landowner exercised his rights in a non-defective manner, even at the expense of neighboring landowners, such work did not give rise to any action for damages, especially in instances where the damage was anticipated and the damaged neighbor did nothing to protect against it.[179]

III. RECENT LEGAL HISTORY AND DEVELOPMENT

The following section of this article has direct precedential value on present-day water law in Texas.[180] Roman and—to a lesser extent—Greek law were instrumental in influencing much of the law throughout Western Europe

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172. DIG. 39.2.26 (Ulpian, Ad Edictum 81).

173. *See* WATSON, *supra* note 61, at 92; BUCKLAND, *supra* note 68, at 41.

174. *See* discussion *supra* Part II.B.4.b.i-ii.

175. *See* discussion *supra* Part II.B.4.b.i-ii.

176. DIG. 39.3.3.1 (Ulpian, Ad Edictum 53).

177. *Id.*; DIG. 39.2.26 (Ulpian, Ad Edictum 81).

178. *See* discussion *supra* Part II.B.4.b.i-ii.

179. *See* discussion *supra* Part II.B.4.b.

180. *See* discussion *infra* Part III.A-E. "Where one government succeeds another over the same territory, in which rights of real property have been acquired, the preceding government is not a foreign government, whose laws must be proved in the courts of the succeeding government." State v. Sais, 47 Tex. 307, 318 (1877).

almost a millennia later,[181] including the laws of Spain and England. The laws of Spain bear powerfully upon Texas jurisprudence today because of Texas' former colonial status to the Spanish Crown,[182] and although Britain never actually held title to Texas soil,[183] the Texas Republic expressly recognized and adopted English common law in 1840, thus, making English views on groundwater ownership rights important to twenty-first century landowners.[184]

The Court ably recounted the land patent history of Texas in the case of *Miller v. Letzerich*, wherein it explained that:

> Lands in Texas have been granted by four different governments, namely, the Kingdom of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas. Many millions of acres of land were granted by Spain, Mexico, and the Republic of Texas prior to the adoption by the latter of the common law of England as the rule of decision in 1840.[185]

A. Spanish Law

Spain laid legal claim to Mexico, and subsequently present-day Texas, when Hernan Cortés discovered New Spain in 1518.[186] Spanish Texas was essentially rectangular in shape, with the coastal strip stretching from modern-day Corpus Christi, Texas, to Lake Charles, Louisiana, surrounded by the Nueces and Calcasieu Rivers and extending from that point inland to the Medina River slightly west of the City of San Antonio to the Arroyo Hondo, just west of Natchitoches.[187] This area, added to the rest of the northern frontier of New Spain south of the Nueces River, stretched more than 2000 miles from east to west and almost 1500 miles from north to south, encompassing some 960,000 square miles in total.[188] Almost two hundred years after Cortés landed in Mexico, Texas was officially formed in 1691 when the governor of Coahuila y Texas was named the governor of Texas independently.[189]

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181. *See* TOUMBOUROS, *supra* note 40, at 21.

182. *See Sais*, 47 Tex. at 318.

183. S. Pac. Co. v. Porter, 160 Tex. 329, 334, 331 S.W.2d 42, 45 (1960).

184. Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002)) (adopting and recognizing the common law of England) (all subsequently discussed dates occur A.D., so the suffix will be dropped in all date references for ease of reading).

185. Miller v. Letzerich, 121 Tex. 248, 253, 49 S.W.2d 404, 407 (1932) (citations omitted).

186. Robert L. Dabney, Jr., *Our Legal Heritage, in Two Parts: Part One: Texas—The Land of the Brave (1518 – 1821)*, 39 HOUS. LAW. 12, 14 (2002).

187. Baade, *supra* note 7, at 26.

188. MEYER, *supra* note 8, at 3.

189. Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR L. REV. 225, 232 (2003).

Spanish law governing Texas is contained in two distinct, yet related sources: (1) *Las Siete Partidas* (*Partidas*), compiled in 1265 by King Alfonso X[190]—which governed peninsular Spain,[191] and (2) the *Recopilacion de Leyes de los Reynos de las Indias* (*R.I.*), promulgated in 1681[192]—which governed New Spain.[193] The drafting of the *R.I.* was a monumental task that distilled over 400,000 cédulas down to just under 6400 provisions.[194] Both of these codes were authoritative in New Spain because of a passage in the *R.I.* that provided that "when colonial law [was] silent on a topic, one must look to the laws of peninsular Spain."[195]

The *Partidas*, in turn, were founded upon the works of Justinian.[196] The influence of Roman law upon that of Castillian Spain was so great that the *Institutes of Justinian* formed the "substance[] of civil law instruction at the Spanish and [Colonial][197] universities," and even furnished the text.[198] Some commentators have surmised that the *Corpus Juris Civilis* (comprised of Justinian's *Institutes*, *Digest*, and second *Code*)[199] "was not a formal source of

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190. *See* Barber, *supra* note 7, at 639, 656-58. King Alfonso was also referred to as "Alfonso the Wise of Castile." Davenport & Canales, *supra* note 7, at 157. Additionally, there appears to be some dissension in the literature as to whether King Alfonso was designated "V" or "X." Barber, *supra* note 7, at 656; MEYER, *supra* note 8, at 106; LAS SIETE PARTIDAS I (Samuel Parsons Scott trans., 1931). Like Justinian before him, Alfonso "the Learned" took up the compilation of the *Partidas* almost immediately after his ascension to the throne. *See* LAS SIETE PARTIDAS, *supra*, at I. Ironically, while the *Digest* took only roughly three years to complete, the *Partidas* took three times as long to finish: nine years. *See id.* at li n.21.

191. *In re* Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 252 (Tex. 1984). Indeed it was termed "the essence of the law of Peninsular Spain after 1348." State v. Valmont Plantations, 346 S.W.2d 853, 857 (Tex. Civ. App.—San Antonio 1961, writ granted), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962); *see* LAS SIETE PARTIDAS, *supra* note 190, at lii-liii.

192. Barber, *supra* note 7, at 657-58.

193. *Medina River*, 670 S.W.2d at 252; *Valmont*, 346 S.W.2d at 860 n.13.

194. Baade, *supra* note 7, at 30. Cedulas are defined as royal and special edicts. *Valmont*, 346 S.W.2d at 866.

195. *Medina River*, 670 S.W.2d at 252 (quoting Book 2, Title 1, Law 1 of the *R.I.*).

196. Some sources, including the Court, refer specifically to the *Institutes* as the foundational text. State v. Balli, 144 Tex. 195, 248, 190 S.W.2d 71, 99 (1944); Manry v. Robinson, 122 Tex. 213, 223, 56 S.W.2d 438, 442 (1932); Davenport & Canales, *supra* note 7, at 157. Additional sources refer only to "Justinian's sixth century code." *See Valmont*, 346 S.W.2d at 857. The court of civil appeals opinion was authored by a future chief justice of the Court and so impressed Justice Hamilton, who authored the Court's opinion adopting Justice Pope's lower court ruling, that he remarked, "it would serve no good purpose to write further on the subject" because Justice Pope's opinion was so "exhaustive and well documented." *Valmont*, 355 S.W.2d at 503. This statement may have referred to all three components of the *Corpus Juris Civilis* or to only the second *Code* itself. Other sources explicitly state that the *Partidas* was based on the *Corpus Juris Civilis*. Baade, *supra* note 7, at 31; MEYER, *supra* note 8, at 107; *see* LAS SIETE PARTIDAS, *supra* note 190, at liv. Still other sources simply recount that the *Partidas* was derived from Roman law. *See* Barber, *supra* note 7, at 656; LAS SIETE PARTIDAS, *supra* note 190, at lii, liv. The final group of authorities cite Spanish jurisprudence as arising from both the *Institutes* and the *Pandects*. *See* Davenport & Canales, *supra* note 7, at 158.

197. Throughout the literature, the territories of New Spain are described interchangeably as colonial, ultramarine, or as the Indies. *See, e.g.*, *Medina River*, 670 S.W.2d at 252; Baade, *supra* note 7, at 31-32.

198. Baade, *supra* note 7, at 31-32; *see* LAS SIETE PARTIDAS, *supra* note 190, at liii.

199. Baade, *supra* note 7, at 31; *see* WATSON, *supra* note 61, at 93.

the law of [the] Indies . . . either directly or by reference," however, the Court "has *uniformly* held that . . . the law as declared in *Las Siete Partidas*, . . . was taken *almost bodily from* the Roman Law; and, more particularly, from the *Institutes* . . . ."[200]

However, as great as Justinian's influence was over its promulgation, the *Partidas* were much more than just a "'[p]oor copy of the pandects of Justinian.'"[201] The *Partidas* were a modification, not a recitation, of Justinian's writings in that they were "modified by custom and usage in medieval Spain," and Justinian's texts were only used to clarify the corresponding provisions of the *Partidas*.[202] While the whole of peninsular Spain was governed by the *Partidas*, they themselves were supplemented by provincial codes and laws enacted in each region of the country.[203]

In particular, one such provincial code was the *Constitutiones de Cataluna*, which governed thirteenth century Cataluna and provided that "live springs" belonged, not in common, but to the lords of the land "without impediment or contradiction from anybody."[204] This ownership right was described as exclusive and hostile to others.[205]

Indeed, New Spain and the entirety of Colonial Spain were the private property of the King,[206] and ownership of land could only be achieved by virtue of a grant from the Crown.[207] One example of such a royal grant was exemplified by the territorial gift made to Hernan Cortés on July 6, 1529,[208] which expressly ceded title to the "'running, stagnant, and *percolating* waters'" found thereon.[209]

The grant to Cortés made imminent sense in context with the provisions of the *Partidas*, which plainly mandated that springs and waters that originated on land went with it in sale.[210] Justinian's influence on landowner immunity

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200. Davenport & Canales, *supra* note 7, at 157 (emphasis added); *see* LAS SIETE PARTIDAS, *supra* note 190, at lii, liv.

201. Davenport & Canales, *supra* note 7, at 158 (citation omitted).

202. *Id.*

203. State v. Valmont Plantations, 346 S.W.2d 853, 858 (Tex. Civ. App.—San Antonio 1961), *aff'd* 163 Tex. 381, 355 S.W.2d 502 (1962).

204. *Id.* at 858 n.6.

205. *Id.* at 858 n.7.

206. All of New Spain, including present-day Texas, was privately owned by the Crown of Castille by virtue of the Bull of Donation (also called the Bull Inter Cetera) of Pope Alexander VI, issued on May 4, 1493—twenty-five years before the discovery of New Spain. *See In re* Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 253 (Tex. 1984); *Valmont*, 346 S.W.2d at 859.

207. *Medina River*, 670 S.W.2d at 253; *see* Baade, *supra* note 7, at 70-71.

208. *See* Baade, *supra* note 7, at 68. Some literature refers to Hernan Cortes as "Hernando." *See id.*

209. *Medina River*, 670 S.W.2d at 253 (quoting the royal grant that transferred title to a large portion of Central Mexico to Hernan Cortés) (emphasis added); *see* Baade, *supra* note 7, at 67-68; *Continuing Voids*, *supra* note 7, at 1292.

210. *Valmont*, 346 S.W.2d at 860 n.14 (citing Law 19, Title 32, Part 3 of the *Partidas* because the *R.I.* did not have a provision dealing explicitly with the alienation of groundwater property rights).

from water injury liability is evident in New Spain as well, in that a colonial landowner was allowed to pump water from a well without royal permission.[211] Interestingly, the only limitations imposed on the use of water originating on private property were that it could not be used maliciously or merely to deny access to a neighboring landowner.[212] This may be the first instance of the modern-day restriction on the rule of capture against malicious injury that is recognized in Texas.[213]

Some have propounded that Spanish and Mexican land grants did not carry with them any implied grants of property rights in groundwater.[214] However, the authority cited for this proposition is based on the lack of implied irrigation rights in perennial[215] or nonperennial[216] streams as incidents of Spanish and Mexican land grants.[217] By the time of Spanish possession of Texas, surface water and groundwater regulation had developed along separate legal paths for about a thousand years.[218] Therefore, any usufructory legal rights granted under a sovereign's surface water laws (e.g., implied irrigation rights in perennial and nonperennial streams) were inapposite to the property rights in groundwater that had accrued to individual landowners.[219]

B. Mexican Law

Mexico achieved its independence from Spain on September 28, 1821,[220] and Stephen F. Austin obtained the Mexican Emperor's approval for the Austin Colony just two years later on February 18, 1823.[221]

After its independence, Mexico retained much of the same water law that existed under Spanish rule.[222] What new legislation the Mexican Republic

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211. *See* Barber, *supra* note 7, at 659.

212. *Id.*

213. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999) (clarifying that, absent malice, a landowner may pump unlimited quantities of water from under the landowner's property); *see* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 29 (Tex. 1978) (quizzically holding that the English rule limits "malicious malice"); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 294, 276 S.W.2d 798, 801 (1955) (ruling that the English rule does not encompass malice or wanton conduct); Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 149-51, 81 S.W.2d 279, 281-82 (1904) (stating that absolute ownership rule forbids malice or wanton conduct); discussion *infra* Part III.E.1.b.i.

214. *Continuing Voids*, *supra* note 7, at 1292.

215. *See Valmont*, 346 S.W.2d at 855.

216. *See In re* Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 252-53 (Tex. 1984).

217. *See Continuing Voids*, *supra* note 7, at 1292.

218. The split began with the publication of the *Digest* in 533. *See* WATSON, *supra* note 61, at 93; BUCKLAND, *supra* note 68, at 41.

219. *See* WATSON, *supra* note 61, at 93; BUCKLAND, *supra* note 68, at 41.

220. *See* Baade, *supra* note 7, at 47. Other commentators have placed the date of Mexican independence on September 7, 1821. *See* Davenport & Canales, *supra* note 7, at 176.

221. *See* Baade, *supra* note 7, at 48.

222. State v. Valmont Plantations, 346 S.W.2d 853, 863 (Tex. Civ. App.—San Antonio 1961), *aff'd*

enacted did not elaborate on nor modify groundwater law, but it did concern the law of flowing waters, as was ably and exhaustively recounted by former Chief Justice Jack Pope in *State v. Valmont Plantations*.[223]

One Mexican scholar, in describing Spanish colonial land grants with and without water rights, framed the existence of a private property right in groundwater as follows: "'Private property in waters not only existed, but the legislation of [the] Indies fostered the reduction of unappropriated waters to private ownership,'" revealing that private ownership of water was not only possible, but encouraged.[224] The express grants of springs described in early twentieth century Mexico also aided the private ownership of water.[225]

C. English Law

English common law is central to this article's analysis because the Roman law pertaining to waters—as stated by Justinian—was expressly incorporated into the common law of England by Henry de Bracton, Justice of the King's Central Court—or King's Bench as it is sometimes referred[226]—around the middle of the thirteenth century.[227] The common law of England was, in turn, expressly adopted and recognized by the Republic of Texas as part of the fledgling Republic's first congressional acts.[228]

The first English case to address the ownership of percolating waters was *Hammond v. Hall* in 1840.[229] While the court did not ultimately reach the merits of the underground water arguments because the claim was not yet ripe, it did recognize that the "question [pertaining to drainage of one well by another, deeper well] . . . was said never to have been discussed before, namely, whether a right or easement could be claimed with respect to *subterranean* water."[230] In its opinion, the court expressly recognized Marcellus's writing in the *Digest* by quoting the original Latin phrasing, which translated to read that "no action . . . can be brought against a person who, while digging on his own land, diverts his neighbor's water supply."[231]

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163 Tex. 381, 355 S.W.2d 502 (1962).

223. *Id. passim.*

224. *Id.* at 862 (quoting ENRIQUEZ, GRANDES PROBLEMAS NATIONALES 171 (1909)).

225. *Id.* at 862-63 (citing PENA, PROPIEDAD INMUEBLE EN MEXICO 146 (1921)).

226. *See* ENCYCLOPAEDIA BRITANNICA 369 (11th ed. 1910).

227. Davenport & Canales, *supra* note 7, at 157.

228. *See, e.g.*, Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898)) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002)) (adopting and recognizing the common law of England).

229. Hammond v. Hall, 59 Eng. Rep. 729 (1840).

230. *Id.* at 730 & n.1.

231. DIG. 39.3.1.12 (Ulpian, Ad Edictum 53); *Hammond*, 59 Eng. Rep. at 730 n.2 (providing the untranslated version of this quote).

Just three years after the *Hammond* decision, the Exchequer Chamber Court heard the case of *Acton v. Blundell*,[232] the first judicial declaration of the modern rule of capture.[233] In *Acton*, a coal mining company dug coal pits to such a depth as to deprive the neighboring cotton mill owner of his supply of well water.[234]

More fascinating than the facts underlying the dispute are some of the excerpts of the oral argument delivered in the case, which are reprinted in the English Reports version of the opinion.[235] Acton's counsel began by acknowledging that "water is the party's as long as it is on his land, as every thing is his that is above or below it."[236] He then showed advanced knowledge of hydrogeologic interconnectivity for the time and stated that "all water is originally underground, and this very stream may at some distance be on the level with and flow along the surface."[237] Acton's counsel, however, may have gone too far after this point in his argument when he cited as controlling authority only cases where surface water was at issue.[238] In addition, at the end of his surface water recitation, he mistakenly included a citation to Marcellus's writings in the *Digest*;[239] at that point, one of the justices on the panel—Justice Maule—interrupted him and responded, "It appears to me that what Marcellus says is against you. The English of it I take to be this: if a man digs a well in his own field, and thereby drains his neighbour's, he may do so, unless he does it maliciously."[240] Justice Maule's interjection was important, not just for revealing the centuries of existing law on groundwater that were overlooked by Acton's counsel, but also for being one of the first enunciations of the malicious injury restriction imposed on the rule of capture.[241] The exchange continued as Acton's attorney cited to further English law adjudicating surface watercourses until Justice Maule again posed a pointed question, asking whether subterranean water could be legally defined as a watercourse.[242] Acton's counsel replied that "the term 'watercourse[s]' [whether subterranean or surface] must apply to all streams," but the court did not reach this point in

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232. Acton v. Blundell, 152 Eng. Rep. 1223 (1843).

233. *See* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999) (citing to *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904), in which the Court adopted the reasoning of the *Acton* court in upholding a railroad company's right to pump groundwater).

234. *Acton*, 152 Eng. Rep. at 1224-25.

235. *Id.* at 1226-32.

236. *Id.* at 1226.

237. *Id.*

238. *See id.* at 1227-28.

239. *Id.* at 1226; *see* DIG. 39.3.1.12 (Ulpian, Ad Edictum 53).

240. *Acton*, 152 Eng. Rep. at 1228.

241. *See* discussion *infra* Part III.E.1.b.i. Malicious intent was later expressly referred to in Texas jurisprudence by the Court. *See, e.g.*, Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 26 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292-94, 276 S.W.2d 798, 800-01 (Tex. 1955).

242. *Acton*, 152 Eng. Rep. at 1229.

its decision.[243] This exchange, however, is again important because it appears to be the first recognition—or at the very least, an inkling—of the definitional and legal distinction between percolating groundwater and underground streams.[244]

In the end, Blundell's counsel must have persuaded the panel by basing his argument on the Roman authorities recounted in Justinian's works instead of on English surface water law opinions.[245] In his response, Blundell's attorney delineated the parameters of the now-famous maxim, *damnum absque injuria*,[246] stating that in order "[t]o constitute a violation of that maxim, there must be injuria as well as damnum.[247] There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbour, so as it be not injuriosum."[248] He then described the analogous situation where a wall built by one neighbor on his own land that blocks out the light of another is not held to be injurious.[249] Blundell's counsel took this example almost verbatim from the *Digest*, wherein Ulpian quotes Proculus for the proposition that buildings increased in height such that they block the light reaching a neighbor's land result in "no action [for injury being] available" to the neighbor.[250]

The inclusion of this analogy in the court's opinion is especially insightful because it alluded to other unnamed Roman jurists when forming the precedential basis of the court's opinion.[251] In the same paragraph that the court cited to the *Digest* and its recital of Marcellus's writing, the court added that "[t]he authority of one at least of the learned Roman lawyers [that is, Marcellus] appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity."[252]

The fact that the court included excerpts from oral argument which specifically cite to other sections in the *Digest*, and more specifically, other sections that explicitly reference actions relating to groundwater diversion,[253]

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243. *Id.* at 1229-30.

244. *See id.* This was later alluded to in *Tex. Co. v. Burkett*, 117 Tex. 16, 29, 296 S.W. 273, 278 (1927).

245. *See Acton*, 152 Eng. Rep. at 1230-32.

246. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999) (defining the phrase as "an injury without a remedy").

247. "Injuria" is defined as either an injury in the sense of an "affronting wrong," or as a derivative of "*in jus*, contrary to law." BLACK'S LAW DICTIONARY 801 (8th ed. 2004). "Damnum" is defined as "[a] loss; damage suffered." *Id.* at 420.

248. *Acton*, 152 Eng. Rep. at 1230.

249. *Id.*

250. *See* DIG. 39.2.26 (Ulpian, Ad Edictum 81). It should be noted that this section of the *Digest* also explicitly refers to the lack of an action of one landowner (me) against another (you) who "divert[s] my water supply by means of a canal, open or closed, on a field of yours, even though . . . you deprive me of my water . . . no action is available to me under this stipulation." *Id.*

251. *See Acton*, 152 Eng. Rep. at 1235.

252. *Id.*

253. *See* DIG. 39.2.26 (Ulpian, Ad Edictum 81).

indicates that the *Acton* court took other juristical writings into account in formulating what is commonly considered to be the first modern groundwater law opinion.[254] This is logical considering the wealth of legal thought concerning subterranean waters in the *Digest*, which was available to the *Acton* justices.[255] Chief Justice Tindal elaborated on the relationship of the Roman law to that of England, stating that while "[t]he Roman law forms no rule, binding in itself, upon the subjects of these realms [i.e., Britain]," in the absence of direct authority on point from British courts, "the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe" should not be cast aside lightly.[256]

The Chief Justice, in delivering the opinion of the court, admonished Acton's counsel for basing his entire case on legal precedents governing surface water, holding that "the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith."[257] He then concluded the opinion by holding that the case before them was:

> [N]ot to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of damnum absque injuriâ, which cannot become the ground of an action.[258]

The holding in this case is important because it creates the foundation for the modern application of the rule of capture, and it defines the rights guaranteed by the rule as well.[259] The *Acton* court clearly went out of its way to declare groundwater a property right by elaborating that not only does "the owner of the soil" own "all that lies beneath his surface," but that there is not even a legal distinction between the "rock, . . . ground, . . . earth, or . . . water" underlying the land.[260]

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254. *Acton*, 152 Eng. Rep. at 1235.

255. *See* discussion *supra* Part II.B.4.b.ii-iii; *see also* WARE, *supra* note 118, § 8 (listing the names of Roman jurists cited in the *Digest* with respect to water law).

256. *Id.*

257. *Acton*, 152 Eng. Rep. at 1234.

258. *Id.* at 1235.

259. *See id.*

260. *Id.*

D. *Pre-*East *American Law*

*1. Pre-*Acton *Law*

The *Acton* court has rightfully received most of the credit for the formulation of the rule of capture, but it has gone almost unnoticed that the precepts of the doctrine were first laid down by an American court in March of 1836, the same year that some 190 militiamen were slaughtered in an old crumbling Spanish mission just outside of San Antonio de Bexar.[261] In *Greenleaf v. Francis*, the Massachusetts Supreme Court held—rather presciently—that a defendant's action of lawfully digging a well in his own ground, although "prejudicial to the plaintiff, [was] *damnum absque injuria*."[262]

In fact, the earliest recorded usage of the maxim in modern western jurisprudence occurred the year before *Greenleaf*, in *Mahan v. Brown*, though there the maxim was written in English and not in Latin.[263] The *Mahan* court held that no action could lie against a defendant who had built a high fence for the sole purpose of obstructing the lights of his neighbor's house.[264] One possible reason for this first usage of the *damnum* maxim may have been that it was based, at least in part, on Ulpian's edict concerning Proculus, who wrote that no action could lie for blocking a neighbor's lights as a result of the height of a structure built on one's own land.[265] The New York Supreme Court of Judicature even used the same reasoning as Proculus, holding that "[t]he refusal or discontinuance of a favor gives no cause of action."[266]

Similarly, the *Greenleaf* court arrived at the identical conclusion that the *Acton* court did seven years later because they both based their decisions on Roman law, even on the same excerpt from the *Digest*.[267] Both courts referred to the same passage taken from Ulpian's critique of Proculus's property formulations,[268] which explained how no liability could attach to a landowner who built a wall so high that it blocked out the light from a neighbor's

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261. *See* Opiela, *supra* note 7, at 88. Eric Opiela is one of the very few groundwater law commentators in the nation to have even mentioned *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117 (1836), much less that its *damnum absque injuria* formulation preceded the identical concept put forward in *Acton*. *Id.* Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 36 S.W. HIST. Q. 251, 265 (April 1933); Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of Its Defenders*, 37 S.W. HIST. Q. 237, 237-38 (April 1934).

262. Greenleaf v. Francis, 35 Mass. (18 Pick.) 117, 123 (1836).

263. Mahan v. Brown, 13 Wend. 261, 265 (N.Y. Sup. Ct. 1835).

264. *Id.* at 263-65.

265. *See* DIG. 39.2.26 (Ulpian, Ad Edictum 81).

266. *Mahan*, 13 Wend. at 265. Compare this language with that of Proculus where he describes the "great difference between the causing of injury and the prevention of enjoyment of an advantage previously enjoyed." DIG. 39.2.26 (Ulpian, Ad Edictum 81).

267. *See Greenleaf*, 35 Mass. (18 Pick.) at 121-22; Acton v. Blundell, 152 Eng. Rep. 1223, 1230 (1843).

268. *See Greenleaf*, 35 Mass. (18 Pick.) at 121-22; *Acton*, 152 Eng. Rep. at 1230.

home.[269] The *Greenleaf* court did not actually cite to Justinian's source text, but to two later commentaries,[270] both of which translated Justinian's *Pandects* into more modern terminology.[271] The interpretative nature of these texts is revealed in the additional explanation added to Proculus's original property rights writing, cautioning that an aggrieved landowner "ought to have placed his lights so as to be out of danger of this inconvenience, which he had no right to hinder, and which he might have easily foreseen."[272] This addition seems to have been taken or interpreted from Ulpian's warning that "anyone who fails to protect himself in advance [of work carried out on neighboring land] . . . against anticipated injury has only himself to blame."[273]

Another noteworthy aspect of the *Greenleaf* opinion is that it, and not *Acton*, is the first court opinion to describe the "absolute dominion" of the landowner over everything lying within the soil.[274]

Additionally, the *Greenleaf* court clearly held that groundwater is a property right belonging to the surface owner by concluding that "'[e]very one has the liberty of doing in his own ground whatsoever he pleases, even although it should occasion to his neighbour some other sort of inconvenience.'"[275]

2. *Post*-Acton *Law*

After *Acton v. Blundell*[276] and *Greenleaf v. Francis*[277] were decided, American state supreme courts relied upon them when confronted with groundwater law cases and uniformly held that the English rule conferred a property right upon the owner of the surface estate.[278] Only the decisions that are significant to the development of the rule of capture are examined below.

Seven years after the *Acton* decision, the Connecticut Supreme Court in *Roath v. Driscoll* held that "[w]ater, whether moving or motionless *in the earth*, is not, in the eye of the law, distinct from the earth."[279] This view of groundwater rights plainly follows the *Acton* court's approach of not

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269. DIG. 39.2.26 (Ulpian, Ad Edictum 81).

270. JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER § 1047 (William Strahan trans., Luther S. Cushing ed. 1980) (1850); JOHN AYLIFFE, A NEW PANDECT OF ROMAN CIVIL LAW, AS ANCIENTLY ESTABLISHED IN THAT EMPIRE AND NOW RECEIVED AND PRACTICED IN MOST EUROPEAN NATIONS 307 (Tho. Osborne, 1734).

271. *Greenleaf*, 35 Mass. (18 Pick.) at 121-22.

272. DOMAT, *supra* note 270, § 1047.

273. DIG. 39.3.3.3 (Ulpian, Ad Edictum 53).

274. *See Greenleaf*, 35 Mass. (18 Pick.) at 122.

275. *Id.* at 121 (quoting DOMAT, *supra* note 270, § 1047).

276. Acton v. Blundell, 152 Eng. Rep. 1223 (1843).

277. *Greenleaf*, 35 Mass. (18 Pick.) at 117.

278. *See infra* notes 279-99 and accompanying text.

279. Roath v. Driscoll, 20 Conn. 533, 541 (1850).

distinguishing between earth and subterranean water.[280] The *Roath* court further clarified the property rights inherent in groundwater by holding that "the nature of the right itself, [must allow] each person [to] be left to enjoy any natural advantage belonging to his own land; and water, appearing and standing, . . . is such a natural advantage."[281]

In 1855, the Supreme Court of Vermont, in *Chatfield v. Wilson*, cited to *Greenleaf*, *Acton*, and *Roath* in ruling that a nonbeneficial use of well water causing damage to a neighbor fell within the *damnum absque injuria* protection.[282]

That same year, the Supreme Court of Pennsylvania addressed the groundwater issue as well in *Wheatley v. Baugh*, becoming the first court to attach the *cujus est solum ejus est usque ad coelum et ad infernos* maxim to the groundwater law lexicon.[283] It is worth noting, however, that the *Greenleaf* court was actually the first court to ascribe the meaning of this maxim to groundwater without using the latin phrasing so prevalent now, by stating that "there is nothing in the case at bar which limits or restrains the owners of these estates . . . from having the absolute dominion of the soil, extending upwards and below the surface so far as each pleases."[284]

In its decision, the *Wheatley* court cited to Jean Domat, a French legal scholar whose legal commentary on Roman law was prevalent at the beginning of the seventeenth century.[285] The *Wheatley* court specifically cited to Domat's writings that carved out a malicious injury exception to the groundwater laws set forth by Justinian[286] and also cited to Domat's version of Proculus's darkened light analogy.[287] The court further referred to another provision from Domat's commentary that provided that a landowner "may dig for water on his own ground, and if he should thereby drain a well or spring in his neighbour's ground, he would be liable to no action of damages on that score."[288] This is consistent with Marcellus's writing, cited in *Acton*,[289] stating that "no action . . . can be brought against a person who, while digging on his

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280. *See id.*; *Acton*, 152 Eng. Rep. at 1235.

281. *Roath*, 20 Conn. at 542.

282. Chatfield v. Wilson, 28 Vt. 49, 55, 58 (1855).

283. Wheatley v. Baugh, 25 Pa. 528, 530 (1855). This maxim is defined as "[w]hoever owns the soil owns everything up to the sky and down to the depths." BLACK'S LAW DICTIONARY 1712 (8th ed. 2004). It too is often cited to the *Acton* court, but nowhere in that court's decision does this phrase appear. What is referred to in *Acton* is an excerpt from the oral arguments where Acton's counsel—strangely enough—referred to the maxim in English by stating that "[t]he water is the party's as long as it is on his land, as every thing is his that is above or below it." *Acton*, 152 Eng. Rep. at 1226. In the formal portion of the opinion the court also refers in passing to a "principle, which gives to the owner of the soil all that lies beneath [the] surface." *Id.* at 1235.

284. Greenleaf v. Francis, 35 Mass. (18 Pick.) 117, 122 (1836).

285. *Wheatley*, 25 Pa. at 532 (citing DOMAT, *supra* note 270, §§ 1047, 1581).

286. *See* DOMAT, *supra* note 270, § 1047.

287. *See id.*; DIG. 39.2.26 (Ulpian, Ad Edictum 81).

288. *Wheatley*, 25 Pa. at 532 (citing DOMAT, *supra* note 270, § 1581).

289. Acton v. Blundell, 152 Eng. Rep. 1223, 1235 (1843).

own land, diverts his neighbor's water supply"[290] and Trebatius's excerpt which ponders, "suppose that I dig a well in my house and by doing so I cut off the sources of your well. Am I liable? Trebatius says that I am not liable . . . ."[291]

In 1861, the Supreme Court of Ohio, in *Frazier v. Brown*,[292] waded into the groundwater law fray and became forever linked with Texas jurisprudence. Forty-three years later, the Texas Supreme Court, in *Houston & Texas Central Railway Co. v. East*, quoted selectively from the *Frazier* decision.[293] This connection was mainly due to two overly descriptive phrases used by Justice Brinkerhoff, who authored the *Frazier* opinion.[294] First the court held that "the law recognizes no correlative rights in respect to underground waters percolating, oozing or filtrating through the earth."[295] Then, in an attempt to bolster its earlier description of water movement, the court depicted subterranean water as "so secret, occult and concealed that" any attempt to manage it would result in "hopeless uncertainty."[296] While these statements were fairly precise for 1861,[297] they have gained notoriety in modern debates over groundwater, as some suggest that scientific advancements have taken much of the "mystery" out of groundwater.[298] Nevertheless, the *Frazier* court held that "[percolating water] is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is."[299]

E. Texas Law

In the preceding pages, this article has reviewed the historical development of the rule of capture up until its recognition in Texas one hundred years ago.[300] As applied in Texas, the rule of capture has several important legal distinctions and parameters that are reviewed below.[301]

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290. DIG. 39.3.1.12 (Ulpian, Ad Edictum 53).

291. DIG. 39.2.24.12 (Ulpian, Ad Edictum 81).

292. *See* Frazier v. Brown, 12 Ohio St. 294 (1861), *overruled by* Cline v. Am. Aggregates Corp., 474 N.E.2d 324, 327 (Ohio 1984).

293. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 149, 81 S.W. 279, 280-81 (1904) (quoting *Frazier*, 12 Ohio St. at 311).

294. *Frazier*, 12 Ohio St. at 298.

295. *Id.* at 311.

296. *Id.*

297. *See* Hill, *supra* note 7, at 302; Mace et al., *supra* note 7, at 69.

298. *See* Mace et al., *supra* note 7, at 69; sources cited *supra* note 7.

299. Hill, *supra* note 7, at 308.

300. *See* discussion *supra* Parts I, II, III.A-D.

301. *See* discussion *infra* Part III.E.1.

1. Caselaw

"The story of water law in Texas is also the story of its droughts."[302] This could not be more true than in *Houston & Texas Central Railway Co. v. East* —the seminal groundwater law case in Texas.[303] For the five years immediately preceding 1901—the year Houston & Texas Central Railway dug a sixty-six foot well near the corner of Owings Street and Lamar Avenue in Denison, Texas—strong evidence exists that Grayson County suffered a moderate to severe drought.[304] While it cannot be known for sure one hundred years after the fact, the combination of the drought and the Houston & Texas Central Railway well operating just across the street likely had a pronounced negative effect on W.A. East's household well.[305] So began the saga of the rule of capture in Texas.[306]

Several years later, documented droughts in 1910 and 1917 spurred the passage of Article XI, Section 59 of the Texas Constitution,[307] which is commonly referred to as the "Conservation Amendment,"[308] imposing the duty to preserve Texas's natural resources on the Texas Legislature.[309] Then, during the sustained drought of the 1950s, the seminal groundwater cases of *City of Corpus Christi v. City of Pleasanton*[310] and *Pecos County Water Control & Improvement District No. 1 v. Williams* were decided.[311]

Texas caselaw developed two critical areas that exempt groundwater or its use from the rule of capture.[312] The first area is definitional and removes certain types of groundwater from the purview of the rule of capture.[313] The second area addresses groundwater that is subject to the rule of capture but is exempt from its governance because of the manner of use to which it is applied.[314]

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302. *In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 441 (Tex. 1982).

303. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

304. *See* Mace et al., *supra* note 7, at 63, 80-81. Denison, Texas, is located in Grayson County. *See id.* at 63.

305. *Id.* at 63, 82.

306. *See id.*

307. *See* Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 626 (Tex. 1996).

308. TEX. CONST. art. XVI, § 59 (amended 2003); *see* Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 626 (Tex. 1996).

309. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 77 (Tex. 1999); *see* discussion *infra* Part IV.C.1.

310. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955).

311. Pecos County Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

312. *See* discussion *infra* Part III.E.1.a-b.

313. *See* discussion *infra* Part III.E.1.a.

314. *See* discussion *infra* Part III.E.1.b.

a. Legal Definitional Boundaries

i. Underground Streams

In order for groundwater to be governed by the rule of capture in Texas, it must be percolating[315] and not part of an underground stream, which is defined as having all the "characteristics of surface water courses, such as beds, banks forming a channel, and a current of water."[316] Any groundwater that is part of an underground stream is automatically deemed state-owned water.[317] However, all groundwater in Texas is assumed to be percolating.[318]

The Court clarified the percolation assumption in its 1927 decision in *Texas Co. v. Burkett* by reasoning that if groundwater was not either "add[ing] perceptibly to the general volume of water in the bed of [a] stream" (underflow), or "of sufficient magnitude to be of any value to riparian proprietors" (underground streams), it had to be considered percolating.[319] Further, "the mere fact that the wells of one man dried up springs or the wells of another, neither proves nor indicates a well defined channel of underground water."[320]

Some commentators, in their youth and inexperience, have written that "if otherwise percolating or artesian waters form or appreciably contribute to the source or path of a surface stream, then they are also subject to state ownership,"[321] basing this assumption on the Court's decision in *Fleming v. Davis*.[322] However, *Fleming* and its companion case, *Tolle v. Correth*,[323] can be distinguished on a very simple ground: both were decided according to surface water law doctrines because both cases involved the diversion of springwater after it had emerged from the ground.[324] Because the springwater was no longer subterranean, its use was governed by surface water doctrines

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315. *See* TEX. WATER CODE ANN. § 36.001 (Vernon 2000 & Supp. 2004).

316. Denis v. Kickapoo Land Co., 771 S.W.2d 235, 236-37 (Tex. App.—Austin 1989, writ denied); *see* Hoefs v. Short, 114 Tex. 501, 507, 273 S.W. 785, 787 (1925); Bartley v. Sone, 527 S.W.2d 754, 760 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

317. *See* TEX. WATER CODE ANN. § 11.021 (Vernon 2000).

318. *See* Tex. Co. v. Burkett, 117 Tex. 16, 28-29, 296 S.W. 273, 278 (1927). This determination can often come down to a "battle of the experts." *See* Shadwick, *supra* note 7, at 663. In the absence of clear certainty, which is almost a given when dealing with groundwater, Texas courts have naturally chosen to err on the side of presumption of percolation. *See Burkett*, 296 S.W. at 278; *accord Denis*, 771 S.W.2d at 235.

319. *Burkett*, 296 S.W. at 278; *see* discussion *infra* Part III.E.1.a.ii.

320. Pecos County Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, 507 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

321. *See* Drummond, *supra* note 7, at 175, 211.

322. *See* Fleming v. Davis, 37 Tex. 173, 201 (1873).

323. Tolle v. Correth, 31 Tex. 362 (1868).

324. *Fleming*, 37 Tex. at 192-93; *Tolle*, 31 Tex. at 363-64; *cf.* Denis v. Kickapoo Land Co., 771 S.W.2d 235, 236-39 (Tex. App.—Austin 1989, writ denied) (holding that groundwater captured below the point at which spring emerged and returned to the stream could be transported downstream by owner).

and not by the rule of capture, which had not even been adopted at that time of the *Fleming* decision.[325]

Bartley v. Sone is another case sometimes cited as authority for the proposition that the rule of capture is not "applicable to springs which form the source of a flowing stream or which add perceptibly to the flow of water in a stream."[326] This case is distinguishable both factually and legally.[327] In *Denis v. Kickapoo Land Co.*, the Third Court of Appeals distinguished *Bartley* on legal grounds.[328] The court explained that the San Antonio court's reliance on a mere implication from the *Burkett* court's holding, in which the court mused about whether the springs at issue "added perceptibly to the general volume of water in the [streambed],"[329] was misplaced.[330] Because even the springs at issue in *Bartley* were held to be percolating, any inference that groundwater could be subject to riparian principles simply because it might feed a surface stream was "*obiter dicta* and not a holding."[331] In additon, the *Bartley* case is factually dissimilar to a typical groundwater law case in that it, like *Fleming* and *Tolle* before it, dealt with appropriation of springwater after it had emerged from the ground.[332]

A renowned water law commentator from the early twentieth century, C.S. Kinney, succinctly described the English rule's relationship to surface waters by reasoning that:

> Percolating waters tributary to springs were treated the same as all other percolating waters as a part of the soil where found and belonged absolutely to the owner thereof, who could do what he pleased with them, even though in abstracting the water it dried up the springs, to which the water was tributary, on the land of another. And it is immaterial that the springs so supplied with water were the sources of a stream or surface water course upon which riparian rights had vested, provided that the water was intercepted while it was still percolating through the soil before it had reached the surface of the ground at the springs.[333]

Finally, it should be pointed out that for all the legal haranguing about underground streams, no Texas appellate court has ever found or recognized one.[334] The reason for this is probably twofold. First, an underground

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325. *See* Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

326. Bartley v. Sone, 527 S.W.2d 754, 760 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

327. *See infra* text accompanying notes 328-32.

328. Denis v. Kickapoo Land Co., 771 S.W.2d 235, 238 (Tex. App.—Austin 1989, writ denied).

329. Tex. Co. v. Burkett, 117 Tex. 16, 28-29, 296 S.W. 273, 278 (1927).

330. *Denis*, 771 S.W.2d at 238.

331. *Id.*

332. Bartley v. Sone, 527 S.W.2d 754, 756 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); *see* Fleming v. Davis, 37 Tex. 173, 192-93 (1873); Tolle v. Correth, 31 Tex. 362, 363-64 (1868).

333. *See* KINNEY, *supra* note 5, at 2167-68.

334. *See* Barber, *supra* note 7, at 652 n.56 ("In Texas, such streams have never been found."); *supra*

watercourse with bed, banks, and a current of flow is antithetical to the hydrogeological realities of aquiferous water.[335] Second, courts are generally reluctant to "open Pandora's box" by finding such a stream in Texas,[336] which would exempt it and all it touches from the rule of capture.[337] The difficulty and absurdity of applying developed legal terminology to the actual hydrogeological behavior of subterranean water is evidenced by the following exchange in *Cantwell v. Zinser*[338] between the appellant's counsel and the appellee:

> Q. You don't contend there is one big stream of water up there? A. Anyone that looks in there can see where the water has channeled its way. . . .
> . . . .
> Q. You think that this water coming into Jim's sump is in an oozing condition? A. Very slow, yes.
> Q. Would you call it percolating? A. Yes, and oozing.[339]

ii. Underflow of Surface Streams

The underflow of surface streams "is the subsurface portion of a watercourse, the whole of which comprises waters in close association both on and beneath the surface."[340] This concept can be divided into two categories: (1) gaining streams and (2) losing streams.[341] Gaining streams are characterized by the water table lying at roughly the same elevation or higher than the level of water flowing in the stream itself.[342] Conversely, in a losing stream, the water level of the water table is typically lower than the water level of the stream, or even the streambed itself.[343]

Like underground streams, "underflow" of surface streams is not percolating groundwater subject to the rule of capture, but is instead "the

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note 5. This includes the courts of appeals, the Commission of Appeals, and the Court.

335. Aquifers are generally described as "geologic formations that store, transmit, and yield . . . water." Kaiser & Skillern, *supra* note 7, at 254. The water that might actually be found inside an aquifer, instead of being akin to a giant pool, or running stream, is actually composed of small amounts of water and air molecularly bonded to the soil particles in place. *Id.*; *see* Barber, *supra* note 7, at 652.

336. *See* Tex. Co. v. Burkett, 117 Tex. 16, 28-29, 296 S.W. 273, 278 (1927).

337. *See* Behrens & Dore, *supra* note 7, at 194. "If such an exception exists to the application of the absolute ownership rule, it has the potential for swallowing up the rule itself, because in a very real sense *all* groundwater is linked to surface water." *Id.*

338. Cantwell v. Zinser, 208 S.W.2d 577 (Tex. Civ. App.—Austin 1948, no writ).

339. *Id.* at 578-79 (conforming the questions to the language present in *Houston & Tex. Cent. Ry. Co. v. East*, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904), and *Frazier v. Brown*, 12 Ohio St. 294, 303 (Ohio 1861), *overruled by Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324, 327 (Ohio 1984)).

340. *See* WIEL, *supra* note 8, at 743.

341. *See* SAX ET AL., *supra* note 8, at 349.

342. *See id.*

343. *See id.* at 349-50.

property of the state."[344] Although underflow, by its nature, could be more easily located[345]—and because no peculiar method of water movement, such as oozing or filtrating, needs to be found—Texas courts might have had considerably less difficulty finding stream underflow to exist than they have underground streams; however, this assumption is wrong.[346] In fact, "[v]ery little mention of underflow of streams is made in the Texas decisions on water rights."[347]

b. Legal Exceptions to the Rule of Capture

i. Malice

As this article previously mentions,[348] one of the earliest stipulations attached to the rule of capture both in Britain and in New Spain was the prohibition against malicious injury.[349] In practical Texas jurisprudential application, however, legal findings of "malice" are a rarity.[350] In order to find that a landowner "'maliciously [took] water for the sole purpose of injuring [his] neighbor,'" the complainant must prove affirmatively that no other possible explanation for why the defendant was draining the complainant's property other than malicious spite exists.[351] Some commentators propose that proving such a level of intent in a court of law is impossible.[352]

ii. Waste

One of the most controversial limitations put on the use of percolating waters is the waste restriction.[353] As with the other exceptions to, and exemptions from, the rule of capture, the Texas judiciary has shown little inclination to find waste.[354]

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344. *See* TEX. WATER CODE ANN. § 11.021 (Vernon 2000) (defining state water); 30 TEX. ADMIN. CODE § 297.1(55) (West 2004) (stating the TCEQ definition of underflow).

345. By definition, underflow is located directly under most surface streams. *See* WIEL, *supra* note 8, at 743.

346. *See* TEXAS LAW, *supra* note 8, at 563-65.

347. *Id.* at 564-65.

348. *See* discussion *supra* Part III.A, C.

349. Acton v. Blundell, 152 Eng. Rep. 1223, 1228 (1843).

350. *See* Shadwick, *supra* note 7, at 663.

351. *Id.* (alteration in original) (quoting City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 294, 276 S.W.2d 798, 801 (1955)); *see* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 26 (Tex. 1978); Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 151, 81 S.W. 279, 282 (1904).

352. *See* Shadwick, *supra* note 7, at 663.

353. *See City of Corpus Christi*, 276 S.W.2d at 804 (Griffin, J., dissenting).

354. *See, e.g.*, *id.* at 803-04; Pring & Tomb, *supra* note 7, at 25-18.

This reluctance among the courts is most famously exemplified in the Court's decision in *City of Corpus Christi v. City of Pleasanton*.[355] In that case, the Lower Nueces River Supply District was under contract to furnish groundwater it pumped to the City of Corpus Christi some 118 miles away.[356] At full capacity, the Nueces wells pumped approximately ten million gallons of water per day into the Nueces River, which flows into Lake Corpus Christi.[357] From there, a natural channel conducted the water to a settling basin at Calallen.[358] The evidence at trial showed that sixty-three to seventy-four percent of the water discharged into the Nueces River never reached Corpus Christi due to losses from evaporation, transpiration, and seepage.[359] The Court found that the Legislature, when it enacted two statutes allowing for the transport of groundwater via "'river, creek or other natural water course or drain, superficial or underground channel, [or] bayou,'"[360] certainly conceived that some of the water might be lost in transport and "could hardly have intended that what it had approved as legal should become illegal."[361] Justice Calvert[362] also noted the Court's holding was supported by Texas common-law traditions when he wrote, "We know of no common-law limitation of the means of transporting the water to the place of use. Neither do we know of any judicial modification in this state of the rule of the East case."[363]

Justice Griffin, in his dissent, rebuked this approach by encapsulating the majority's reasoning that even though only twenty-five percent of the transported water reaches its destination, "this use is a lawful use; therefore, argues the majority, no waste occurs. The same reasoning would hold no waste occurs if only [.0001% of the water] reach[es its] destination if this [.0001%] is used lawfully."[364]

The Court also distinguished the Austin Court of Appeals's opinion in *Cantwell v. Zinser*, which suggested that waste might be found when extracted groundwater is stored in a leaky, earthen tank,[365] holding that because *Cantwell* had no writ history, there was "no basis for such a modification [to the rule of capture]."[366]

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355. *City of Corpus Christi*, 276 S.W.2d at 804.
356. *Id.* at 799-800.
357. *Id.* at 800.
358. *Id.*
359. *Id.*
360. *Id.* at 802 (quoting TEX. REV. CIV. STAT. ANN. art. 7602 (Vernon 1925)).
361. *Id.*
362. Justice Calvert became chief justice of the Court six years later. *See* OFFICE OF COURT ADMINISTRATION, CHIEF JUSTICES SINCE 1945, *at* http://www.supreme.courts.state.tx.us/history/cj.asp (last visited Oct. 27, 2004) (listing Chief Justice Calvert's tenure as lasting from January 3, 1961 to October 4, 1972).
363. *City of Corpus Christi*, 276 S.W.2d at 802.
364. *Id.* at 804 (Griffin, J., dissenting).
365. Cantwell v. Zinser, 208 S.W.2d 577, 578-79 (Tex. Civ. App.—Austin 1948, no writ).
366. *City of Corpus Christi*, 276 S.W.2d at 802.

iii. Negligent Subsidence

The exception to the rule of capture for negligence is a very limited and relatively recent one.[367] In 1978, the Court was forced to address the issue of subsidence due to groundwater production.[368] Subsidence occurs when an aquifer is overdrafted intensely and long enough to drain a sufficient quantity of the water out of the aquiferous soil strata, weakening the structural latticework of the soil by leaving air in place of the water.[369] This causes the drained soil to collapse, thereby lowering each higher level of soil sediment up to the surface.[370]

In 1973, several landowners in Harris County, including Smith-Southwest Industries, brought suit against Friendswood Development Co. and its parent company, Exxon Corp., alleging that withdrawals of large quantities of groundwater on nearby lands caused severe subsidence on their land.[371] That same year, and probably not by coincidence, the 63rd Legislature amended the original 1949 legislation, enabling the creation of groundwater districts to include subsidence control among the list of purposes for which a district could be created to address.[372]

In 1975, during the 64th Session, the Legislature created the first underground water conservation district specifically tasked to manage the emerging subsidence issues present in Harris County.[373] The constitutionality of this district was promptly challenged in *Beckendorff v. Harris-Galveston Coastal Subsidence District*[374] on the grounds that the Conservation Amendment to the Texas Constitution[375] did not specifically "authorize the creation of a conservation and reclamation district for the purpose of controlling subsidence."[376] However, the court upheld the district's constitutionality.[377] The court reasoned that a conservation aim of the Conservation Amendment was the "control . . . [of] flood waters,"[378] which was also listed among the purposes for creating the district.[379]

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367. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978).

368. *See id.* at 21.

369. *See* Todd, *supra* note 7, at 238. Overdrafting is a process by which water is withdrawn from an aquifer at a greater rate than that of the natural recharge. *See* Drummond, *supra* note 7, at 193.

370. *See* Todd, *supra* note 7, at 238.

371. *Friendswood*, 576 S.W.2d at 21-22.

372. *See* Act of May 26, 1973, 63d Leg., R.S., ch. 598, 1973 Tex. Gen. Laws 1641.

373. *See* Act of May 12, 1975, 64th Leg., R.S., ch. 284, 1975 Tex. Gen. Laws 672.

374. Beckendorff v. Harris-Galveston Coastal Subsidence Dist., 558 S.W.2d 75 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

375. TEX. CONST. art. XVI, § 59 (amended 2003); *see Beckendorff*, 558 S.W.2d at 78.

376. *Beckendorff*, 558 S.W.2d at 78.

377. *Id.*

378. TEX. CONST. art. XVI, § 59(a) (amended 2003).

379. Act of May 12, 1975, 64th Leg., R.S., ch. 284, 1975 Tex. Gen. Laws 672.

In 1978, the *Friendswood* suit finally made its way up to the Court after two consecutive legislative sessions in which the Water Code was amended.[380] The Court granted the writ of error and took the groundbreaking step of substantively modifying the rule of capture by adding negligent subsidence to malice and waste, as the three exceptions to the use of groundwater, which would otherwise be protected under the blanket protection of the English rule,[381] as adopted by the Court in *Houston & Texas Central Railway Co. v. East.*[382]

The addition of negligence as a ground of recovery in subsidence cases made the Court's holding extremely narrow, however, allowing for liability to a landowner only where the "negligent, willfully wasteful, or . . . malicious[ly] injur[ious]" withdrawal of groundwater was the "proximate cause of the subsidence of the land of others."[383] Notably, because exceptions to the rule of capture previously existed for waste and malice, any pumping of groundwater solely for malicious or wasteful motives would already subject such drilling to liability, whether or not it resulted in subsidence on neighboring lands.[384] So in actuality, the inclusion of proximately caused, negligent subsidence to the list of liability exceptions was mainly an academic change.[385]

The *Friendswood* opinion was not the first time the Court toyed with the imposition of negligence as a common law limitation.[386] In 1936, in *Turner v. Big Lake Oil Co.*, the Court held that "the law imposes upon all persons to use due care in the use of their property or the conduct of their business to avoid injury to others."[387] The Court expressed this notion in the context of imposing some liability on land use "'[i]n the absence of some positive law forbidding or regulating the keeping or use of the thing.'"[388] This idea of positive law appears to be drawn from the U.S. Supreme Court's proposal of a "negative community,"[389] discussed at length below.[390] Some commentators have attempted to draw a connection between the discussions of negligence in the *Turner* and *Friendswood* decisions, but such a link is tenuous at best.[391] The *Friendswood* opinion directly distinguished *Turner* by explaining that:

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380. *See id.*; Act of May 26, 1973, 63d Leg., R.S., ch. 598, 1973 Tex. Gen. Laws 1641.

381. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 29 (Tex. 1978).

382. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W.279 (1904).

383. *Friendswood*, 576 S.W.2d at 30; *see* Cisneros, *supra* note 7, at 1202-03.

384. *See Friendswood*, 576 S.W.2d at 30; City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 293-94, 276 S.W.2d 798, 801 (1955).

385. *See Friendswood*, 576 S.W.2d at 30.

386. *See* Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936).

387. *Id.* at 223.

388. *Id.* (quoting Galveston, H. & S.A. Ry. v. Currie, 100 Tex. 136, 147, 96 S.W.1073, 1077 (1906)).

389. *See* Ohio Oil Co. v. Indiana, 177 U.S. 190, 209 (1900).

390. *See* discussion *infra* Part IV.A.1.

391. *See* Drummond, *supra* note 7, at 216; Todd, *supra* note 7, at 253.

> The problem [with] those cases [including *Turner*], none of which related to ground water withdrawals, [is that they] involved liability for the *unreasonable use* of correlative property rights or the balancing of legal and equitable rights between property owners. This is a concept which was deliberately rejected with respect to withdrawals of underground water when this Court adopted [in *East*] the common law rule that such rights are not correlative, but are absolute . . . .[392]

Finally, in recognition of the substantive change to the common law rule of capture adopted by the Court in *Friendswood* and consistent with Justice Calvert's admonition in the *City of Corpus Christi* decision that the people of Texas, having adopted the Conservation Amendment, had directed the Legislature to pass all laws necessary to protect Texas's natural resources,[393] the Court made the application of its holding concerning liability for negligently caused subsidence prospective.[394]

2. Attorney General Opinions

The Office of the Attorney General has addressed the rule of capture intermittently for over sixty years.[395] Despite, or perhaps due to, this long history, the Attorney General has been less than consistent on what exactly a landowner owns under the rule of capture.[396]

On August 22, 1940, the Attorney General took the perplexing position that "regardless of where the ownership may rest, the public at large has more need for the use of large underground reservoirs of water contained within strata than even of its surface streams."[397] The Attorney General reached this conclusion by citing almost exclusively to California caselaw,[398] which had adopted the correlative rights doctrine by that time.[399] The Attorney General attempted to "clarify" groundwater law in Texas by designing a complex scheme that purported to distinguish between different classes of percolating waters, leaving only groundwater that moved through the soil profile solely by

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392. Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 24 (Tex. 1978) (citing Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904)) (emphasis added).

393. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 296, 276 S.W.2d 798, 803 (1955) (holding that power certainly does not lie with the courts to usurp the legislative function); *see* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 78 (Tex. 1999).

394. *Friendswood*, 576 S.W.2d at 30.

395. Op. Tex. Att'y Gen. No. O-2402 1 (1940) (providing the first Attorney General opinion dealing directly with groundwater ownership).

396. *See infra* notes 397-407 and accompanying text.

397. Op. Tex. Att'y Gen. No. O-2402 1, 6 (1940).

398. *Id. passim*.

399. Katz v. Walkinshaw, 74 P. 766 (Cal. 1903) (adopting the correlative rights doctrine).

force of gravity as the single type of underground water subject to the rule of capture.[400] The Attorney General justified this approach by explaining that he:

> [B]elieve[d] the science of hydrology, that is, the study of underground waters [had] advanced . . . to a degree of certainty as to warrant some measure of discrimination on the part of the courts, requiring them to abandon the [general percolation presumption] and to distinguish the different types of percolating water.[401]

The opinion went on to chide that "[w]e cannot believe that our courts would hold [groundwater found in soil strata] constitute[s] percolating water[] within the sense that that term is ordinarily used, that is, diffused percolation."[402] The "scientific" location of water not contained within soil strata would indeed be challenging to find.[403]

By 1987, however, the Attorney General had turned away from California's correlative rights and began focusing his analysis on the law promulgated in, of all places, Texas.[404] In his opinion, the Attorney General held that "under Texas law, landowners have 'absolute ownership' of percolating groundwater beneath their lands."[405] The Attorney General went on to state that:

> The right of landowners to groundwater beneath their land is an incident to their ownership of the land—a part of the land. Because groundwater is considered to be the property of the overlying landowner . . . [the landwoner] may withdraw it regardless of the effect of the withdrawal on other wells or the reasonableness of the use to which it is put.[406]

The Attorney General then distinguished the absolute ownership doctrine from the doctrine of riparian rights in surface water by writing that "[u]nlike the riparian landowner's right to non-flood waters, however, a landowner's 'absolute ownership' right to groundwater may not be characterized . . . as . . . 'usufructory.'"[407]

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400. Op. Tex. Att'y Gen. No. O-2402 1, 6 (1940).

401. *Id.* at 5.

402. *Id.* at 7.

403. *See* Drummond, *supra* note 7, at 175, 177 (describing how all groundwater is contained in one kind of soil strata or another).

404. *See* Op. Tex. Att'y Gen. No. JM-827 (1987).

405. *Id.* at 3956 (quoting City of Sherman v. Pub. Util. Co., 643 S.W.2d 681, 686 (Tex. 1983)).

406. *Id.* at 3956-57.

407. *Id.* at 3957 (quoting *City of Sherman*, 643 S.W.2d at 686).

IV. CURRENT APPLICATION IN TEXAS

Several snappy quotes have been cited in various publications, all used as clever commentary on the rule of capture.[408] Among these are Benjamin Franklin's attributed quote, stating "'[w]hen the well is dry, we know the worth of water;'"[409] Mark Twain's observation that "'[w]hiskey is for drinking and water is for fighting over;'"[410] former Speaker of the U.S. House Jim Wright's admonition on the importance of water, "'[t]he crisis of our diminishing water resources is just as severe (if less obviously immediate) as any wartime crisis we have ever faced. Our survival is just as much at stake as it was at the time of Pearl Harbor, or the Argonne, or Gettysburg or Saratoga;'"[411] former Governor George W. Bush's comment on groundwater regulation, "'[w]ater can be war;'"[412] Oliver Wendell Holmes's famous critique of precedential value, which is often applied definitively to the rule of capture, which reads:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past[;][413]

a more blunt definition of stare decisis, "Latin[] for 'We stand by our past mistakes;'"[414] and Mohamar Ghadafi's surprisingly sane observation that "[w]ater is more valuable than oil; water is life."[415]

While not as catchy, the authors attempt in this section of the article to elaborate on the current state of groundwater regulation in Texas beyond the conditions hinted at above.[416]

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408. *See infra* notes 409-15 and accompanying text.

409. Opiela, *supra* note 7, at 87, *quoted in* SANDRA POSTEL, LAST OASIS: FACING WATER SCARCITY 166 (1992); Miles, *supra* note 7, at 213, *quoted in* POSTEL, *supra*, at 166.

410. *In Search of a Solution*, *supra* note 7, at 192 (quoting Mark Twain).

411. TEXAS WATER FOUNDATION, EVERY DROP COUNTS, *at* http://www.texaswater.org/default.htm (last visited Oct. 27, 2004) (quoting the Honorable Jim Wright, then Speaker of the Texas House of Representatives).

412. Miles, *supra* note 7, at 213 (quoting Homer Jones, *Water Wars*, TEX. BUS., Feb. 1997, at 23).

413. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 82 (Tex. 1999) (Hecht, J., concurring) (quoting Hon. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)); Shadwick, *supra* note 7, at 641 (quoting Holmes, *supra*); Cisneros, *supra* note 7, at 1203 (quoting Holmes, *supra*); Castleberry, *supra* note 7, at 514 (quoting Holmes, *supra*).

414. James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 1000 n.93 (1990).

415. Rick Storm, *Forum Speakers Tout Importance of Water to Panhandle's Future*, AMARILLO GLOBE-NEWS, June 15, 2002, http://amarillo.com/stories/061502/new_forum.shtml (quoting Mohamar Ghadafi).

416. *See* discussion *infra* Part IV.A-D.

A. *The Term "Rule of Capture" Is an Unfortunate Misnomer*

Despite the clarity and regularity with which Texas courts have defined the rule of capture as an absolute, freely alienable, corporeal right of ownership in groundwater located beneath a landowner's property,[417] and despite the fact that the Texas Legislature has passed no statute that is intended to impair the ownership and property rights in groundwater,[418] nor imposed upon groundwater the laws and administrative rules relating to surface water,[419] the term "rule of capture" has caused—and continues to cause—much confusion in the legal community.[420] Admittedly, it is a misnomer.[421] Some reviewers have even lamented the spread of the use of the term, describing it as supporting the "dangerous and . . . unjustified inference drawn by some from the use of this expression."[422] The term has also inspired "[l]awyers . . . [to] glibly talk[] about the rule of capture and its sinister influence," and has even stirred some to consider it "a sort of inherent disease."[423] In reality, the rule of capture has gone by many names in Texas, including the "English rule," "English doctrine," "absolute ownership rule," "Texas capture rule," "Texas rule," "law of capture," "law of the biggest pump," "big pump theory," "common law doctrine," and the "common law rule."[424]

Testaments to the befuddlement that the term rule of capture has caused within the legal community over the last hundred years are evidenced by several instances where, even though the Court famously and unambiguously adopted the English rule in *East*, some reviewers, jurists, and even the Court itself has intimated that *East* did not adopt the English rule at all.[425] One commentator opined that *East* "really follows the American rule of reasonable and beneficial use . . . , although the case is sometimes cited as following the English rule without any modifications or limitations whatever."[426] The San Antonio Court of Appeals erroneously cited *East* for the proposition that "[i]t is now settled in this state ... that owners of the soil have no rights in subsurface waters . . . as against neighbors who may withdraw them by wells or other excavations, even though this withdrawal by the one results in the destruction of the other's water supply."[427] Less than four months later, the Court itself spontaneously cited *East* for allowing neighboring landowners the

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417. *See* sources cited *supra* note 5.
418. TEX. WATER CODE ANN. § 36.002 (Vernon Supp. 2004-05).
419. *Id.* § 35.003 (Vernon 2000).
420. *See, e.g.*, Opiela, *supra* note 7, at 92; *Continuing Voids*, *supra* note 7, at 1288-90.
421. *See Continuing Voids*, *supra* note 7, at 1288-90.
422. A.W. Walker, *supra* note 7, at 375.
423. Hardwicke, *supra* note 7, at 392.
424. *See* sources cited *supra* notes 5, 7-8, 11-14.
425. *See* Hardwicke, *supra* note 7, at 409 n.24; Stephens County v. Mid-Kan. Oil & Gas Co., 113 Tex. 160, 167, 254 S.W. 290, 292 (1923).
426. Hardwicke, *supra* note 7, at 409 n.24.
427. Farb v. Theis, 250 S.W. 290, 292 (Tex. Civ. App.—San Antonio 1923, no writ).

"correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own."[428] This was an errantly-worded opinion directly and wholly in contravention with the Court's earlier pronouncement in *Houston & Texas Central Railway Co. v. East*[429] and the subsequent opinions of *Texas Co. v. Burkett*,[430] *City of Corpus Christi v. City of Pleasanton*,[431] *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*,[432] *Barshop v. Medina County Underground Water Conservation District*,[433] and *Sipriano v. Great Spring Waters of America, Inc.*[434]

The most recent judicial discussion of the rule of capture comes from the Austin Court of Appeals in an opinion issued in 2004 in *City of San Marcos v. Texas Commission on Environmental Quality*,[435] wherein the court held that the absolute ownership rule adopted in *East* relieved a landowner from "tort liability" for adverse impacts to a neighboring landowner's wells that result from pumping.[436] The third court went on to state that a "landowner can [only] assert absolute ownership over groundwater by drilling a water well and capturing it."[437] The court based its view on an 1805 New York intermediate court opinion that discussed the rule of capture in the context of the "possession of hunted wild animal[s]."[438]

1. Confusion with Feroe Naturoe

The use of the word "capture" logically implies the exertion of dominion over something not owned, or more precisely, the act of "tak[ing] into one's possession or control . . . ."[439] This similarity of terminology has led to analogizing the rule of capture to the seizing of wild game, or *feroe naturoe*.[440] The origin of this analogy is explained "as an expression of derision by critics of the old analogy to wild animals."[441] Indeed, even the U.S. Supreme Court made this error, albeit while quoting a nineteenth century Pennsylvania case

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428. *Mid-Kan. Oil*, 254 S.W. at 292.
429. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904).
430. Tex. Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927).
431. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292-94, 276 S.W.2d 798, 800-01 (1955).
432. Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978).
433. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 625-26 (Tex. 1996).
434. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999).
435. City of San Marcos v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied).
436. *Id.* at 271.
437. *Id.* at 270.
438. *Id.* at 270-71; *see* discussion *infra* Part IV.A.1.
439. THE NEW OXFORD AMERICAN DICTIONARY 257 (2001).
440. *See* Westmoreland & Cambria Nat. Gas Co. v. De Witt, 18 A. 724, 725 (Pa. 1889).
441. A.W. Walker, *supra* note 7, at 375.

—*Westmoreland & Cambria Natural Gas Co. v. De Witt*—where it stated that "'[w]ater and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feroe naturoe*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner.'"[442] This quote reveals one ground on which to distinguish both courts' interpretation of water's subterranean nature—water has never been considered a mineral since the time of Justinian.[443]

The U.S. Supreme Court also belied the confusion between the terminology "absolute ownership" and "capture" when it quoted the *Westmoreland* opinion in describing groundwater as "'belong[ing] to the owner of the land, and . . . a part of it, so long as [the groundwater is] on or in it,'" while citing the same opinion as requiring capture for a property interest to accrue.[444] The U.S. Supreme Court elaborated further on the *feroe naturoe* comparison, explaining that "[i]t [is] true as to both animals *feroe naturoe* and gas and oil, therefore, that wilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession."[445] The High Court further postulated that "things which are *feroe naturoe* belong to the 'negative community;' in other words, [they] are public things subject to the absolute control of the state."[446] This holding was a fairly drastic departure from the High Court's earlier pronouncement on the subject, wherein it decided that:

> Petroleum gas and oil are substances of a peculiar character . . . . They belong to the owner of the land, and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.[447]

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442. Ohio Oil Co. v. Indiana, 177 U.S. 190, 204 (1900) (quoting *Westmoreland*, 18 A. at 725).

443. *See* Robinson v. Robbins, 501 S.W.2d 865, 867 (Tex. 1973); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972); discussion *supra* Part II.B.4 (describing the various jurists' view that groundwater was owned by the holder of the surface estate).

444. *Ohio Oil*, 177 U.S. at 204 (quoting *Westmoreland*, 18 A. at 725).

445. *Id.* at 209.

446. *Id.* at 208-09.

447. Brown v. Spillman, 155 U.S. 665, 669-70 (1895).

Other commentators have been misled by the confusion in terminology inspired by the rule of capture.[448] In 2000, one author stated that "the rule of capture [was] based upon . . . [a] legal concept that ownership is derived from gaining control over the property and reducing it to possession."[449]

Another reviewer correctly described how the legal theory of capture of wild animals arose in England in the context of land ownership, whereby a hunter could not claim ownership of a stag or fox "until possession [of it] was actually taken . . . by virtue of capture," but thereafter mistakenly assumed that English courts applied this form of the rule of capture to groundwater.[450]

As examined above, in *Acton v. Blundell*, the Exchequer Chamber court did not refer to the capture of wild animals or even capture for that matter.[451] The underpinnings of the *Acton* decision rested instead on the *Digest of Justinian* and the passage from Marcellus in particular, neither of which made reference to the capture of wild game, *feroe naturoe*.[452] However, both did expressly refer to the maxim *damnum absque injuria*,[453] the tenets of which were first described by Proculus and Ulpian.[454]

Another commentator made the same troubled assumption about the *Acton* court, stating that the British courts "compared underground liquids and gas to wild animals that roam across the surface. Wild birds and animals belong to no one until killed or captured, according to the rules of state. This concept is sometimes referred to as *ferea* [sic] *nuturae* or free in nature."[455]

Some scholars have not tied a theoretical concept of capture to that of *feroe naturoe* but instead have simply surmised that, because water can migrate out from under one's boundary and no action will lie once it exits, water must be reduced to actual possession before it can be owned.[456] In the context of water marketing, one commentator wrote that "the [Texas] landowner does not hold title to specific units of water beneath his land . . .

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448. *See infra* notes 449-63 and accompanying text.

449. DeLaughter, *supra* note 7, at 1477.

450. *See* Technical Rep. 1469, *supra* note 7, at 6.

451. *See* Acton v. Blundell, 152 Eng. Rep. 1223 (1843); *see also supra* Part III.C (discussing the history and rationale of *Acton*).

452. *See Acton*, 152 Eng. Rep. at 1235.

453. *Id.*

454. *See* DIG. 39.2.26 (Ulpian, Ad Edictum 81).

455. *See* Publ'n 1458, *supra* note 7, at 1.

456. *See* Kaiser & Skillern, *supra* note 7, at 258 n.433 (theorizing that:

> [W]hile Texas groundwater law is characterized as an absolute right for the landowner, this is somewhat of a misnomer. A landowner does not have an absolute right to the water beneath his land, but only has an absolute right to capture it. The results of this rule can be illustrated with the following example. Suppose landowner A's property overlies the source of percolating groundwater that would normally flow under landowner B's property. Under the absolute ownership rule, landowner A can capture all of the percolating groundwater under his property, thereby depriving landowner B of any water and B is without any legal remedy.

Id.); Ellis, *supra* note 7, at 91-92.

[but he or she] may 'reduce groundwater to ownership' by pumping it."[457] Gould, in his work on waters, posited that "'[p]etroleum [and] oil, . . . like water, . . . is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie.'"[458] Our Commission of Appeals Court quoted this passage from Gould with approval in *Prairie Oil & Gas Co. v. State*, but only the judgment of the opinion was later adopted by the Court.[459] The Court did, however, appear to go astray in the early case of *Bender v. Brooks*, where it held that owners of land had "no specific title to the oil therein until it [its removal] from the earth."[460] This holding was later clarified in *Right of Way Oil Co. v. Gladys City Oil*, where the Court held that oil in place was, in fact, capable of ownership, but the title to such oil becomes more definite upon the oil's extraction.[461] One writer summed up his approximation of the absolute ownership doctrine by stating that "it is obvious that one cannot claim absolute ownership in something so fleeting as groundwater."[462] Yet another described the confusion generated by the meanings of capture versus absolute ownership by reasoning that the right did not confer:

> a property right in the form of an *affirmative privilege* on the part of one landowner to capture the oil or gas of his neighbor. Such a conception would seem utterly inconsistent with the ownership theory. The true view . . . is that, instead of an affirmative privilege to capture, there is merely a negative freedom from liability for drainage because practical considerations render the giving of a cause of action for drainage undesirable.[463]

2. *Clarification from Texas Oil and Gas Caselaw*

This last statement was made shortly after the U.S. Supreme Court's decision in *Ohio Oil* and mirrors the High Court's description of a "'negative community'" made up of "public things subject to the absolute control of the

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457. Griffin & Boadu, *supra* note 7, at 279-80.

458. GOULD, *supra* note 5, at § 291; *see* Prairie Oil & Gas Co. v. State, 231 S.W. 1088, 1090 (Tex. Comm'n App. 1921, judgm't adopted) (quoting Ohio Oil Co. v. Indiana, 177 U.S. 190, 207 (1900)).

459. *Id.* This type of Court approval:

> [I]s to be understood as having no further effect than to simply adopt the view of the Commission as to the determination to be made of the cause. It is not to be construed as an approval by the Supreme Court of the opinion of the Commission in the particular case, or the reasons given in the Commission's opinion for its conclusion.

McKenzie v. Withers, 109 Tex. 255, 256, 206 S.W. 503, 503 (1918).

460. Bender v. Brooks, 103 Tex. 335, 335, 127 S.W. 168, 170 (1910).

461. Right of Way Oil Co. v. Gladys City Oil, 106 Tex. 94, 103, 157 S.W. 737, 740 (1913).

462. *See* Opiela, *supra* note 7, at 92.

463. *See* A.W. Walker, *supra* note 7, at 375.

State."[464] In a landmark decision, the Court in *Texas Co. v. Daugherty*[465] rebutted both the wild animal and public community analogies by holding that:

> [T]he analogy between deposits of oil and gas and things ferae naturae is, at best, a limited one. The difference between them is that things ferae naturae are public property, and all have an equal right to reduce them to possession and ownership, while the right to the oil and gas beneath his land is an exclusive and private property right in the landowner, inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property.[466]

Justice Phillips went further in a masterful explanation for the Court on how an exclusive property right could accrue to a migratory substance, especially when no action could be had against a neighbor who captures such a substance and draws it away from the original landowner's borders:

> Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things ferae naturae, have made a distinction between their conveyance while in place and that of other minerals, holding that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. . . . Is the possibility of their escape to render them while in place incapable of conveyance, or is their ownership while in that condition, with the exclusive right to take them from the land, anything less than ownership of an interest in the land? Conceding that they are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that, so long as they have not departed, they are a part of the land? . . . The opposing argument is founded entirely upon their peculiar property, and therefore the risk of their escape. But how does that possibility alter the character of the property interest which they constitute while in place beneath the land? The argument ignores the equal possibility of their presence, and that the parties have contracted upon the latter assumption . . . . In other words, the question . . . reduces itself to this: If the oil and gas, the subject of the conveyance, are in fact not beneath or within the land, and are therefore not capable of being reduced to possession, the conveyance is of no effect. But if they have not departed and are beneath it, they are as a part of the realty; and their conveyance while in place . . . is consequently the conveyance of an interest in the realty. . . . While they lie within the ground as a part of the realty, is the ownership of the realty to be denominated, as to them, a mere license to appropriate, as distinguished from an absolute

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464. *See* Ohio Oil Co. v. Indiana, 177 U.S. 190, 208-09 (1900) (quoting Westmoreland & Cambria Nat. Gas Co. v. DeWitt, 18 A. 724, 725 (Pa. 1890)).

465. Tex. Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915).

466. *Id.* at 720.

> property right in the corpus of the land? With the land itself capable of absolute ownership, everything within it... is likewise capable of ownership, so long as it constitutes a part of it. If these minerals are a part of the realty while in place, as undoubtedly they are, upon what principle can the ownership of the property interest, which they constitute while they are beneath or within the land, be other than the ownership of an interest in the realty?[467]

The Court again addressed the fallacy of the wild-game analogy in 1948, recognizing that "'[t]here is no oil or gas producing state today which follows the wild-animal analogy to its logical conclusion that the landowner has no property interest in the oil and gas in place.'"[468]

3. How Water Law Is Analogous to Oil and Gas Law

The following sections explain how the preceding expositions on oil and gas law apply to water, which—unlike oil and gas—has never been considered a mineral.[469]

First, as explained below, the doctrines of oil and gas law and water law in Texas derive from the same source: the Court's adoption of the rule of capture in *East*[470] and from the *Acton* court's promulgation of the English rule.[471] In this sense, oil and gas law is an offshoot of groundwater law, but oil and gas law developed more quickly because of the rapidity with which an oil and gas market emerged.[472] Such a market is only now emerging with respect to the development of groundwater law.[473] As such, because the doctrine evolved from groundwater law originally, evaluations of the rule of capture as it applies to oil and gas in place are necessarily linked to the rule of capture as it applies to groundwater in place.[474]

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467. *Id.* at 719-20.

468. Elliff v. Texon Drilling Co., 146 Tex. 575, 581, 210 S.W.2d 558, 561 (1948) (quoting A.W. Walker, *supra* note 7, at 371).

469. *See* discussion *supra* Parts II-III.

470. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 26 (Tex. 1978) (tracing how *East* was cited as the earliest case establishing the "law of capture" in *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935) which itself was "one of the basic cases recognizing private ownership of oil and gas in place"); McCleskey, *supra* note 7, at 213 ("*East* influenced early oil and gas law as well as water law."); Greenhill & Gee, *supra* note 7, at 621 ("Beyond doubt the [*East*] decision influenced the formative stages of the Texas law of oil and gas as the courts developed the ownership-in-place rationale.").

471. *See Friendswood*, 576 S.W.2d at 26 (tracing both the Texas ownership and capture rules back to the English rule as laid down in *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843)).

472. *See* McCleskey, *supra* note 7, at 213-14 (recounting how, after oil was accidentally discovered in Corsicana in 1894, the industry grew extremely quickly in the 1920s and 1930s).

473. *See id.* at 216; Lehman, *supra* note 7, at 105; Drummond, *supra* note 7, at 217-23.

474. *See Friendswood*, 576 S.W.2d at 26; McCleskey, *supra* note 7, at 213; Greenhill & Gee, *supra* note 7, at 621.

Second, while groundwater has never been held to be part of the mineral estate, it has repeatedly been held to be a real property right.[475] Further, courts have held that groundwater in place is indistinguishable from the soil.[476] Therefore, the Court's admonishments in *Daugherty* concerning the ownership of elements in the soil are directly applicable to groundwater in, and as a part of, the soil as well.[477]

4. The Rules of Capture and Absolute Ownership Are Similar, Yet Distinct Property Regimes

The last area where oil and gas law provides much needed insight, which concerns the difference in terminology between the rule of capture and the doctrine of absolute ownership, is one of the oldest and most intriguing distinctions as well.[478] *Brown v. Humble Oil & Refining Co.* is "one of the basic cases recognizing private ownership of oil and gas in place."[479] In it, the Court cited to *Houston & Texas Central Railway Co. v. East* as the earliest enunciation of the "law of capture" in Texas but cited to *Daugherty* as the earliest case "recogniz[ing] the ownership of oil and gas in place."[480]

In *Humble Oil*, the Court made clear that it viewed the two doctrines as distinct by holding that "[b]oth rules are subject to regulation under the police power of a state."[481] Just under a decade after the *Humble Oil* decision, the Court reaffirmed the distinction between the rules of capture and absolute ownership in *Corzelius v. Harrell*.[482] The Court, however, linked the two concepts by explaining that "[t]he rule in this State recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. It is also held that such rule should be considered in connection with the law of capture, which is recognized as a property right."[483]

In *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, the Court again confirmed the view that the rules of capture and absolute ownership are two distinct property theories.[484] Justice Daniel distinguished between the ownership theory espoused in *Humble Oil* and the law of capture established in *East* by stating that "[o]ther writers have traced *both* the Texas ownership *and* capture theories to the English rule relating to underground

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475. *See* discussion *infra* Part IV.B.1.

476. *See, e.g.*, Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904); *Acton*, 152 Eng. Rep. at 1235.

477. Tex. Co. v. Daugherty, 107 Tex. 226, 235-37, 176 S.W. 717, 719-20 (1915).

478. *See* Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935 (1935).

479. *Friendswood*, 576 S.W.2d at 26.

480. *Humble Oil*, 83 S.W.2d at 940 (citing *East*, 81 S.W. at 279 and *Daugherty*, 176 S.W. at 719-20).

481. *Id.*

482. Corzelius v. Harrell, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945).

483. *Id.*

484. *Friendswood*, 576 S.W.2d at 21.

[and] percolating waters."[485] Lest there be any remaining ambiguity, the Court again described the theories as discrete concepts in 1983, calling the right to capture a "corollary to absolute ownership of groundwater."[486]

However, where the Court in *Friendswood* and *Humble Oil* cited to *East* as the source of the rule of capture[487] and the *Humble Oil* decision looked to *Daugherty* as the genesis of the absolute ownership doctrine,[488] the Court in *City of Sherman v. Pubic Utility Commission* characterized *East*, not *Daugherty*, as adopting "[t]he absolute ownership theory."[489] In fact, in *East* the word "capture" is never even mentioned.[490] Instead, the "person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure" language from *Acton v. Blundell*[491] is quoted, and the term "absolute owner" is first used by the Court.[492] Alternatively, in *Daugherty*, the Court departed on a long discourse describing both capture and ownership concepts.[493] Nevertheless, it appears that as late as twenty years ago, the Court viewed these two doctrines as separate and distinct property regimes, which were commingled and perhaps so closely tied to each other that cases originating each view had become somewhat interchangeable.[494] Accordingly, while the rules of capture and absolute ownership are indeed separate theories, both are derived from the English rule.[495]

B. What Does a Texas Landowner Own Under the Rule of Capture?

Many allege that Texas is the "lone holdout" in the United States to still govern its groundwater resources under the rule of capture.[496] The allegation is not precisely accurate.[497] Several states still adhere to some version of the

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485. *Id.* at 26 (emphasis added).

486. *See* City of Sherman v. Pub. Util. Comm'n, 643 S.W.2d 681, 686 (Tex. 1983).

487. *Friendswood*, 576 S.W.2d at 26; Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940 (1935). This characterization is perplexing because nowhere in the *East* opinion is the word "capture" found.

488. *Humble Oil*, 83 S.W.2d at 940.

489. *Sherman*, 643 S.W.2d at 686.

490. *See* Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

491. Acton v. Blundell, 152 Eng. Rep. 1223, 1235 (1843).

492. *East*, 81 S.W. at 281.

493. *See* Tex. Co. v. Daugherty, 107 Tex. 226, 234-37, 176 S.W. 717, 719-20 (1915).

494. *See Sherman*, 643 S.W.2d at 686; Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 26 (Tex. 1978); Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935); *Daugherty*, 176 S.W. at 719-20; *East*, 81 S.W. at 280-82.

495. *See Friendswood*, 576 S.W.2d at 26; *Humble Oil*, 83 S.W.2d at 940; *Daugherty*, 176 S.W. at 719-20; *East*, 81 S.W. at 280-82.

496. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 82 (Tex. 1999) (Hecht, J., concurring); *see* Ahrens, *supra* note 7, at 3; Potter, *supra* note 7, at 1; Evans, *supra* note 7, at 496-97; McCleskey, *supra* note 7, at 212; Norris, *supra* note 7, at 498; Tyler, *supra* note 7, at 535; Harnsberger et al., *supra* note 7, at 727.

497. *See* TARLOCK, *supra* note 8, § 4.6; WATER AND WATER RIGHTS, *supra* note 8, §§ 21.05, 21.07;

rule of capture, including Connecticut, Indiana, Louisiana, Maine, and Rhode Island.[498] But, what may be fairly said is that Texas follows the most conservative, and historically consistent, interpretation of the rule of capture.[499]

1. The Rule of Capture Confers a Vested Property Right in the Overlying Landowner

Precisely what right the rule of capture—as it is currently applied in Texas[500]—guarantees a landowner is the seminal question the authors seek to answer in this article. This article traces the rule of capture from its inception as scattered threads of Roman juristic musings, through its later interpretations in Spanish and English jurisprudence, and into the early American courts as a recognized and distinct body of law.[501] This article documents how each of these early sources treated groundwater as an element of the soil conferring upon the overlying landowner a vested real property right in groundwater.[502] The authors now pick up the legal trail of the doctrine as it meanders through the federal courts, Texas courts, and the Texas Legislature and attempt to discern what exactly a Texas landowner can call his own.[503]

a. Federal Recognition

The federal courts have kept their relative distance from Texas groundwater law.[504] However, in 1966, the Western District Court in Austin was forced to intervene after the Legislature passed a statute prohibiting the

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Caroom & Maxwell, *supra* note 7, at 41-42; Drummond, *supra* note 7, at 197.

498. *See* TARLOCK, *supra* note 8, § 4.6; WATER AND WATER RIGHTS, *supra* note 8, §§ 21.05, 21.07; Caroom & Maxwell, *supra* note 7, at 41-42; Drummond, *supra* note 7, at 197.

499. *See* discussion *supra* Part III.E.

500. For all the frenzied debate and defense of private property rights in groundwater over the years, it is worth noting that the State of Texas currently owns several thousand square miles of groundwater. This is because, while the vast majority of Texas is privately held, approximately six percent is not. *See* DAVID J. SCHMIDLY ET AL., TEXAS PARKS AND WILDLIFE FOR THE 21ST CENTURY: AN OVERVIEW OF THE TEXAS TECH UNIVERSITY STUDIES IN CONSERVATION AND RECREATION FOR THE COMING DECADES 13 (Tex. Parks and Wildlife Dep't, 2001) at 13 (revealing that a little over ninety-four percent of the land area of Texas is privately owned). Of this six percent, less than half is owned by the federal government, with the remainder being held by one of the state land agencies. *See id.* In all, potentially just under sixteen thousand square miles of groundwater is owned in fee simple by the people of Texas. *See* JOHN B. ASHWORTH & JANIE HOPKINS, AQUIFERS OF TEXAS 9, 29 (Tex. Water Dev. Bd., Rep. 345, 1995) (There are approximately 262,017 square miles of land in Texas. TEX. ALMANAC 7 (1996-97 ed., 1995). Mathematically, six percent of 262,017 is roughly equal to 15,721 square miles of publicly-owned land overlying Texas aquifers. The practical computation of the total state-owned aquifer acreage is, of course, not quite this simplistic because not every inch of land area in Texas is underlain by an aquifer, major or minor, but the calculation is provided here more for illustration and sense of scale, than for precision).

501. *See* discussion *supra* Parts II.B-III.D.

502. *See* discussion *supra* Parts II.B-III.D.

503. *See* discussion *infra* Part IV.B.1-3.

504. *See* City of Altus, Okla. v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966).

exportation of groundwater outside of Texas.[505] The details of the case are of little importance here, but the court's characterization of Texas groundwater law is particularly enlightening.[506]

The federal court began by recounting the development of the *damnum absque injuria* doctrine, and then held that "[t]his right to enter upon the land and appropriate underground percolating waters is an interest in real estate, and may be exercised by the landowner or made the subject of an independent grant of ownership."[507] The court went on to recognize that "after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land and outside the basin where produced, just as he could sell any other species of property."[508] The court then explained that "[t]hese rights, although not codified, have been generally recognized by statute as property rights of sufficient character for ownership."[509] Last, the court reasoned that "the general law of the State of Texas . . . [is that] water that has been withdrawn from underground sources [is] personal property subject to sale and commerce."[510]

b. The Legislature

In 1993, the Legislature enacted the Edwards Aquifer Authority Act, which was one of the first legislative adjustments to the rule of capture.[511] Under the Act, for the first time, aquifer-wide withdrawal caps were imposed on landowners, but the Legislature nevertheless recognized the property right inherent in groundwater.[512] The statute expressly stated that "[t]he [L]egislature intends that just compensation be paid if implementation of this article causes a taking of private property . . . in contravention of the Texas or federal constitution."[513] This provision for the payment of takings claims is explicitly included to redress the possibility that production withdrawal caps under section 1.14 of the Act would effect a taking of the "private property" rights of landowners within the Authority's boundaries.[514] If the Legislature did not accept or agree with the Court in its decision in *Houston & Texas Central Railway Co. v. East*[515] and its progeny,[516] as well as with the common

505. *See id.* at 840; discussion *infra* Part IV.B.4.a.

506. *See City of Altus*, 255 F. Supp. at 840.

507. *Id.* (citing to Evans v. Ropte, 128 Tex. 75, 96 S.W.2d 973 (1936)).

508. *Id.* This excerpt was also referenced by the U.S. Supreme Court in *Sporhase v. Nebraska* ex rel. *Douglas*, 458 U.S. 941, 949 (1982).

509. *City of Altus*, 255 F. Supp. at 840.

510. *Id.*

511. Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1, 1993 Tex. Gen. Laws 2350, 2360.

512. *See id.* § 1.07, 1993 Tex. Gen. Laws 2350, 2356.

513. *Id.*

514. *See id.*

515. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

516. *See* discussion *infra* Part IV.B.1.c.

law of England[517] that the rule of capture confers a vested property right in groundwater to the overlying landowner, why would a takings provision have been included in the first statute to cap groundwater withdrawals?

Following the passage of Senate Bill 1 (S.B. 1) in 1997,[518] and Senate Bill 2 (S.B. 2)[519] in 2001, legislative involvement in groundwater law issues has become much more pronounced.[520] Thus far, the most important provision to Texas property owners is contained in section 36.002 of the Texas Water Code, entitled "Ownership of Groundwater."[521] This provision states that "[t]he ownership and rights of the owners of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this [Water Code] shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights . . . ."[522] This portion of the provision shows legislative recognition of the entirety of the *East* rule of capture and its progeny.[523]

Sections 36.001 and 36.002, while crucial to protecting landowners' property claims to the "water . . . below" their land,[524] do not expressly term the right as one in property.[525] However, the recent passage of H.B. 803 during the 78th session reveals legislative acceptance of a property right in groundwater.[526] In the bill, the Legislature amended the Property Code to allow a "political subdivision"[527] to condemn land for the purpose of "acquiring rights to groundwater,"[528] but also required such a subdivision to pay damage claims to private landowners whose property rights in groundwater underlying their land are taken.[529]

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517. *See* Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002)).

518. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610. This was a "truly revolutionary" overhaul of groundwater law, strengthening and clarifying the powers of the groundwater conservation districts. *See* Lehman, *supra* note 7, at 107-10.

519. Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991; *see* Lehman, *supra* note 7, at 110-14.

520. *See* Lehman, *supra* note 7, at 107.

521. TEX. WATER CODE ANN. § 36.002 (Vernon Supp. 2004-05).

522. *Id.* "Groundwater" is defined in the preceding section as "water percolating beneath the surface of the earth." *Id.* § 36.001(5).

523. *See id.* § 36.002. The rest of the section reads, "except as those rights may be limited or altered by rules promulgated by a district." *Id.*

524. *See id.* § 36.001(5).

525. *See id.* §§ 36.001, .002.

526. *See* Act of May 28, 2003, 78th Leg., R.S., ch. 1032, 2003 Tex. Gen. Laws 2979 (now codified at TEX. PROP. CODE ANN. §§ 21.0121, .0421 (Vernon 2000 & Supp. 2004-05)).

527. "Political subdivision" is defined in the Water Code as "a county, municipality, or other body politic or corporate of the state, including a district or authority created under Section 52, Article III, or Section 59, Article XVI [Conservation Amendment], Texas Constitution, a state agency, or a nonprofit water supply corporation created under Chapter 67." TEX. WATER CODE ANN. § 36.001(15) (Vernon 2000 & Supp. 2004-05).

528. *See* TEX. PROP. CODE ANN. § 21.0121.

529. *See id.* § 21.0421.

Several aspects of this bill are important to note. First, and most obvious, this amendment was made to the Property Code, leading to the inescapable conclusion that the Legislature—in its wisdom—considered groundwater to be a property right.[530] Further, the bill text does not refer to the right to capture groundwater, the right to explore for groundwater, or the right to use groundwater, as the right now capable of being condemned and for which compensation must be paid.[531] Instead, the bill expressly references groundwater,[532] which the Water Code defines as "water percolating below the surface of the Earth."[533] This is as clear a reference to the corpus of the water itself as the Legislature is likely to elucidate. Newly-enacted section 21.0421 goes even further than the condemnation statute.[534] First, subsection (a), explicitly terms groundwater "as property apart from the land in addition to the local market value of the real property."[535] The bill then refers to the object of the condemnation proceedings described in section 21.0121 as "fee title of real property."[536] In section 21.0421(c)(2), the Legislature again confirms the property rights inherent in groundwater by describing "the market value of the groundwater rights as property apart from the land at the time of the hearing."[537]

As one commentator recently summarized the enactment of H.B. 803, "this treatment of groundwater rights as a component of property to be considered and valued apart from the land itself is entirely inconsistent with the idea that the property owner has no compensable ownership right."[538] Further, if Texas landowners possess no vested real property right in the subterranean water beneath their land, the authors rhetorically ask for what purpose would H.B. 803 have been studied, drafted, and enacted by the Legislature originally?[539]

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530. *See id.* §§ 21.0121, .0421.

531. *See id.* §§ 21.0121, .0421.

532. *See id.* §§ 21.0121, .0421.

533. TEX. WATER CODE ANN. § 36.001(5) (Vernon 2000 & Supp. 2004-05).

534. *See* TEX. PROP. CODE ANN. § 21.0421.

535. *Id.* § 21.0421(a).

536. *Id.* § 21.0421(a)(1).

537. *Id.* § 21.0421(c)(2).

538. *See* Caroom & Maxwell, *supra* note 7, at 46.

539. *See* TEX. GOV'T CODE ANN. § 311.023 (Vernon 1998) (containing statutory construction "aids"). "An Act should be given a fair and sensible construction, in order to carry out the purposes for which it was enacted, and not be construed in such manner as to nullify or defeat its purposes." Brazos River Conservation & Reclamation Dist. v. Costello, 135 Tex. 307, 312, 143 S.W.2d 577, 580 (1940); *see* City of Mason v. W. Tex. Utils. Co., 150 Tex. 18, 25-27, 237 S.W.2d 273, 278 (1951); Sanchez v. Brandt, 567 S.W.2d 254, 258 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); Austin v. Collins, 200 S.W.2d 666, 670 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.). As the Court declared in *Citizens Bank v. First State Bank, Hearn*, 580 S.W.2d 344, 348 (Tex. 1979), "It is recognized that a statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction." *See* Nootsie Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 662 (Tex. 1996) ("[W]e must reject interpretations of a statute that defeat the purpose of the legislation so long as another reasonable

c. Supreme Court of Texas

Given the monolithic consistency with which the has Court construed the rule of capture,[540] the Court's very first opinion addressing the rule—*Houston & Texas Central Railway Co. v. East*—not surprisingly defined the rights conferred by it as ones in land.[541] The Court unambiguously held that:

> An owner of soil may divert percolating water, consume or cut it off, with impugnity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.[542]

Next, in the context of an oil and gas case, the Court delivered a brilliantly-nuanced opinion by the Court's first Justice named Phillips in *Texas Co. v. Daugherty*, which explained that the rule of capture conferred

> [a] vested interest in the minerals in the ground, forming in their natural state a part of the land, with absolute dominion over them while in that state, and with the further unlimited right to their appropriation, plainly constitute property and all that is recognized in proprietorship, and equally amount to an interest in the land itself.[543]

The first chance the Court had to re-evaluate its reasoning in *East* arose in *Texas Co. v. Burkett*.[544] In *Burkett*, the Court decided instead to continue the jurisprudential path it began almost a quarter of a century before, declaring non-percolating groundwater to be "the exclusive property of [the landowner], who had all the rights incident to them that one might have as to any other species of property."[545]

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interpretation exists."); Chevron Corp. v. Redmon, 745 S.W.2d 314, 316 (Tex. 1987) (stating that statutes should not be construed in manner that renders their provisions meaningless or without effect); *cf.* Sharp v. House of Lloyd, Inc., 815 S.W.2d 245, 249 (Tex. 1991) (stating that "a court must consider the entire act, its nature and object and the consequences that would follow from each construction").

540. *See, e.g.*, Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 296, 276 S.W.2d 798, 803 (1955); Elliff v. Texon Drilling Co., 146 Tex. 575, 580, 210 S.W.2d 558, 561 (1948); Corzelius v. Harrell, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945); Evans v. Ropte, 128 Tex. 75, 79, 96 S.W.2d 973, 974 (1936); Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 305, 83 S.W.2d 935, 940 (1935); Tex. Co. v. Burkett, 117 Tex. 16, 29, 296 S.W. 273, 278 (1927); Tex. Co. v. Daugherty, 107 Tex. 226, 236-37, 176 S.W. 717, 720 (1915); Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904).

541. *See East*, 81 S.W. at 281.

542. *Id.* (quoting Pixley v. Clark, 35 N.Y. 520, 527 (1866)).

543. *Daugherty*, 176 S.W. at 720.

544. *Burkett*, 296 S.W. at 278.

545. *Id.*

The Court next addressed the rule of capture in another oil and gas case, *Brown v. Humble Oil Refining Co.*, and held that the "law of capture . . . [creates] a property right."[546]

One of the most sweeping statements the Court has ever used on the topic came when the Court adopted the opinion of the Commission of Appeals in the case of *Evans v. Ropte*.[547] In that opinion, the Commission surmised that "[i]t seems to be almost universally recognized that a right created by a grant to enter upon land and take and appropriate the waters of a spring or well thereon amounts to an interest in real estate . . . . In all events, it is an interest in land."[548]

In *Corzelius v. Harrell*, the Court simply reaffirmed that "the law of capture . . . is recognized as a *property right*."[549]

Then in 1948, the Court expanded its holding from *Humble Oil* in the case of *Elliff v. Texon Drilling Co.*, wherein it concluded that the absolute rule of ownership made the substances located "beneath the soil . . . part of the realty."[550]

A few years later in *City of Corpus Christi v. City of Pleasanton*, the Court undertook its first major re-examination of the rule of capture in the twenty-eight years since its decision in *Burkett*, and it remained steadfast to the property rights enunciations from its earlier groundwater law cases.[551] In *City of Corpus Christi*, the Court resolutely acknowledged that:

> [P]ercolating waters are regarded as the property of the owner of the surface who may, "in the absence of malice, intercept, impede, and appropriate such waters while they are upon his premises, and make whatever use of them he pleases, regardless of the fact that his use cuts off the flow of such waters to adjoining land, and deprives the adjoining owner of their use."[552]

In *Sun Oil Co. v. Whitaker*, the Court reiterated that "[w]ater, unsevered expressly by conveyance or reservation, has been held to be a part of the surface estate."[553]

Five years after *Sun Oil Co.*, the Court next addressed the groundwater property rights of Texas landowners in the landmark case of *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, where it confirmed that

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546. Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940 (1935).
547. Evans v. Ropte, 128 Tex. 75, 96 S.W.2d 973 (1936).
548. *Id.* at 974.
549. Corzelius v. Harrell, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945) (emphasis added).
550. Elliff v. Texon Drilling Co., 146 Tex. 575, 580, 210 S.W.2d 558, 561 (1948).
551. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955).
552. *Id.* at 803 (quoting Annotation, *Subterranean or Percolating Waters*, 55 A.L.R. 1390 (1928)).
553. Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (citing Fleming Found. v. Texaco, Inc., 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd, n.r.e.)).

"ownership of underground water comes with ownership of the surface; it is part of the soil."[554]

Almost twenty years elapsed between the Court's seminal decision in *Friendswood* and its next significant opportunity to address property rights in groundwater beneath the surface of his land.[555] In 1996, the Court issued its decision in *Barshop v. Medina County Underground Water Conservation District*,[556] upholding the constitutionality of the Edwards Aquifer Authority Act,[557] which created the Edwards Aquifer Authority and authorized it to issue permits and to regulate production of groundwater from the Edwards Aquifer.[558] The tale of the formation of the Edwards Aquifer Authority, and the role the federal bench played in the saga, is important to the examination of exactly what interest a Texas landowner holds in the water beneath his land.[559]

In 1991, the Sierra Club sued the U.S. Secretary of the Interior in the Midland U.S. District Court "alleging that the Secretary . . . had allowed takings of endangered species by not ensuring water levels in the Edwards Aquifer adequate to sustain the flow of Comal and San Marcos Springs."[560] The trial began in November 1992 in Midland, Texas and was presided over by the late Judge Lucius D. Bunton III,[561] who ruled in favor of the Sierra Club[562] on February 1, 1993, exactly twenty days after the 73rd Legislature convened in Austin.[563]

As part of his ruling, Judge Bunton threatened the State with the "'blunt axes'" of federal intervention[564] if the Texas Legislature did not adopt a management plan that limited withdrawals from the Edwards Aquifer by the end of the Legislative Session.[565] If the Legislature failed to act in time, Judge Bunton would allow the Sierra Club to return to his court and seek additional remedies—namely the regulation of the aquifer by the United States Fish and Wildlife Service (USFWS), subjecting it to federal control.[566] Not surprisingly, the Legislature passed the Edwards Aquifer Authority Act just one day before Judge Bunton's deadline expired.[567]

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554. Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978).

555. *See* Barshop v. Medina County Underground Conservation Dist., 925 S.W.2d 618 (Tex. 1996).

556. *Id.*

557. Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1, 1993 Tex. Gen. Laws 2350, 2360.

558. *Id.* § 2351; *see Barshop*, 925 S.W.2d at 623-24.

559. *See Raiders*, *supra* note 7, at 273.

560. *Fish that Roared*, *supra* note 7, at 856. Bruce Babbit was the U.S. Secretary of the Interior at the time. *See Raiders*, *supra* note 7, at 274; *Fish that Roared*, *supra* note 7, at 856.

561. *Raiders*, *supra* note 7, at 274.

562. *See id.*; *Fish that Roared*, *supra* note 7, at 856.

563. *See* 1993 Tex. Gen. Laws vol. I at iii.

564. Sierra Club v. Lujan, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. May 26, 1993) (not designated for publication) (citation omitted); *see Fish that Roared*, *supra* note 7, at 856.

565. *Fish that Roared*, *supra* note 7, at 856.

566. *See Raiders*, *supra* note 7, at 275; *Fish that Roared*, *supra* note 7, at 860.

567. *See* Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1, 1993 Tex. Gen. Laws 2350, 2360;

The Edwards Aquifer Authority Act imposed an aquifer-wide cap on annual total groundwater production from the Aquifer of 450,000 acre-feet[568] of water per year through calendar year 2007,[569] dropping to 400,000 acre-feet per year thereafter[570] until the cap is increased upon a determination that "additional water supplies are safely available from the aquifer."[571] To implement the objectives of the legislation, the Edwards Aquifer Authority was authorized to adopt regulations and issue permits limiting the amount of groundwater a landowner could produce.[572]

In 1995, a group of plaintiffs, led by the Medina County Underground Water Conservation District, brought a facial constitutional challenge to the Edwards Aquifer Authority Act.[573] The District brought the suit against the individual directors, including San Antonio businessman Phil Barshop, and the State of Texas was joined as a necessary party.[574] The district court subsequently ruled that the Edwards Aquifer Authority Act was unconstitutional, and the State perfected a direct appeal to the Court.[575]

The introduction to the Court's opinion recounted the long legal history of the rule of capture:

> This case concerns [ground]water rights in Texas. The clash between the property rights of landowners in the water beneath their land and the right of the State to regulate [that] water for the benefit of all is more than a century old. This case presents another chapter in this ongoing battle.[576]

Raiders, *supra* note 7, at 276; *Fish that Roared*, *supra* note 7, at 860.

568. An "acre-foot [of water] is the amount of water that would cover an acre of land to one foot, approximately 325,850 gallons." Barshop v. Medina County Underground Conservation Dist., 925 S.W.2d 618, 624 n.1 (Tex. 1996); SAX ET AL., *supra* note 8, at 18, 19 tbl. 1-6.

569. Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.14(b), 1993 Tex. Gen. Laws 2350, 2360.

570. *Id.* § 1.14(c).

571. *Barshop*, 925 S.W.2d at 624 (citing Edwards Aquifer Authority Act, *supra* note 3, § 1.14(d)).

572. Act of May 30, 1993, 73d Leg., R.S., ch. 626, §§ 1.03, .16-.20, 1993 Tex. Gen. Laws 2350, 2360; *see Barshop*, 925 S.W.2d at 624-25. A complete analysis of the Edwards Aquifer Authority Act and the Court's analysis of the constitutional issues raised and unraised in *Barshop* is beyond the scope of this Article.

573. *Barshop*, 925 S.W.2d at 623. Other plaintiffs included the Texas and Southwestern Cattle Raisers Ass'n, Russell Brothers Cattle Co., and Bruce Gilleland. *Id.* The District did not challenge the constitutionality of the Edwards Aquifer Authority Act as it was applied to any particular landowner and their right to produce the groundwater from beneath their land. *Id.* Under a facial challenge, the Court reviewed the Edwards Aquifer Authority Act to determine whether the statute, "by its terms, always operates unconstitutionally." *Id.* The Court did *not* consider whether the Edwards Aquifer Authority Act, when applied to a particular landowner, would operate unconstitutionally to "take" their rights in the groundwater in place or their right to produce the same. *Id.* at 623, 625-27.

574. *See id.* at 623.

575. *Id.*

576. *Id.*

But, the *Barshop* "chapter" of the story of the rule of capture in Texas proved to be anticlimactic.[577]

The plaintiffs's central claim was that the Edwards Aquifer Authority Act constituted an unconstitutional deprivation of the affected landowner's vested property rights in the groundwater beneath their land.[578] The plaintiffs's claims were founded on the Court's adoption of the rule of capture in *East*[579] and its subsequent reaffirmation of the doctrine in *East*'s progeny,[580] which all steadfastly rejected the "correlative rights" or "reasonable use" theories of groundwater ownership followed in other jurisdictions.[581] The State defended the constitutionality of the Act on the theory that "until the water is actually reduced to possession, the right is not vested and no taking occurs."[582] Under the State's defense, there could be no constitutional taking under the Act for landowners "who ha[d] not previously captured [ground]water."[583]

The Court noted that the parties "fundamentally disagree[d] on the nature of the property rights affected" by the Edwards Aquifer Authority Act, and that it had not had occasion to previously address "the point at which [ground]water regulation [by the state] unconstitutionally invades the property rights of landowners."[584] Ultimately however, the Court sidestepped the issue.[585] Instead, the Court addressed the plaintiffs's "facial challenge" to the constitutionality of the Edwards Aquifer Authority Act and held the plaintiffs "ha[d] not established that the Act is unconstitutional on its face."[586] Having resolved the issue on the basis of the narrow constitutional question presented, the Court found it unnecessary "to definitively resolve the clash between property rights in [ground]water and regulation of [ground]water."[587]

The Court's next consideration of the rule of capture came in 1999 in *Sipriano v. Great Spring Waters of America, Inc.*[588] In *Sipriano*, the plaintiffs sued Great Spring Waters of America, Inc., also known as Ozarka Spring Water Co., alleging that their wells became depleted after Ozarka began

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577. Some have argued that federal preemption prompted by enforcement of the Endangered Species Act could possibly serve as a limitation to the rule of capture. 16 U.S.C.A. §§ 1531-44 (West 2000); *see Raiders*, *supra* note 7, at 274; *Fish that Roared*, *supra* note 7, at 856.

578. *Barshop*, 925 S.W.2d at 625 (alleging the Edwards Aquifer Authority Act does more than "regulate use of the aquifer water; it actually deprives the landowner of a vested property right").

579. Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

580. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21 (Tex. 1978); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955); Tex. Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927).

581. *Barshop*, 925 S.W.2d at 625.

582. *Id.*

583. *Id.*

584. *Id.* at 625-26.

585. *Id.* at 626.

586. *Id.*

587. *Id.* "Under a facial challenge, Plaintiffs must establish that the statute, by its terms, always operates unconstitutionally." *Id.* at 623.

588. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999).

producing groundwater on a nearby tract of land.[589] The trial court granted Ozarka's motion for summary judgment based upon the protections afforded under the rule of capture, and both the Tyler Court of Appeals[590] and the Court affirmed.[591]

Although squarely presented with the opportunity to overturn, or at least modify the nearly one hundred year-old doctrine, the Court declined to do so in *Sipriano*.[592] Consistent with Justice Calvert's observation about the proper role of the Court *vis-à-vis* the Legislature in *City of Corpus Christi v. City of Pleasanton*, the Court declined the opportunity to usurp the legislative function of passing all laws necessary to preserve and conserve the natural resources of the state, including groundwater, as mandated under the Conservation Amendment of 1917.[593] Instead, the *Sipriano* court concluded that:

> By constitutional amendment, Texas voters made groundwater regulation a duty of the Legislature. And by Senate Bill 1, the Legislature has chosen a process that permits the people most affected by groundwater regulation in particular areas to participate in democratic solutions to their groundwater issues. It would be improper for courts to intercede at this time by changing the common-law framework within which the Legislature has attempted to craft regulations to meet this state's groundwater-conservation needs. Given the Legislature's recent actions to improve Texas's groundwater management, we are reluctant to make so drastic a change as abandoning our rule of capture and moving into the arena of water-use regulation by judicial fiat. It is more prudent to wait and see if Senate Bill 1 will have its desired effect, and to save for another day the determination of whether further revising the common law is an appropriate prerequisite to preserve Texas's natural resources and protect property owners' interests.
>
> We do not shy away from change when it is appropriate. We continue to believe that "the genius of the common law rests in its ability to change, to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly." And Sipriano presents compelling reasons for groundwater use to be regulated. But unlike in *East*, any modification of the common law would have to be guided and constrained by constitutional

589. *Id.*

590. Fain v. Great Spring Waters of Am., Inc., 973 S.W.2d 327 (Tex. App.—Tyler 1998, no pet.), *aff'd sub nom. Sipriano*, 1 S.W.3d at 75.

591. *Sipriano*, 1 S.W.3d at 76.

592. *Id.* at 80.

593. *Id.* at 77; *see* City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 296, 276 S.W.2d 798, 803 (1955) (stating that "'the Legislature shall pass all such laws' . . . [n]o such duty was or could have been delegated to the courts" (quoting TEX. CONST. art. XVI, § 59(a) (amended 2003))).

> and statutory considerations. Given the Legislature's recent efforts to regulate groundwater, we are not persuaded that it is appropriate today for this Court to insert itself into the regulatory mix by substituting the rule of reasonable use for the current rule of capture.[594]

The Court's decision in *Sipriano* was made in clear recognition of what it described as "the Legislature's broad powers to regulate use of groundwater following the 1917 [Conservation] [A]mendment, even within the common-law tort framework established by the rule of capture."[595] The latter part of this statement has been misconstrued by some commentators who attempt to cite it as authority for the proposition that the rule of capture is a rule of tort law, rather than one of property law.[596] However these commentators fail to appreciate the ultimate decision of that opinion. The plaintiffs plead the case as a tort action, but their claims were dismissed on summary judgment because "Texas does not recognize [these] claims because Texas follows the rule of capture."[597] Not surprisingly, the Court affirmed the summary judgment dismissal, stating that "the sweeping change to Texas's groundwater law Sipriano urges this Court to make is not appropriate at this time."[598] In addition, the Court recognized that "any modification of the common law would have to be guided and constrained by constitutional and statutory considerations."[599]

At least one member of the Court indicated that the Court's deference to the Legislature was not without limits however.[600] In what had the dulcet tones of a dissent, Justice Hecht stated plainly in his concurrence that "I agree with the Court that it would be inappropriate to disrupt the process created and encouraged by the 1997 legislation before they have had a chance to work. I concur in the view that, for now—but I think only for now—*East* should not be overruled."[601]

In 2002, the Court handed down a follow-up opinion to its earlier decision in *Barshop v. Medina County Underground Water Conservation District*,[602] wherein it examined allegations of property "takings" involving the Edwards Aquifer Authority.[603] In *Bragg v. Edwards Aquifer Authority*, the Court was compelled to determine whether "certain actions of the . . . [Edwards Aquifer Authority] Act violate[d] provisions of the Private Real

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594. *Sipriano*, 1 S.W.3d at 80 (citations omitted).
595. *Id.* at 78.
596. *See* Hicks, *supra* note 7, at E1-1.
597. *Sipriano*, 1 S.W.3d at 76.
598. *Id.* at 75.
599. *Id.* at 80.
600. *See id.* at 83 (Hecht, J., concurring).
601. *Id.*
602. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996).
603. *See* Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729 (Tex. 2002).

Property Rights Preservation Act."[604] A unanimous Court decided that the Edwards Aquifer Authority's duty to prevent waste was a "broader concept of preventing waste by conserving, protecting, and preserving the aquifer through the Legislature's designated permit system" "than the Braggs' contention" "that because they do not waste water, the [Edwards Aquifer Authority] could not have adopted its aquifer-wide rules pursuant to its statutory authority to prevent waste."[605]

d. District Courts of Appeal

The earliest recorded Texas appellate case disposing of groundwater law issues was *Toyaho Creek Irrigation Co. v. Hutchins*, where, in 1899, the court surmised that "[i]t must certainly be held that the owner of lands owns also all ordinary springs and waters arising thereon."[606]

Fifty years later, in *Cantwell v. Zinser*, the Austin Court of Appeals declared that prescriptive rights could not attach to springs by use of the streams the springs fed.[607]

In 1954, the year before the Court's decision in *City of Corpus Christi v. City of Pleasanton*,[608] the El Paso Court of Appeals handed down a landmark decision addressing groundwater property rights in *Pecos County Water Control & Improvement District No. 1 v. Williams*, wherein it held that "[i]t seems clear to us that percolating or diffused and percolating waters belong to the landowner, and may be used by him at his will."[609] The court explained further that "the landowner owns the percolating water under his land . . . and such is based on a concept of property ownership."[610] The situation reviewed in *Pecos* is especially instructive here as the downstream plaintiff was "admittedly attempting to assert title by prescription to waters 'upper' to them —in other words, to waters that [had] not, as yet reached them or crossed any lands owned by them."[611] Not only did the court resoundingly reject this assertion of a prescriptive right in groundwater, it affirmed that ownership of

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604. *Id.* at 730. The PRPRPA is codified as TEX. GOV'T CODE ANN. §§ 2007.001-.045 (Vernon 2003).

605. *Bragg*, 71 S.W.3d at 735-36.

606. Toyaho Creek Irrigation Co. v. Hutchins, 21 Tex. Civ. App. 274, 282-83, 52 S.W. 101, 105 (Tex. Civ. App.—1899, writ ref'd) (a "writ refused" designation before June 14, 1927 did not carry the same weight it carries since that date, namely that the judgment of the court of appeals was correct, all principles of law declared were correctly determined, and the binding effect of the decision was the same as one from the Court itself. Instead, a "writ refused" designation in 1899 meant that the Court might not even approve of the result reached by the court of appeals), *see* TEX. RULES OF FORM 84 App. A (TEX. L. REV. eds., 9th ed.).

607. Cantwell v. Zinser, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ).

608. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955).

609. Pecos County Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, 505 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

610. *Id.*

611. *Id.* at 506.

groundwater is a property right attaching to the surface owner.[612] The implication of this decision is that the rule of capture cannot merely guarantee a landowner a usufructory right to explore his property for water to capture because the use-based prescriptive rights alleged in *Pecos* were held to be subservient to the inherent property rights of the landowner in the water underlying his land.[613]

The El Paso court in *Pecos* also provided the historical background that helped to delineate a Texas landowner's groundwater property rights, explaining that because "Texas came into the Union claiming ownership of her lands, [it] was not subject to the Desert Land Act, . . . and [so] . . . such lands, when patented as these have been to the defendants, carry with them as a property right the ownership of percolating underground water."[614] This, coupled with the fact that approximately ninety-four percent of Texas is privately owned, explains why Texas is unique in its consistent application of the rule of capture.[615]

Twenty years later, in *Bartley v. Sone*, the San Antonio Court of Appeals decreed that "the owner of land owns the water under the surface, generally referred to by hydrologists as 'ground water.'"[616]

Another important appellate case in Texas groundwater law was the 1989 decision in *Denis v. Kickapoo Land Co.*, which confirmed that "groundwater percolating beneath the soil is the property of the owner of the surface," and it is "treated as part of the soil where found and belong[s] absolutely to the surface owner."[617]

e. Legal Commentary

The legal community has had no shortage of opinion on the rule of capture over the last century, but even the rule's critics have recognized the real property rights it conveys to overlying landowners.[618]

One of the first articles to recognize the groundwater property rights of landholders was published in 1948 and has the distinction of not only having been authored by the Dean of Stanford Law School, but also having been published as the first article, on the first page, in the first volume of the Stanford Law Review.[619] In it, Dean Kirkwood addressed the ownership

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612. *Id.*

613. *See id.*; Cantwell v. Zinser, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948, no writ) (holding that no prescriptive right could attach to the springs at issue).

614. *Pecos*, 271 S.W.2d at 506 (citations omitted).

615. *See* SCHMIDLY ET AL., *supra* note 500, at 13; discussion *supra* Part III.E.

616. Bartley v. Sone, 527 S.W.2d 754, 760 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

617. Denis v. Kickapoo Land Co., 771 S.W.2d 235, 236 (Tex. App.—Austin 1989, writ denied).

618. *See* sources cited *supra* note 7.

619. *See* Kirkwood, *supra* note 7, at 1, n.*.

discussion from *Acton v. Blundell*[620] and framed it as "obviously asserting a doctrine of ownership of the corpus of the water by the owner of the overlying land and recognizing the usual broad rights and privileges of use that accompany ownership."[621]

Four years later, two student authors at The University of Texas School of Law confirmed that "Texas courts are committed to the rule that, apart from statutory or contractual restriction, percolating water is the property of the landowner."[622]

In 1973, Stephen E. Snyder explained that "the English rule gives each landowner absolute ownership of the water underlying his land."[623] Three years later, Roger Tyler wrote that "[t]he very law itself recognizes private ownership of the ground water."[624]

In 1990, Karen Norris, in characterizing the "stagnant" state of Texas groundwater law, acknowledged that "Texas landowners, by virtue of their surface ownership, are vested with property rights in all underlying groundwater."[625]

One year later, Eric Behrens and Matthew G. Dore acknowledged that in Texas the "presumption[] [is] that subsurface water is percolating groundwater, that it belongs to the owner of land where it is found, and that the owner may use the water for whatever purpose he desires."[626]

In 1998, another reviewer asserted that "[i]n accordance with [the rule of capture], underground water is the exclusive property of the owner of the overlying land."[627]

Cynthia DeLaughter next described "[t]he rule of capture as applied in Texas . . . [as guaranteeing that] the water under the land belongs to the landowner," and "[b]ecause groundwater is owned by the landowner, it qualifies as real property."[628]

During the first few years of this decade, the erroneous notion began to be put forward that "[s]urface owners may or may not own the groundwater [beneath their lands]."[629] Some commentators, including a certain eager but naïve former law student,[630] asserted that "Texas property owners do not own the water beneath their land. They own [instead] the right to search (drill) and

620. Acton v. Blundell, 152 Eng. Rep. 1223, 1235 (1843).
621. *See* Kirkwood, *supra* note 7, at 2.
622. *See* Woodruff & Williams, *supra* note 7, at 865.
623. *See* Snyder, *supra* note 7, at 290.
624. *See* Tyler, *supra* note 7, at 536.
625. *See* Norris, *supra* note 7, at 498.
626. *See* Behrens & Dore, *supra* note 7, at 187.
627. *Fish that Roared*, *supra* note 7, at 855.
628. *See* DeLaughter, *supra* note 7, at 1477, 1479.
629. Technical Rep. 1593, *supra* note 7, at 1.
630. *See* Drummond, *supra* note 7, at 197 (inaccurately citing *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843), as supporting the statement that "no one owns the subsurface while in place [and] therefore, no property right accrues until someone pumps the water").

to produce (capture) [groundwater] if found," and "nothing could be further from the truth" than the belief that "landowners . . . own the water beneath their property."[631] This notion even pervaded some reviewers' interpretations of state statutes, somehow finding that section 36.002 of the Water Code mandates that "subsurface resource[s]" are only owned "by those who produce and capture" them.[632] However, what section 36.002 does in fact mandate is that "[t]he ownership and rights of the owners of the land . . . in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners . . . of the[ir] ownership or rights."[633]

In 2002, in an article critiquing the reasoning the *Acton* and *East* courts used to formulate the rule of capture and generally holding that the rule cannot guarantee a property right "in something so fleeting as groundwater," Eric Opiela quoted a Pennsylvania Supreme Court decision, which held that "'[t]he owner of land on which a spring issues from the earth, has a perfect right to it against all the world.'"[634]

In 2004, Chris Lehman published an article providing a broad overview of groundwater conservation districts after the implementation of S.B. 1 and 2.[635] Lehman described the doctrine of absolute ownership as "embod[ying] the premise of private ownership of groundwater accompanied by the right of unlimited use."[636]

During the summer of 2004, a paper was presented at the TWDB's symposium recognizing the hundredth anniversary of the *East* decision, which argued that the "'rule of capture' . . . is a rule of property . . . , whether [the groundwater] is used or not."[637] The authors went on to state that "groundwater is considered the property of the owner of the surface estate."[638] The authors concluded by explaining that "the Texas Supreme Court has repeatedly endorsed the premise that landowners have a property right in groundwater located underneath their property."[639]

f. Treatises

One of the earliest legal treatises portrayed the English rule as considering percolating water "a mere ingredient of the soil—one of the constituents of the soil, the *corpus* of [which was] real property."[640] The

631. *See* Publ'n 1377, *supra* note 7, at 1.
632. *See* Hill, *supra* note 7, at 302.
633. TEX. WATER CODE ANN. § 36.002 (Vernon Supp. 2004-05).
634. *See* Opiela, *supra* note 7, at 92-93 (quoting Wheatley v. Baugh, 25 Pa. 528, 533 (1855)).
635. *See* Lehman, *supra* note 7, at 101.
636. *Id.* at 126.
637. *See* Caroom & Maxwell, *supra* note 7, at 43.
638. *Id.* at 44.
639. *Id.* at 46.
640. *See* WIEL, *supra* note 8, at 971-72.

author, Samuel C. Wiel, described the unique corporeal characteristics of groundwater best by explaining that:

> There is only one case in law in which water in its natural state is the subject of ownership, and that is the case of percolating water. A man is regarded as owning the percolating water while it is in his land. But other water in its natural state is subject only to the use of the man through whose land it flows. He has a right to its use, but is not regarded as having the title.[641]

Wiel concluded by reasoning that "[t]he word 'land' does not include running water; but does, under this rule, include percolating water."[642]

One of the most prolific groundwater law authors—Wells A. Hutchins—stated that, under Texas law, "the owner of land is recognized as owning ground waters found therein."[643] He further explained that "ordinary percolating waters[] are the exclusive property of the owner of the land in which they occur and are subject to the same disposition as any other species of land."[644] In another publication, Hutchins asserted that "[p]ercolating waters 'belong' to the owners of overlying lands."[645]

Professor C.S. Kinney's writings are also particularly instructive, confirming that:

> Under the English rule of the common law, percolating waters tributary to springs were treated the same as all other percolating waters as part of the soil where found and belonged absolutely to the owner thereof, who could do what he pleased with them, even though in abstracting the water it dried up the springs, to which the water was tributary, on the land of another. And it is immaterial that the springs so supplied with water were the sources of a stream or surface water course upon which riparian rights had vested, provided that the water was intercepted while it was still percolating through the soil before it had reached the surface of the ground at the springs.[646]

This passage builds upon the dominance of the groundwater property right over that of other usufructory rights discussed in *Pecos County Water Control & Improvement District No. 1 v. Williams*,[647] and extends the supremacy of the

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641. *Id.* at 972-73 (citations omitted).

642. *Id.* at 973.

643. *See* Champion, *supra* note 8, at 650; *cf.* S. Tex. Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.) (noting the state retains title to the corpus of the surface water and the permittee has only a usufructory right of use in the water).

644. WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, *supra* note 8, at 746.

645. *Ground Water Legislation*, *supra* note 7, at 417.

646. *See* KINNEY, *supra* note 5, at 2167-68.

647. Pecos County Water Control & Improvement Dist. No. 1 v. Williams, 271 S.W.2d 503, 506 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.); *see* discussion *supra* Part IV.B.1.b.

property right in groundwater over lesser rights attached to mere uses, even when those usufructory rights have vested.[648]

2. *Once Severed, Groundwater Is Personalty and an Article of Commerce*

The federal judiciary has played only a minor role in the development of groundwater law in Texas.[649] However, one important instance is found in the case of *City of Altus, Oklahoma v. Carr* in 1966.[650] The basis of the case was a statute passed by the 59th Legislature forbidding the transport of groundwater outside the state unless specifically authorized by the Legislature.[651] While recognizing that the right of a landowner to "appropriate underground percolating waters *is an interest in real estate*,"[652] the court concluded that, once pumped and withdrawn—and thereby severed from the surface estate—the groundwater becomes personalty, and as such, it is an article of commerce that can be subject to federal regulation under the Dormant Commerce Clause of the federal constitution.[653] The court found that the Texas statute imposed "an unreasonable burden upon interstate commerce," and held the act unconstitutional under the Dormant Commerce Clause.[654]

The U.S. Supreme Court not only affirmed the result of the *City of Altus* case,[655] but it also went to great pains to affirm its reasoning some sixteen years later in *Sporhase v. Nebraska* ex rel. *Douglas*.[656] Therein, the High Court upheld the proposition that in Texas, once produced and reduced to possession at the well head, groundwater is personalty subject to interstate commerce regulation.[657]

3. *Title to Groundwater May Change Depending on Where it Is Stored or How it Is Transported*

It is well-established in Texas that title to groundwater transfers to the State once the groundwater emerges to the surface as springflow and enters a watercourse.[658] In addition, a few other limited situations exist where the title to groundwater may change, depending on the location of storage or the

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648. *See* KINNEY, *supra* note 5, at 2167.
649. *See* discussion *supra* Part IV.B.1.a.
650. City of Altus, Okla. v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966).
651. Act of May 28, 1965, 59th Leg., R.S., ch. 568, § 2, 1965 Tex. Gen. Laws 1245.
652. *City of Altus*, 255 F. Supp. at 840.
653. *Id.*
654. *Id.*
655. *See* Carr v. City of Altus, 385 U.S. 35 (1966).
656. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982).
657. *Id.* at 949.
658. *See* Tex. Co. v. Burkett, 117 Tex. 16, 28-29, 296 S.W. 273, 278 (1927); Denis v. Kickapoo Land Co., 771 S.W.2d 235, 238-39 (Tex. App.—Austin 1989, writ denied).

method of transport.[659] Although neither line of cases has developed an authoritative picture as to the resolution of these specialized ownership disputes, both are discussed here to clarify what right a landowner has to the underlying ground water, and how the use of that groundwater might affect its title.[660]

a. Aquifer Storage and Recovery May Affect Title to Withdrawn Groundwater

"Aquifer Storage and Recovery" (ASR) is an industry term of art describing the subsurface storage of extracted groundwater, surface water, or treated wastewater effluent.[661] ASR is a technology that, while long practiced in some jurisdictions,[662] is relatively new to Texas.[663] The prevalence of ASR is mainly due to the desire "to avoid the expense of an artificial reservoir and to prevent the evaporation that attends surface water storage."[664] While there are many hydrogeological considerations attendant to ASR operations, this article focuses only on the legal implications raised.[665]

i. Title Determined by Quantity

ASR appears to have entered the Texas legal scene in 1995, when both the Legislature[666] and the Austin Court of Appeals in *Texas Rivers Protection Ass'n (TRPA) v. Texas Natural Resource Conservation Commission*[667] first addressed its legal repercussions. In House Bill 1989,[668] the Legislature authorized the former Texas Natural Resource Conservation Commission (TNRCC)[669] to investigate the feasibility of aquifer storage and recovery projects by issuing temporary or term permits for pilot demonstration projects.[670]

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659. *See* discussion *infra* Part IV.B.4.a-b.

660. *See* discussion *infra* Part IV.B.4.a-b.

661. *See* McCarthy, *supra* note 7, at 1; PYNE, *supra* note 8, at 6; SAX ET AL., *supra* note 8, at 355-56.

662. SAX ET AL., *supra* note 8, at 431.

663. McCarthy, *supra* note 7, at 1-2; *see* Caroom & Sherman, *supra* note 8, at 519; SAX ET AL., *supra* note 8, at 356. *See generally* PYNE, *supra* note 8, at 169-208 (exploring the various geochemical processes present in groundwater systems).

664. *TRPA*, 910 S.W.2d 147, 150 (Tex. App.—Austin 1995, writ denied); *see* McCarthy, *supra* note 7, at 2-4.

665. *See* SAX ET AL., *supra* note 8, at 355-56. *See generally* PYNE, *supra* note 8, at 6, 18, 32-34.

666. *See* Act of May 18, 1995, 74th Leg., R.S., ch. 309, 1995 Tex. Gen. Laws 2693.

667. *TRPA*, 910 S.W.2d at 147.

668. *See* 1995 Tex. Gen. Laws at 2693.

669. TCEQ, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *at* http://www.tceq.state.tx.us/about/tceqhistory.html (last visited Oct. 27, 2004) (stating the TNRCC is now the TCEQ).

670. TEX. WATER CODE ANN. § 11.153 (Vernon 2000); *see* Caroom & Sherman, *supra* note 8, at 519; Drummond, *supra* note 7, at 211-12. *See generally* TEX. WATER CODE ANN. §§ 11.153-.155 (addressing projects for storage of appropriated water in aquifers, permits to store appropriated water in

Soon thereafter, the Austin court was called upon to review the TNRCC's issuance of a surface water rights permit[671] to the Upper Guadalupe River Authority in Kerrville, Texas, which authorized the underground storage of surface water using ASR technology, rather than the use of a conventional surface reservoir.[672] The TNRCC's findings stated that stored water would move "no more than 120 feet per year," would "mix only minimally with native groundwater," and would "remain[] readily available for later use."[673] The court held that water was a "fungible commodity," and the permittee did not need to "extract from the aquifer the very same water molecules that it injected into the aquifer."[674] Instead, the permittee had only the duty to put the water "to a beneficial use."[675] Thus, the court reasoned the TNRCC was simply required to make "a determination that the *quantity* of water put into the aquifer can be recovered and put to such use."[676] To date, the *TRPA* case appears to be the only appellate case decided in which ASR issues have been litigated.[677]

Notably, the Legislature did not alter the rule of capture in its passage of House Bill 1989[678] because the focus of the legislation was to clarify the State's authority to incorporate ASR technology, as a storage component, in permits authorizing the diversion and beneficial use of state-owned surface water.[679] In fact, the Legislature even went so far as to reaffirm the surface landowner's "existing property rights, including the rights of a landowner in groundwater."[680]

ii. Title Determined by Intent

The only other developed area of Texas jurisprudence pertaining to storage in underground reservoirs is found in selected cases pertaining to natural gas.[681] In one such case, *Lone Star Gas Co. v. Murchison*,[682] the Dallas Court of Civil Appeals concluded that "'[t]he pivotal issue in this case is whether title to natural gas, once having been reduced to possession, is lost by

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aquifers, and aquifer storage pilot project reports).

671. TEX. WATER CODE ANN. § 11.121.

672. *See TRPA*, 910 S.W.2d at 151-52.

673. *Id.* at 154-55.

674. *Id.* at 155 (rebutting the control theory of title); *see* discussion *infra* Part IV.B.4.b.iii.

675. *See TRPA*, 910 S.W.2d at 155.

676. *Id.*

677. *See id.* at 150-51.

678. *See* Act of May 18, 1995, 74th Leg., R.S., ch. 309, 1995 Tex. Gen. Laws 2693.

679. *See* TEX. WATER CODE ANN. § 11.021 (Vernon 2000) (defining "state water"); §§ 11.153-.155 (authorizing ASR). *See generally* Chapter 11 of the Texas Water Code (establishing the process for acquiring a permit to appropriate state water).

680. Act of May 18, 1995, 74th Leg., R.S., ch. 309, 1995 Tex. Gen. Laws 2693.

681. *See infra* notes 689-705 and accompanying text.

682. Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

the injection of such gas into a natural underground reservoir for storage purposes.'"[683] The Dallas court addressed this question using the same premise later introduced by the groundwater cases of *City of Altus, Oklahoma v. Carr*[684] and *Sporhase v. Nebraska* ex rel. *Douglas*,[685] that "[t]here can be no doubt that gas which has been produced is personal property."[686]

The court began its analysis on the merits by theorizing that an owner of personalty "does not lose his title thereto by not having the property on his person or on his land unless there is abandonment, and abandonment requires an *intent* to abandon."[687] The court bolstered this line of reasoning by recounting that "'[t]he doctrine of abandonment rests primarily on intention.'"[688] Because the opposite intent was present in the case, the Fifth Court of Appeals held that "[l]ogic and reason dictates . . . that in Texas, the owner of gas does not lose title thereof by storing the same in a well-defined underground reservoir."[689]

An earlier federal case quoted extensively by the Texas court in *Lone Star Gas* was *White v. New York State Natural Gas Corp.*[690] The *White* court used much of the same reasoning as adopted by the court in *Lone Star Gas*,[691] which propounded that "[o]nce severed from the realty . . . gas and oil, like other minerals, become personal property."[692] In *White*, the court concluded by surmising that the "Supreme Court of Pennsylvania would hold that title to natural gas once having been reduced to possession is not lost by the injection of such gas into a natural underground reservoir for storage purposes."[693]

In 1974, the Court solidified the law in Texas in the case of *Humble Oil & Refining Co. v. West*, wherein the Court considered the character of title and ownership of what it called "extraneous gas" that had been produced and then injected into an underground reservoir for purposes of storage prior to production of all the recoverable native gas.[694] The owner of the surface overlying the underground reservoir asserted ownership of the injected gas and the right to receive royalty payments at the time the gas was produced and recovered.[695]

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683. *Id.* at 877 (quoting White v. N.Y. State Natural Gas Corp., 190 F. Supp. 342, 345 (W.D. Pa. 1960)).

684. *See* City of Altus, Okla. v. Carr, 255 F. Supp. 828, 840 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966).

685. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 949 (1982).

686. *Lone Star Gas*, 353 S.W.2d at 879.

687. *Id.* (emphasis added).

688. *Id.* (quoting 1 TEX. JUR. 10).

689. *Id.*

690. White v. N.Y. State Natural Gas Corp., 190 F. Supp. 342, 345 (W.D. Pa. 1960); *Lone Star Gas*, 353 S.W.2d at 870.

691. *See White*, 190 F. Supp. at 345-49; *Lone Star Gas*, 353 S.W.2d at 870.

692. *White*, 190 F. Supp. at 347.

693. *Id.* at 349. In the case, the federal court was construing Pennsylvania state law. *Id.* at 345.

694. Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 813 (Tex. 1974).

695. *Id.* at 813-14.

The Court adopted the rationale articulated a decade earlier in the *Lone Star Gas* decision[696] that extraneous gas injected for storage by the producer retained its character as "personal property."[697] The Court affirmed the *Lone Star Gas* court's rejection in Texas of the doctrine of minerals *feroe naturoe*, and concluded that Humble Oil's ownership of the injected gas as personal property was not altered either upon injection into the reservoir or upon its subsequent production.[698]

b. Riverflow Transport May Affect Title to Withdrawn Groundwater

The second situation in which title to groundwater may be affected by what is done after production is detailed in the line of Texas cases dealing with river transport of withdrawn groundwater.[699]

i. Title Determined by Quantity

In *Denis v. Kickapoo Land Co.*, the Austin Court of Appeals utilized the same legal reasoning it relied on six years later in *TRPA*.[700] In *Denis*, the Austin court considered a landowner who withdrew groundwater at the wellhead *before* it emerged to the surface watercourse as springflow and, then, after measuring it, channeled the produced groundwater back into Kickapoo Creek.[701] From the point of discharge into the watercourse, the groundwater flowed downstream a little more than a mile, whereupon the landowner withdrew a similar amount as was contributed upstream, and used it for irrigation purposes.[702] The case was not decided on this legal distinction but, instead, on whether the groundwater was state-owned because it contributed perceptibly to the flow of a creek.[703]

The closest the Court has come to endorsing this theory was its examination of a riverflow transport case in *City of Corpus Christi v. City of Pleasanton*.[704] There, the City of Pleasanton sued the City of Corpus Christi and the Lower Nueces River Supply District because Pleasanton alleged that transporting withdrawn groundwater approximately 118 miles via a river flow was wasteful and, therefore, in violation of statutory prohibitions against the

696. *Lone Star Gas*, 353 S.W.2d at 872-82.

697. *Humble Oil*, 353 S.W.2d at 817.

698. *Id.*

699. *See* discussion *infra* Part IV.B.3.b.i-iii.

700. *See* Denis v. Kickapoo Land Co., 771 S.W.2d 235, 238-39 (Tex. App.—Austin 1989, writ denied); *TRPA*, 910 S.W.2d 147, 150 (Tex. App.—Austin 1995, writ denied).

701. *Denis*, 771 S.W.2d at 236.

702. *Id.*

703. *Id.* at 238-39 (holding that groundwater was not state owned).

704. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 304, 276 S.W.2d 798, 808 (1955).

waste of water produced from artesian wells.[705] The Court upheld the City of Corpus Christi's right to transport extracted groundwater in any manner it saw fit because the Court stated it knew "of no common-law limitation of the means of transporting the water to the place of use."[706] The Court further reasoned that the two statutes at issue, which dealt with waste of artesian waters "recognized . . . the right of the owner or user of the water to transport it by any of the means enumerated" in the statute, which included "river[s], creek[s], or other natural water courses or drains."[707] Here too, the mentioning of the contribution of groundwater to surface streams as an extension of the commonlaw rule of capture, adopted in *Houston & Texas Central Railway Co. v. East*[708] and extended in *Texas Co. v. Burkett*,[709] was only corollary to the crux of the opinion, which hinged on the waste exception to the rule of capture.[710]

ii. Title Determined by Quality

In 2004, the Third Court of Appeals re-examined its holding in *Denis*[711] and the Court's holding in *City of Corpus Christi*[712] in the case of *City of San Marcos v. Texas Commission on Environmental Quality*.[713] There, the court was asked to determine whether, "once discharged into a state watercourse, the [privately owned] groundwater became state water."[714] In finding that groundwater-based effluent released into the San Marcos River had lost its character as private property and, therefore, had become state-owned, the Third Court centered its reasoning on two grounds.[715] The first concerned the quality of the water discharged.[716] The court found that the City of San Marcos was "flowing its previously-used groundwater into a river essentially for 'cleaning' purposes,"[717] whereby the effluent had to "adequately mix[]with

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705. *Id.* at 800.

706. *Id.* at 802.

707. *Id.*

708. *See* Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904).

709. *See* Tex. Co. v. Burkett, 117 Tex. 16, 25-28, 296 S.W. 273, 276-78 (1927).

710. *City of Corpus Christi*, 276 S.W.2d at 802-04.

711. *See* Denis v. Kickapoo Land Co., 771 S.W.2d 235, 236-38 (Tex. App.—Austin 1989, writ denied).

712. *See City of Corpus Christi*, 276 S.W.2d at 798.

713. City of San Marcos v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied) (the City filed a motion for rehearing on September 27, 2004, and on October 5, 2004, the Court requested that the respondents file a response to the motion for rehearing).

714. *City of San Marcos*, 128 S.W.3d at 273-74. This case was unlike *Denis*, where the dispute was based on whether the groundwater contributed perceptibly to the flow of the creek. *See Denis*, 771 S.W.2d at 236. This case was also unlike *City of Corpus Christi*, where the issue was whether riverflow transportation of unused artesian water was wasteful. *See City of Corpus Christi*, 276 S.W.2d at 799.

715. *See infra* notes 716-20, 722-33 and accompanying text.

716. *City of San Marcos*, 128 S.W.3d at 275.

717. *Id.*

the river water while flowing downstream."[718] The court noted that this was "'the opposite of fungibility'"[719] and that "'[i]ntent does not trump physical reality in water law.'"[720] The second ground for the court's opinion is discussed below.[721]

iii. Title Determined by Control

The *City of San Marcos* court also based its opinion on its determination that privately-owned groundwater, once mixed with state-owned surface water, became state-owned, in part, on a theory of control.[722]

The first Texas case that alluded to control as a determining factor of water ownership was *Harrell v. Vahlsing*.[723] In that case, landowners captured portions of surface water flow in a ditch maintained by a water control and improvement district.[724] The landowners based their "claim of title to the waters in the drainage ditch . . . upon the bold assertion that . . . they were the only persons physically able to do so."[725] The court rejected the landowners' argument, reasoning that it placed "undue emphasis upon mere physical position."[726]

However, the Austin Court of Appeals in *City of San Marcos* relied not on *Vahlsing*, but on two subsequent cases.[727] In arriving at its conclusion, the third court characterized its own earlier decision in *Denis*,[728] and the Court's decision in *City of Corpus Christi*,[729] as being based on the "physical control of the captured property rather than on subjective intent to maintain ownership over it."[730] The court next cited an excerpt from a 1981 ruling by the TCEQ's predecessor, the Texas Water Commission, in which it concluded that:

> "Private, percolating spring water which is allowed to enter into a watercourse and commingle with State water retains its private property characteristic[s] only if the landowner maintains control over the spring water and can identify it both as to amount *and* location in the watercourse. In the

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718. *Id.* at 276.

719. *Id.* (quoting Brief for San Marcos River Foundation). This notion countered a basis of the court's earlier holding in *TRPA*, 910 S.W.2d 147, 155 (Tex. App.—Austin 1995, writ denied).

720. *City of San Marcos*, 128 S.W.3d at 275 (quoting Brief for San Marcos River Foundation).

721. *See* discussion *infra* Part IV.B.3.b.iii.

722. *See City of San Marcos*, 128 S.W.3d at 277.

723. *See* Harrell v. Vahlsing, 248 S.W.2d 762, 766-69 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

724. *See id.*

725. *Id.* at 770.

726. *Id.*

727. *See City of San Marcos*, 128 S.W.3d at 277.

728. *See* Denis v. Kickapoo Land Co., 771 S.W.2d 235, 235 (Tex. App.—Austin 1989, writ denied).

729. *See* City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 292-95, 276 S.W.2d 798, 800-02 (1955).

730. *City of San Marcos*, 128 S.W.3d at 277.

absence of this evidence, the private spring water which has been allowed to enter a State watercourse and commingle with State water therein will be presumed to have become state water."[731]

The Austin court concluded by explaining that "unless the owner of discharged effluent can identify the location of the effluent in the watercourse —and divert it before it commingles with state water—it is presumed to become state water."[732] The court vacated the TCEQ's order granting the city's permit to transport its groundwater-based effluent upon concluding that the city had no common-law right to do so, and that the TCEQ lacked any explicit authority to grant a bed and banks permit for such an activity prior to 1997.[733]

c. Conclusions to be Drawn

Two different rules appear to be developing in Texas, one dealing with the title of withdrawn groundwater reinjected into an aquifer via ASR, and another governing groundwater discharged into a watercourse.[734]

i. Groundwater Reinjected into an Aquifer

The only Texas appellate case to address the injection of water into an aquifer for storage purposes—albeit surface water—resolved the issue of title to the injected water by holding that the ownership of that water was immaterial, to some extent, as long as the same quantity of water could be traced back to the injector.[735] The Texas natural gas cases[736] followed the same line of reasoning that the federal courts utilized in relation to groundwater law.[737] The federal cases held that injected gas remains privately owned by the injector because it is transformed into personal property after the "original capture," and title can, therefore, only be lost by abandonment, which requires some overt expression of intent.[738]

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731. *Id.* (quoting In re *Adjudication of the Salt Fork and Double Mountain Fork Watersheds of the Brazos I Segment in the Brazos River Basin*, Texas Water Comm'n, (Feb. 10, 1981)).

732. *City of San Marcos*, 128 S.W.3d at 277. *But see* Harrell v. Vahlsing, 248 S.W.2d 762, 766-69 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

733. *City of San Marcos*, 128 S.W.3d at 279 (reserving the question of the TCEQ's authority post-1997).

734. *See* discussion *infra* Part IV.B.3.c.i-ii.

735. *See TRPA*, 910 S.W.2d 147, 155 (Tex. App.—Austin 1995, writ denied).

736. *See* Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 818-19 (Tex. 1974); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870, 880-82 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

737. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 949 (1982); City of Altus, Okla. v. Carr, 255 F. Supp. 828, 840 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966).

738. *See Lone Star Gas*, 353 S.W.2d at 879.

ii. Groundwater Discharged into a Surface Stream

September 1, 1997 marked the effective date when S.B. 1 amended section 11.042 of the Water Code.[739] The amendment outlined the permit requirements for the use of Texas watercourses to transport groundwater and groundwater-based effluent.[740] Prior to this date, the use of a state water course as a means of transporting unused groundwater was governed by the common-law principles announced by the Court in *City of Corpus Christi v. City of Pleasanton*.[741] As noted earlier, the City of San Marcos had attempted to follow those principles when it proposed to transport treated groundwater-based effluent that it planned to discharge into the San Marcos River for delivery downstream to its point of beneficial use.[742] On appeal, the Austin Court of Appeals held that the common-law principles of the *City of Corpus Christi* decision were to be narrowly applied, and that these principles did not apply to the transport of groundwater-based effluent.[743] Although the court recognized the city's ownership of its effluent, the court concluded that the city "abandoned" its ownership when it discharged the effluent into the watercourse.[744] Because the parties stipulated that the S.B. 1 amendments to section 11.042 did not apply to the city's reuse project, the Austin court effectively "reserved" the questions relating to its holding concerning the transportation of treated effluent on a state watercourse pursuant to Section 11.042(b).[745]

To the authors' knowledge, the *City of San Marcos* case is the only reported pre-S.B. 1 reuse project involving groundwater issues. On September 10, 2004, the Court denied the City of San Marcos's Petition for Review. However, the final chapter in the *City of San Marcos* case is still literally being written as the City filed a motion for rehearing on September 27, 2004, to which the Court ordered a response by October 5, 2004.[746]

Effective September 1, 1997, the Legislature empowered the TCEQ to issue permits authorizing the transport of groundwater-based effluent in Texas watercourses.[747] To the extent that the volume of wastewater sought to be discharged into the watercourse for transport and then recovered has been historically discharged, the TCEQ is authorized to impose "special conditions"

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739. TEX. WATER CODE ANN. § 11.042 (Vernon 2000).

740. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

741. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955).

742. City of San Marcos v. Tex. Comm'n of Envtl. Quality, 128 S.W.3d 264, 266 (Tex. App.—Austin 2004, pet. denied).

743. *Id.* at 273-74, 279.

744. *Id.* at 276-77.

745. *Id.* at 279.

746. TEXAS JUDICIARY ONLINE, CASE SEARCH RESULTS ON CASE #04-0164, *at* http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=24738 (last visited Nov. 9, 2004) (motion for rehearing pending in Cause No. 04-0164).

747. Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

if necessary to protect either: (i) an existing water right granted in reliance upon the use and availability or both of those return flows, or (ii) to maintain instream uses and fresh water inflows to bays and estuaries.[748]

Irrespective of whether the effluent sought to be transported in the state watercourse has been historically discharged, or whether there is a new or increased volume of discharge, the owner of the groundwater-based effluent is required to account for the "carriage losses" in the volume of water discharged.[749] Specifically, the discharger must account for the volume of water lost through seepage, evaporation, and evapotranspiration in route between the point of discharge and the downstream point of diversion.[750]

Because of the property rights that attach to the groundwater, an unresolved question raised by the S.B. 1 amendment is whether a taking occurs due to the imposition of these special conditions.[751] On the face of the legislation, the special conditions being imposed will result in a reduction of the amount of groundwater or groundwater-based effluent that the owner can recover downstream.[752] Moreover, the special conditions are being imposed for the benefit of third parties, namely downstream water rights holders and environmental interests or both, without just compensation to the owner of the groundwater or groundwater-based effluent.[753]

C. Can the Legislature Modify the Rule of Capture?

Can what the Legislature giveth also be taken away? Aristotle certainly thought so, arguing that the proper function of a legislator was to create a disposition of putting private property to common use.[754] Notwithstanding Aristotle's learned opinion, the preceding pages of this article demonstrate that the rule of capture in Texas has always guaranteed and continues to guarantee, the landowner a vested private property right in the groundwater beneath the landowner's property.[755]

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748. TEX. WATER CODE ANN. § 11.042(b) (Vernon 2000).
749. *Id.*
750. *Id.*
751. *Id.*
752. *Id.*
753. *Id.*; *see* TEX. CONST. art. V, § 1.
754. ARISTOTLE, ARISTOTLE'S POLITICS § 1263b, at 44-45 (Hippocrates G. Apostle & Lloyd P. Gerson trans., 1986).
755. *See* discussion *supra* Parts II, III, IV.A-B.

1. The Conservation Amendment of 1917

The genesis of the concept that the Legislature has the sole authority to amend or repeal the rule of capture begins with the passage of the Conservation Amendment to the Texas Constitution in 1917.[756] Section 59(a) of the amendment mandates that:

> The conservation and development of all of the natural resources of this State ... and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.[757]

From this delegation of power, the Court has consistently held that this amendment "made clear that in Texas, responsibility for the regulation of natural resources, including groundwater, rests in the hands of the Legislature."[758] Indeed, Justice Hecht, in his concurring opinion in *Sipriano v. Great Spring Waters of America, Inc.*, meticulously described the instruction given to the Legislature by the people of Texas as not only giving the Legislature "the power but [also] the duty to 'pass all such laws as may be appropriate' for the conservation, development, and preservation of the State's natural resources, including its groundwater."[759]

2. Ability of the Legislature to Modify Vested Property Rights Under the Police Power

Taken as a whole, the Court's authority on the issue of whether the Legislature can eliminate vested property rights indicates that it can do so —but only under the exercise of its police powers and not without constitutional "takings" implications.[760]

In *Turner v. Big Lake Oil Co.*, the Court described the interest in rainwater that attaches to a landowner by holding that:

> [T]he right of a landowner to the rainwater which falls on his land is a *property right which vested in him when the grant was made.* Being a

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756. *See* TEX. CONST. art. XVI, § 59 (amended 2003).

757. *Id.* § 59(a).

758. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 77 (Tex. 1999); *see* Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729, 731 (Tex. 2002); FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 875-76 (Tex. 2000); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 295-96, 276 S.W.2d 798, 803 (1955); *see also* Corzelius v. Harrell, 143 Tex. 509, 511-13, 186 S.W.2d 961, 963-64 (1945) (recognizing the Legislature's authority to enact laws to regulate the state's natural resources—oil and gas in this case—pursuant to the authority created by the 1917 passage of the Conservation Amendment).

759. *Sipriano*, 1 S.W.3d at 81 (Hecht, J., concurring) (quoting TEX. CONST. art. XVI, § 59).

760. *See infra* notes 761-70 and accompanying text.

> property right, the Legislature is *without power to take it from him or to declare it public property* and subject by appropriation or otherwise to the use of another.[761]

The Court again addressed this issue in *Barshop v. Medina County Underground Water Conservation District*, wherein it warned that "[e]ven the State concedes that without some provision protecting existing users from a complete shutdown of their wells, this Act would not survive constitutional scrutiny under the takings clause."[762]

Additionally, the Court repeatedly confirmed that the Legislature "under its police power," is given broad discretion to legislate.[763] In fact, the Court has further elaborated that "[a]ll property is held subject to a valid exercise of the police power,"[764] the constitutionality of which is judged by "[t]he necessity or reasonableness of [the] particular regulations imposed under the police power."[765]

The Court has held this to be true even with regard to the Republic of Texas's adoption of the common law of England in 1840.[766] In *Harned v. E-Z Finance Co.*, the Court explained that "[o]ur very first statute declares that the common law of England, when not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision and shall continue in force until altered or repealed by the Legislature."[767]

However, the Court has been equally clear that the Legislature's exercise of its police powers is subject to the constitutional protections against "takings" without just compensation when private property rights are involved.[768] If valid regulations, imposed under the rubric of the police power, abrogate vested property rights, "such rights may be recognized as a compensable 'taking' of private property."[769] Such takings are not proscribed by the Texas Constitution but "rather, [] merely require[] just compensation for the property taken."[770]

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761. Turner v. Big Lake Oil Co., 128 Tex. 155, 170, 96 S.W.2d 221, 228 (1936).

762. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 629 (Tex. 1996).

763. Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 461 (Tex. 1997).

764. R.R. Comm'n of Tex. v. Rowan Oil Co., 152 Tex. 439, 445, 259 S.W.2d 173, 176 (1953).

765. Tex. State Bd. of Barber Exam'rs v. Beaumont Barber College, Inc., 454 S.W.2d 729, 732 (Tex. 1970).

766. *See* Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002)).

767. Harned v. E-Z Fin. Co., 151 Tex. 641, 649, 254 S.W.2d 81, 86 (1953).

768. Hartman, *supra* note 7, at 303.

769. *Id.*

770. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 628 (Tex. 1996).

3. *The Texas Supreme Court's Counterbalancing Respect for Vested Property Rights*

In addition to the foregoing, the Court has repeatedly evinced a reluctance to stray from precedent, especially where property rights are at stake.[771] Forty-seven years after the Republic of Texas's adoption and recognition of the common law of England,[772] the Court wrote that:

> [W]here a decision has been made, adhered to and followed for a series of years, it will not be disturbed, except on the most cogent reasons, and it must be shown in such case that the former decisions are clearly erroneous; and, where property rights are shown to have grown up under the decision, the rule will rarely be changed for any reason.[773]

The Court reaffirmed this view in 1954 when it held that "[w]e are not unmindful of the doctrine of stare decisis, based on public policy and sound legal administration, requiring that courts respect and adhere to prior judicial decisions. The law should be settled, so far as possible, especially where contract rights and rules of property have been fixed."[774]

It is not apparent whether the Court has ever specifically defined what it meant by the usage of the terms "fixed" and "grown up under," but one could reasonably infer that one hundred years of caselaw might safely qualify.[775]

4. *Any Drastic Changes Made by the Legislature Would Have Significant Takings Implications*

The Court showed amazing foresight in 1915 when it described the practical effect of altering the private property rights guaranteed by the rule of capture, explaining that the "right in the landowner, inhering in virtue of his proprietorship of the land . . . may not be deprived without a taking of private property."[776]

From the preceding discussion, it is apparent that the Legislature possesses the power to alter the rule of capture in the exercise of its police power, should it choose to do so.[777] Indeed, the Court has repeatedly deferred

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771. *See, e.g.*, John G. & Marie Stella Kennedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 281 (Tex. 2002); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 29 (Tex. 1978); Southland Royalty Co. v. Humble Oil & Ref. Co., 151 Tex. 324, 249 S.W.2d 914, 915 (1952).

772. *See* Act approved Jan. 20, 1840, 4th Cong., R.S., *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898) (recodified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002)).

773. Groesbeck v. Golden, 7 S.W. 362, 365 (Tex. 1887).

774. McLendon v. City of Houston, 153 Tex. 318, 322-23, 267 S.W.2d 805, 807 (1954).

775. *See* Houston & Tex. Cent. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

776. Tex. Co. v. Daugherty, 107 Tex. 226, 237, 176 S.W. 717, 720 (1915).

777. *See* discussion *supra* Part IV.C.2.

to the Legislature on matters concerning groundwater legislation per the state separation of powers[778] outlined in the Conservation Amendment.[779] In light of this deference, even though the Court jealously guards a landowner's vested property rights, groundwater law might conceivably be one of the rare situations where the Court might someday consider the alteration of property rights to be appropriate.[780]

Nevertheless, even though the Legislature may constitutionally possess the power to alter or even overturn the rule of capture, exercising that power would likely expose the State to significant takings liability. Taking into account that around ninety-four percent of Texas land is privately held,[781] the relative scale of the resulting takings liability could reach, on the low end, around $24.5 billion dollars and over $170 billion dollars on the higher end of the calculation.[782] In a state that recently experienced one regular[783] and four special sessions[784] over attempts to cope with the $10 billion shortfall the State faced in 2003, a deficit anywhere from two to seventeen times that size caused by takings lawsuits would be a problematic issue to explain to a constituency.[785]

5. *The Rule of Capture Has Already Been Affected by the Legislature's Exercise of its Police Powers*

While some refer to S.B. 1[786] as "revolutionary,"[787] and even as "the most exhaustive rewrite of Texas water law in the [preceding] thirty years,"[788] S.B. 2 is the legislation that directly confronted the tenets of the rule of capture more than any other Texas statute, before or since.[789]

In the midst of the Legislature's consideration of S.B. 2, the Amarillo Court of Appeals handed down its decision in *South Plains Lamesa Railroad,*

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778. *See* discussion *supra* Part IV.C.1.

779. *See* TEX. CONST. art. XVI, § 59 (amended 2003).

780. *See* Groesbeck v. Golden, 7 S.W. 362, 365 (Tex. 1887).

781. *See* SCHMIDLY ET AL., *supra* note 500, at 13.

782. *See* Technical Rep. 1469, *supra* note 7, at 22 (recording the permanent acquisition prices paid in West Texas as low as $100 per acre-foot and also listing Edwards Aquifer permanent acquisition prices of around $700 per acre-foot).

783. *See* TEXAS SENATE NEWS, 78TH REGULAR SESSION OPENS, ¶ 1 (Jan. 14, 2003), *at* http://www.senate.state.tx.us/75r/Senate/Archives/Arch03/p011403a.htm; Rep. LARRY PHILLIPS, 78TH LEGISLATIVE SESSION OPENS, ¶ 2 (Jan. 19, 2003), *at* http://www.house.state.tx.us/news/release.php?id=40.

784. *See Senate Gavels in Fourth Special Session*, Texas Senate News, ¶ 1, *at* http://www.senate.state.tx.us/75r/Senate/Archives/Arch04/p042004a.htm (last visited Oct. 27, 2004).

785. *See Comptroller's Biennial Revenue Estimate Outlines Budgetary Challenges: The 78th Legislature Faces a Total Shortfall of $9.9 Billion*, Texas Senate News, ¶ 1, *at* http://www.senate.state.tx.us/75r/Senate/Archives/Arch03/p011303a.htm (last visited Oct. 27, 2004).

786. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

787. *See* Lehman, *supra* note 7, at 107.

788. *See* Hubert & Bullock, *supra* note 7, at 54.

789. *See* Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991.

Ltd. v. High Plains Underground Water Conservation District No. 1, wherein it held that the groundwater district at issue lacked the authority to regulate water withdrawals based on tract size.[790] The opinion issued on April 17, 2001 gave the Legislature a full forty days to amend legislation in S.B. 2 in order to allay the court's concerns.[791] The Legislature accomplished the task by amending section 36.116 of the Water Code,[792] the amendment of which states that groundwater production may be regulated "based on acreage or tract size."[793] Notably, this association of production to acreage and tract size is a hallmark of correlative rights.[794]

S.B. 2 also codified the authority of a groundwater district to regulate the spacing of water wells.[795] This type of power is another artifact of the correlative rights doctrine, which tempers one landowner's right to produce groundwater by a neighboring landowners' rights to do the same.

Finally, S.B. 2 provided for the consideration of historic use in the promulgation of "any rules limiting groundwater production."[796] The term "historic use," however, is traditionally associated with the doctrine of prior appropriation, which places great emphasis on temporal precedence.[797]

Each of the foregoing considerations—tract size, well spacing, and historic use[798]—is antithetical[799] to the unfettered right to capture and to absolute ownership of subterranean water.[800] One reviewer appraised the situation by stating that "when local regulation is in place, an essential ingredient of the rule of capture no longer exists."[801] Put another way, the absolute ownership right is now not so absolute because "property owners no longer have an unrestricted right to the water beneath their land."[802] As this article has shown, property rights in groundwater are unquestioned legally, but exactly what elements of ownership those rights confer are now less certain because, while a landowner "may still own the water, the removal of that water and how it may be used is subject to rules created by the [Groundwater Conservation Districts (GCDs)]."[803]

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790. S. Plains Lamesa R.R. v. High Plains Underground Water Conservation Dist. No. 1, 2 S.W.3d 770, 779-80 (Tex. App.—Amarillo 2001, no pet.).

791. *See* Act of May 27, 2001, 77th Leg., R.S., ch. 966, § 13.06, 2001 Tex. Gen. Laws 1991, 2084.

792. *See* Caroom & Maxwell, *supra* note 7, at 47.

793. TEX. WATER CODE ANN. § 36.116(a)(2)(B) (Vernon 2000 & Supp. 2004-05).

794. *See* Kaiser & Skillern, *supra* note 7, at 267.

795. TEX. WATER CODE ANN. § 36.116(a)(1).

796. TEX. WATER CODE ANN. § 36.116(b).

797. *See* Kaiser & Skillern, *supra* note 7, at 267.

798. § 36.116.

799. *See* discussion *supra* Parts II, III, IV.A-B.1.

800. *See* discussion *supra* Part IV.A.4.

801. *See* Lehman, *supra* note 7, at 128.

802. *Id.*

803. *Id.*; *see* discussion *supra* Parts II, III.

Some commentators have described the effect of GCD regulation as reducing the rule of capture to "a localized version of reasonable use."[804] Reasonable use, however, is too imprecise a label to apply because it can be further divided into its two constituent doctrines: the American rule and the Restatement rule.[805] The American rule is inapplicable to the current situation in Texas because it has strict restrictions against the use of withdrawn groundwater on nonoverlying land and, therefore, prohibits groundwater exports entirely.[806] In fact, the inverse of the American rule is currently alive and thriving in Texas.[807] In contrast, the Restatement rule strikes a closer comparison, as Justice Hecht forecasted in his concurrence in *Sipriano v. Great Spring Waters of America, Inc.*, wherein he advocated the adoption of the Restatement rule over the rule of capture.[808]

Interestingly, the drafters of S.B. 2 likely had a copy of the Restatement in front of them because at least two of the provisions of the bill are taken almost verbatim from the Restatement itself.[809] First, the well spacing provision in section 36.116(a)(1) of the Water Code[810] accomplishes the restriction against "unreasonable harm" to neighboring landowners laid out in section 858(1)(a) of the Restatement.[811] Similarly, the pumping limitations based on tract size found in section 36.116(a)(2)(b) of the Water Code[812] are directly analogous to the Restatement's restriction of groundwater withdrawals exceeding the "proprietor's reasonable share of the annual supply or total store of groundwater."[813] Regardless of their source, these modifications are now a part of Texas statutory law.[814]

D. Criticisms of the Current Groundwater Conservation Districts

While much progress has been made in modernizing and improving GCDs, much remains to be done.[815] The passage and enactment of S.B. 1 in 1997[816] and S.B. 2 in 2001,[817] heralded a monumental change in the purpose,

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804. Lehman, *supra* note 7, at 132 (quoting DeLaughter *supra* note 7, at 1465 n.46).

805. *See* Drummond, *supra* note 7, at 198-200. The Restatement rule is named after the *Restatement, Second, of Torts* § 858, promulgated in 1979. *See* RESTATEMENT (SECOND) OF TORTS § 858 (1979).

806. Drummond, *supra* note 7, at 198.

807. *See In Search of a Solution*, *supra* note 7, at 190; Lehman, *supra* note 7, at 123-25; Drummond, *supra* note 7, at 217-22.

808. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 83 (Tex. 1999) (Hecht, J., concurring).

809. *See infra* notes 810-13 and accompanying text.

810. *See* TEX. WATER CODE ANN. § 36.116(a)(1) (Vernon 2000 & Supp. 2004-05).

811. *See* RESTATEMENT (SECOND) OF TORTS § 858(1)(a) (1979).

812. *See* TEX. WATER CODE ANN. § 36.116(a)(2)(B).

813. *See* RESTATEMENT (SECOND) OF TORTS § 858(1)(b).

814. *See* TEX. WATER CODE ANN. § 36.116.

815. *See* Lehman, *supra* note 7, at 106.

816. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610.

817. *See* Act of May 27, 2001, 77th Leg., R.S., ch. 966, 2001 Tex. Gen. Laws 1991.

promotion, and effectiveness of GCDs never before seen in Texas groundwater law.[818] However, since the heady days just after the enactment of S.B. 1 and S.B. 2, several problems have taken root. Indeed, some commentators have come to characterize the use of GCDs as "an inadequate response to a state-wide problem."[819]

An original and primary goal of the GCDs was to develop more local control of groundwater use and policy, which, ironically, now has proven to be quite problematic.[820] Localized decision-making tends to be inherently myopic, resulting in aquifer management schemes based on differing scientific assumptions and, at times, even differing underlying data, with little or no coordinated management among even the neighboring groundwater districts.[821] This problem is exacerbated because GCD boundaries "rarely coincide with aquifer boundaries,"[822] and instead are laid out entirely by legislative or municipal fiat, "typically follow[ing] county or political lines."[823] Variations in management from district to district, even within the same watershed, "promote[] inconsistency among management strategies, which ultimately results in overall [watershed] inefficiency."[824] The concern of some in the groundwater management community is that "[a]lthough local control appears to be better suited to accommodate multiple needs and uses, some doubt exists as to the practicality of a handful of [GCDs] attempting to collectively manage groundwater for the entire state."[825]

The problems are further exacerbated as the number of GCDs increases.[826] As of the fall of 2004, eighty confirmed GCDs existed, with eight more pending.[827] The numbers of confirmed GCDs have doubled in the last five to ten years.[828] Moreover, despite the proliferation of local districts, no state agency has been given any enforceable oversight authority to ensure that the interest of the State as a whole is considered, or that the multitude of local management schemes are cohesive and can work together.[829]

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818. *See* Lehman, *supra* note 7, at 107.

819. Kaiser & Skillern, *supra* note 7, at 295.

820. *See* Lehman, *supra* note 7, at 103.

821. *See id.* at 118-23; *In Search of a Solution*, *supra* note 7, at 191 (describing the current problem areas in GCDs that need to be addressed by the 79th Legislature).

822. Lehman, *supra* note 7, at 121.

823. *Id.*

824. *Id.* at 117.

825. *Id.* at 119.

826. *See* Caroom & Maxwell, *supra* note 7, at 49.

827. *Id.*

828. Caroom & Maxwell, *supra* note 7, at 49; *In Search of a Solution*, *supra* note 7, at 191.

829. *See* TEXAS WATER CODE §§ 36.052, 36.301, 36.3011, 36.302, 36.303, 36.305; *compare id. with* TEXAS WATER CODE §§ 12.081 *and* 12.082 *and* 12.083 *and* 49.001(1) *and* 49.002.

V. FUTURE ADJUSTMENTS

The 79th Session of the Texas Legislature shows signs of being "'a big water session.'"[830] During the interim, Lieutenant Governor David Dewhurst established the Senate Select Committee on Water Policy and an offshoot, the Interim Subcommittee on the Lease of State Water Rights, both of which were given a weighty list of charges.[831] The Legislature will likely address issues related to the rule of capture and there may even be a "strong interest among a number of our senators to look at moving away from [it]."[832] Members of the agricultural community—long some of the most ardent supporters of the rule of capture—are now, at least in the estimation of the Lieutenant Governor, "increasingly willing to look at [legislatively abolishing the rule of capture]."[833] Senator Robert Duncan,[834] who is also a member of both the Select Committee and its Subcommittee,[835] stated bluntly: "Agriculture needs to rethink its political position and strength with regard to water . . . [n]o longer can we pump all we want . . . [i]t makes no sense."[836] Even Land Commissioner Jerry Patterson has called on the Legislature to change the rule of capture,[837] describing it as "'not suitable for the 21st century.'"[838] Commissioner Patterson advocates the adoption of a system of correlative rights instead.[839]

Other issues that may be addressed during the 79th Session include: (1) the marketability and transferability of groundwater,[840] (2) historic use regulations imposed by GCDs,[841] (3) "strengthening protections against third-party impacts from groundwater transfers,"[842] (4) toughening "district powers

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830. Elder, *supra* note 21, ¶ 9 (quoting Mary Kelley, attorney at the Austin office of Environmental Defense).

831. *See* SENATE COMMITTEE ON WATER POLICY, SELECT, *at* http://www.senate.state.tx.us/75r/senate/commit/c750/c750.htm (last visited Oct. 27, 2004) [hereinafter SENATE COMMITTEE ON WATER POLICY]; SUBCOMMITTEE ON THE LEASE OF STATE WATER RIGHTS, INTERIM, *at* http://www.senate.state.tx.us/75r/senate/commit/c755/c755.htm (last visited Oct. 27, 2004) [hereinafter SUBCOMMITTEE ON THE LEASE OF STATE WATER RIGHTS]; Ahrens, *supra* note 7, at Attachment 3.1.

832. Elder, *supra* note 21, ¶ 2 (quoting Lt. Governor Dewhurst).

833. *See id.* ¶ 7 (quoting Lt. Governor Dewhurst).

834. *See* Paul Burka & Patricia Kilday Hart, *The Best and Worst*, TEX. MONTHLY, July 2001, at 76; *The Best & Worst Legislators*, TEX. MONTHLY, July 2003, at 98.

835. *See* SENATE COMMITTEE ON WATER POLICY, *supra* note 831; SUBCOMMITTEE ON THE LEASE OF STATE WATER RIGHTS, *supra* note 831.

836. *It's Time for Texas to Re-examine 'Rule of Capture'*, AUSTIN-AM. STATESMAN, November 16, 2003, ¶ 5.

837. Robert Elder Jr., *Official Gets Deep Into Water Policy*, AUSTIN-AM. STATESMAN, Dec. 2, 2003, at D1.

838. *Id.* (quoting Land Commissioner Jerry Patterson).

839. *Id.*

840. *See* Ahrens, *supra* note 7, at 10.

841. *Id.*

842. *Id.*

to protect landowners from water-level drawdown,"[843] (5) increasing "state oversight of [groundwater] districts,"[844] (6) "standardizing certain district procedures,"[845] (7) possible alterations in how GCDs are funded,[846] (8) due process and procedures in groundwater district hearings,[847] (9) uniformity in the methodologies used to determine groundwater availability and the total usable amount of groundwater in a groundwater district,[848] (10) use of export fees by local entities other than groundwater districts, (11) the applicability of conflict of interest laws to groundwater districts, and (12) the leasing of groundwater from State lands.[849]

Clearly, the Legislature, never accused of excesses in subtlety, has made the reformation or the amendment of the rule of capture a chief priority during the 79th Session.[850]

VI. CONCLUSION

That the rule of capture, so maligned and discredited throughout much of the nation today, traces its roots back to some of the greatest legal minds the world has ever known, including two Roman Emperors is startling.[851]

Even more impressive is that throughout the last 1600 years,[852] the rule of capture has been consistently interpreted, applied, and implemented, including in more recent history by countries that have either claimed title to Texas soil or exerted influence over the development of Texas's jurisprudence.[853] That the property right conferred to a landowner in his groundwater by the rule of capture could have been forgotten, obscured, or doubted[854] is especially perplexing in light of the historical development of the rule and by its later interpretation and development in the Texas courts[855] and the Legislature. No doubt, much of the legal confusion has been due to the name of the rule itself, which connotates more of a usufructory concept than the corporeal ownership interest.[856] This is even evidenced by the inter-

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843. *Id.*

844. *Id.*

845. *Id.*

846. *See In Search of a Solution*, *supra* note 7, at 191-92; Lehman, *supra* note 7, at 116.

847. *See Evolution or Revolution?*, *supra* note 7, at E2-12 to -13.

848. *See id.*

849. *See* SUBCOMMITTEE ON THE LEASE OF STATE WATER RIGHTS, *supra* note 831; Ahrens, *supra* note 7, at Attachment 3.1; HON. JERRY PATTERSON, TEXAS GENERAL LAND OFFICE, 100 YEARS IS TOO LONG: THE RULE OF CAPTURE TURNS 100 ¶ 59 (2003).

850. *See supra* notes 830-49 and accompanying text.

851. *See* discussion *supra* Part II.

852. *See* CODE THEOD. 15.2.7 (stating that water rights were first aligned with property rights in 397 A.D.); discussion *supra* Part II.B.3.

853. *See* discussion *supra* Part III.A-D.

854. *See* sources *supra* note 7; Tex. S.B. 1041, 78th Leg., R.S. (2003).

855. *See* discussion *supra* Part IV.A.2-3, IV.B.1.c-d.

856. *See* discussion *supra* Part IV.A., IV.A.1, IV.B.1.

changeable terminology used to describe the rule of capture[857] and the overlooked existence of two distinct doctrines—the rule of capture and the absolute ownership theory—where the existence of only one is commonly understood.[858]

As Roger Tyler noted some thirty years ago in his oft-cited article in the *Texas Bar Journal*, "no general statute appropriating all of the uncaptured underground waters can now be adopted in Texas without an eminent domain provision to guard against a taking of private waters without due process of law."[859]

This article documents the Legislature's ability to make adjustments to our groundwater laws pursuant to its police powers and the authority granted it by the constitutional amendment to the Texas Constitution.[860] However, this article also reveals that the long legal history of the rule of capture clearly establishes it as being a property right, which generations of Texans have come to rely upon,[861] and which is constitutionally protected against taking without just compensation.[862]

In the end, the "overlay" of local GCDs, combined with the vested property rights conferred by the rule of capture, currently strike a delicate balance, albeit an uneasy truce, in the management of the state's groundwater resources.[863] However, as this article demonstrates the rule of capture and its 1600 years of development are surely worth protecting.[864]

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857. *See* discussion *supra* Part IV.A.

858. *See* discussion *supra* Part IV.A.4.

859. Tyler, *supra* note 7, at 536; Smith, *supra* note 7, at 633 ("[T]he legislature cannot act on absolute ownership . . . without taking what is claimed as private property, an act that would require compensation for the lost property rights.").

860. *See* discussion *supra* Part IV.C.1-2.

861. *See* discussion *supra* Part IV.B.1.b-e, IV.C.1-3.

862. *See* discussion *supra* Part IV.C.4.

863. *Cf.* Caroom & Maxwell, *supra* note 7, at 55.

864. *See* discussion *supra* Parts II-III.