

ESSAY

The Water Ethic: The Inexorable Birth of a Certain Alienable Right

Montgomery F. Simus*
James G. Workman†

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* Founder and President, Water Politics LLC; Co-Founder and Chief Executive Officer, SmartMarkets. A graduate of Yale and Harvard, Mr. Simus has a lifelong interest in environmental and conservation issues, primarily as they relate to freshwater scarcity, renewable energy, and national park policy. Working from a water-scarce base in Las Vegas with his wife and son, he is the founder of Water Politics (www.waterpolitics.com), an organization dedicated to the identification and analysis of geopolitical water issues arising from the world's growing and vast water deficits. He is also a cofounder of SmartMarkets (www.smart-markets.com), an eco-preneurial venture that applies Web 2.0 technology and online social networking innovations to motivate energy and water conservation.

† An honors graduate from Yale, James Workman is an award-winning journalist, speaker, consultant, and former writer for statesmen ranging from Interior Secretary Bruce Babbitt to Nelson Mandela. In Africa and Asia, he helped forge the landmark report of the World Commission on Dams, led research safaris, and advised businesses, aid agencies, and conservation organizations on water resources. Based on his seven-year study of indigenous coping mechanisms in the Kalahari Desert, Workman wrote the critically acclaimed *Heart of Dryness: How the Last Bushmen Can Help Us Endure the Coming Age of Permanent Drought*. When he was blacklisted from Botswana for his work, he returned to the United States, where he launched a business venture, SmartMarkets, which partners with utilities to let end users own, save, and trade shares in water and energy efficiency.

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I. INTRODUCTION

In 2009, California’s Assembly passed a landmark Human Right to Water Bill.¹ This legislation, the first of its kind in the United States, declared that “every human being has the right to clean, affordable, and accessible water for human consumption, cooking, and sanitary purposes,

1. Brett Walton, *California Right to Water Bill Vetoed*, CIRCLE OF BLUE: WATERNEWS, Oct. 21, 2009, <http://www.circleofblue.org/waternews/2009/world/California-right-to-water-bill-vetoed/>.

that is adequate for the health and well-being of the individual and family.”²

That sounds innocuous enough. Yet Bill 1242 landed on the governor’s desk in October 2009 during a tense moment; California was both fiscally and aquatically bankrupt.³ Sacramento was mired in heated debate over how or whether it could afford to overhaul management and infrastructure of the fresh water on which it depended.⁴ In the third year of drought, and following a season of printing IOUs, the state lacked funds to conserve or store water that the world’s eighth-largest economy would need to keep functioning.⁵

No politician seems to oppose water as a human right in the abstract, but the effort to codify it in a specific law raised profoundly sticky issues. What would this new right cost taxpayers? Who would enforce it? Which offices might be liable to human rights prosecution in court for failure to uphold the right? How much water would the right set aside? Did it overlap, extinguish, or interfere with other existing rights like irrigation, health and safety codes, or section 106 of the Water Code? Lacking clear answers, Governor Schwarzenegger terminated the bill with his veto pen, arguing that only money, not unfunded mandates, could ensure clean, affordable drinking water for the 150,000 California citizens who lacked it.⁶

This fight was hardly an isolated incident unique to the Golden State. Neither the proponents nor the opponents of Bill 1242 emerged overnight, out of nowhere. Both sides drew on national and international precedents from Laredo, Stockton, Lexington, and Atlanta in the United States, to Mexico City, Johannesburg, Kyoto, and Istanbul abroad.⁷ Indeed, the California legislation represented the tip of the global iceberg of a worldwide push by nongovernmental organizations and human rights activists—who had been seeking legal language from the United

2. *Id.* (quoting A.B. 1242, 2009-10 Leg., Reg. Sess. (Cal. 2009)).

3. *See id.*

4. *See id.*

5. Cal. Nat’l Org. for Women, World’s 8th Largest Economy Officially Broke (Feb. 2, 2009), <http://www.canow.org/canoworg/2009/02/California-officially-broke.html>.

6. Press Release, Food & Water Watch, Governor’s Water Priorities All Wrong; He Fails To Recognize Basic Water Needs While Pushing Billions for Pet Water Projects (Oct. 13, 2009), <http://www.foodandwaterwatch.org/press/press-releases/governor-s-water-priorities-all-wrong-he-fails-to-recognize-basic-water-needs-while-pushing-billions-for-pet-water-projects/>.

7. Charles C. Mann, *the Rise of Big Water*, VANITY FAIR, May 2007, at 122, 134, available at <http://www.charlesmann.org/articles/water-vanity-fair-05-07-a.pdf>; ALAN SNITOW ET AL., THIRST: FIGHTING THE CORPORATE THEFT OF OUR WATER, at ix, 206 (2007); *Promoting Privatization*, WATER BARONS (Ctr. for Pub. Integrity, Wash. D.C.), Feb. 3, 2003, <http://projects.publicintegrity.org/water/report.aspx?aid=45>.

Nations Assembly right on down the government hierarchy to local city councils—for recognition that access to water was a fundamental prerequisite for the realization of all other human rights.⁸

Against this, no nation has fought more aggressively than the United States to strip language in any international convention that refers to a right to water. A pivotal legal showdown between powerful interests appears to be quietly converging.

II. THE DRY WAR

The Cold War ended decades ago, but the Berlin Wall had barely been shattered before a new ideological barrier arose in its place. The ideological Left and Right are now waging a Dry War over who controls and has access to the earth's fresh water.

For most nations, this Dry War is a recent phenomenon. Water management used to be a mind-numbingly boring discourse best left to an insulated and specialist band of hydrologists, civil engineers, and policy wonks.⁹ The most valuable element on earth it may be, but for decades the topic of water rarely enlivened cocktail parties. Today, in the face of looming scarcity, human access to water has grown politicized.

Both the United Nations and the World Bank have concluded that the problems facing the water sector show that the era of plenty has ended, the era of scarcity has begun, and “water wars” have begun breaking out locally and nationally, if not quite yet globally.¹⁰ Yet, contrary to the economic theory that resource-use efficiency improves with scarcity, water is being used less efficiently even as water becomes scarcer.¹¹

A. *Bipartisan Concern*

Liberal green activists are not the only water worriers. Scarcity also troubles boosters among the bastions of unfettered capitalism. The *Wall Street Journal* excoriated a corporate raider for using more water per day than even profligate families use in a year.¹² The bullish panelists at the January 2007 World Economic Forum in Davos, Switzerland, predicted

8. Walton, *supra* note 1.

9. Anthony Turton, *Hydropolitics: The Concept and Its Limitations*, in *HYDROPOLITICS IN THE DEVELOPING WORLD: A SOUTHERN AFRICAN PERSPECTIVE* 15 (Anthony Turton & Roland Henwood eds., 2002).

10. SANDRA POSTEL, *PILLAR OF SAND* 138-40 (1999).

11. R. MARIA SALETH & ARIEL DINAR, *THE INSTITUTIONAL ECONOMICS OF WATER: A CROSS-COUNTRY ANALYSIS OF INSTITUTIONS AND PERFORMANCE* (2004).

12. Robert Frank, *Nelson Peltz's Water Problem*, *WALL ST. J.*, Nov. 16, 2007, at W2.

that the world faced no limits to economic growth anywhere, with one possible exception: fresh water.¹³

Worldwide, that exception has proved the rule, even in the United States. On April 6, 2007, the Intergovernmental Panel on Climate Change (IPCC) reported that global warming was not *coming* to America; it had arrived.¹⁴ Global warming meant less rain and more evaporation in certain regions worldwide, including the American West.¹⁵ But by the year's end, its impacts were national; drought crippled more than a third of the country. As businesses wilted in Atlanta, United Parcel Service, Inc., installed dry urinals; landscapers fired 14,000 workers; Stone Mountain Park melted 1.2 million gallons of manufactured snow; the earth's largest aquarium drained exhibits; and Coca-Cola shut off its fountains.¹⁶

B. Political Danger

Such conservation gestures may feel good, but change little. The underlying threat from drought is less economic than it is political. More than oil, scarce water splits nations, rations freedom, and erodes trust.

Arizona called out the National Guard against California over Colorado River water.¹⁷ Massachusetts splintered over the Ipswich River.¹⁸ Maine fought Swiss CEOs for its aquifers.¹⁹ By 2005, eleven states broke off from the rest of the United States, uniting with Canada in a compact to defend the Great Lakes' fresh waters against the booming thirsty Sunbelt South and Southwest.²⁰ Alabama, Florida, and Georgia sued each other over dwindling reservoirs.²¹ Maryland challenged Virginia over Potomac River currents for the first time since the Civil

13. Klaus Schwab & Peter Brabek-Letmathe, *Water: Why We Need To Adapt Our Water Use*, <http://www.weforum.org/en/media/OpinionEditorials/OpEdWaterUsage/index.htm> (last visited Jan. 31, 2010).

14. See Susan Solomon et al., *IPCC 2007: Summary for Policy Makers*, in *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 2* (Susan Solomon et al. eds., 2007).

15. *Id.*

16. Mary Jane Credeur & Laurence Viele Davidson, *Atlanta Urinals, Fountain Run Dry as UPS, Coke Fight Drought*, BLOOMBERG, Oct. 31, 2007, <http://www.bloomberg.com/apps/news?pid=20601109&sid=a0WazQxwAbNg>.

17. PETER GLEICK, *THE WORLD'S WATER 2002-2003* (2002).

18. Beth Daley, *Watershed Group Rejoin State Panel River—Protection Talks To Resume*, BOSTON GLOBE, Nov. 4, 2009, at 3.

19. ROBERT GLENNON, *WATER FOLLIES* 5-9 (2002).

20. PETER ANIN, *THE GREAT LAKES WATER WARS* 237-38 (2006).

21. See, e.g., *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1117 (11th Cir. 2005).

War.²² Southwest states pulled apart Colorado River remnants.²³ North Carolina banned “nonessential” water use.²⁴ Tennessee towns cut off household water twenty-one hours per day.²⁵ Atlanta sacrificed showers, gardens, and lawns.²⁶ Georgia’s governor kneeled and urged his citizens: “[P]ray for rain.”²⁷

Instead, people continue to lose faith, and for good reason: The IPCC’s conservative climate projection models predict drier winters, protracted droughts, and a thirty-year doubling of thirst.²⁸ And if water disputes like these break out in the rich, modern, democratic, and stable United States, consider how aridity can splinter more fragile civilizations living precariously along the Nile, Mekong, Ganges, Euphrates, Yellow, and Jordan Rivers.

C. Global Risks

In the twenty-first century, economic and security analysts note that while the world’s two most precious liquid resources may not be running out, oil and water have hit ceilings.²⁹ Even oil industry chieftains say that petroleum, long-considered inexhaustible, has reached a practical distributional peak.³⁰ After brushing off doom-and-gloom predictions, oil is at last maxing out and heading for irreversible decline.³¹ Water faces a similar fate.

Observers proclaimed that “water is the new oil,” with all the inherent geopolitical risks and strategic conflicts of interest that the comparison implies.³² Perhaps. But water conflicts may turn even uglier.

22. Linda Greenhouse, *Justices Consider Dispute on Use of Potomac River*, N.Y. TIMES, Oct. 8, 2003, at A20.

23. Nancy Vogel, *U.S. Warns District in Water Dispute*, L.A. TIMES, Jan. 17, 2003, at 8.

24. Martha Quillin, *Drought’s Back, but Not Dire*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 31, 2009, available at <http://www.newsobserver.com/2009/10/31/167118/droughts-back-but-not-dire.html>.

25. Greg Bluestein, *Worst-Case Scenario in the South: Tennessee Town Has Run Out of Water and Has To Truck It in*, ASSOCIATED PRESS, Nov. 2, 2007, available at <http://southcoasttoday.com/apps/pbcs.dll/article?AID=20071102/NEWS/711020392/-1/ARCHIVE>.

26. Teri Walley, *Prayers Rise for Rainy Skies*, CHARLOTTE OBSERVER, Jan. 13, 2008, at 4A.

27. *Id.*

28. BARRY NELSON ET AL., NAT’L RES. DEF. COUNCIL, IN HOT WATER: WATER MANAGEMENT STRATEGIES TO WEATHER THE EFFECTS OF GLOBAL WARMING, at iv-v, 69-73 (2007), <http://www.nrdc.org/globalwarming/hotwater/hotwater.pdf>.

29. Russell Gold & Ann Davis, *Oil Officials See Limit Looming on Production*, WALL ST. J., Nov. 19, 2007, at A1.

30. *Id.*

31. *Id.*

32. Susan Berfield, *There Will Be Water*, BUS. WK., June 12, 2008, at 40, 40, available at http://www.businessweek.com/magazine/content/08_25/64089040017753.htm.

After all, oil has alternatives and we can survive indefinitely without it. Water has no replacement; after three days without it, we die.

Yet the issue with water scarcity is not supply; there is more than enough. The problem lies in distribution and quality: The wrong amount of water falls in the wrong places at the wrong time, harming the poorest people in the wrong ways. Efforts to control this fickle and fugitive resource have failed. Why? Because dynamic projections of water supply and demand are incompatible with the rigid public systems for water distribution and allocation.

Centralized top-down monopoly allocations may have limped along whenever and wherever water flowed in abundance. Such days and places are vanishing, perhaps forever, unless ideological elites can stop fighting long enough to allow a human rights-based market mechanism for water to emerge on its own.

III. SACRIFICING PAWNS

There is one parallel with petroleum policy: the emerging global water debate is being driven by well-educated political elites who rarely suffer personal consequences for their advocacy.³³ Perversely, their statures rise as the situation worsens; their salaries grow and frequent flier miles accumulate. But beyond their small circle, where dry abstractions meet gritty reality, the poor and the environment are seldom as lucky. As a consequence of ideological rigidity and the resulting paralysis, direct and indirect casualties mount in developing countries each year.

A. *Water Casualties*

A Bolivian boy is shot dead in the face during peaceful protests over jacked-up water prices.³⁴ Dozens of Kenyan farmers and herders machete one another in skirmishes over a desiccating creek.³⁵ One thousand Chinese in the Changzhou rice belt contract cancer from heavy metal in their tea water.³⁶ Ten thousand Bangladeshi slowly and

33. DAVID HALL, PUB. SERV. INT'L RESEARCH UNIT, WATER IN PUBLIC HANDS 16-18 (2001), http://www.world-psi.org/content/ContentGroups/English7/Sectors/Utilities1/EN_Water_in_Public_Hands.pdf.

34. William Finnegan, *Leasing the Rain: The World Is Running Out of Fresh Water, and the Fight To Control It Has Begun*, NEW YORKER, Apr. 8, 2002, at 43, 43.

35. Meera Selva, *Death Toll Rises as Kenyan Tribes Battle over Water*, INDEPENDENT (London), Feb. 7, 2006, at 20.

36. Mann, *supra* note 7, at 122.

unwittingly poison their families with arsenic-laced water.³⁷ At least seventeen thousand Indian farmers commit suicide as boreholes that support the Green Revolution suddenly pump nothing but air.³⁸ Worldwide, each year, thirst, drought, famine, and intestinal parasites kill between 1.8 and 2.8 million people, three quarters of them children—a figure higher than AIDS, malaria, and wars combined.³⁹ Beyond human casualties, one-third of aquatic species risk extinction due mostly to dams, diversions, and desiccation;⁴⁰ one-third of America’s rivers remain too polluted to swim or fish in.⁴¹

B. *Finding the Right Words*

These casualties are unfortunate, though hardly tragic; the world’s poor have been dying over fresh water since the beginning of humankind. What is tragic is that water deaths could be slowed or ended by the stroke of a pen, indeed quite possibly through the power of one carefully worded phrase.

Yet it is the precise wording of such a phrase over which Right and Left fundamentally clash. “Secure water as a private property right,” bellows one camp. No, “recognize a fundamental, universal, human right to water,” shrieks the other. Each sees the rival prescription of a right as inferior to, and incompatible with, their own.⁴²

We argue that these are not necessarily competing claims; they are, rather, mutually reinforcing and even symbiotic assertions. According to the U.N. Human Rights Commission, private property *is* a fundamental human right;⁴³ it is the result of scarcity giving rise to conflict.⁴⁴ In that respect, water has the potential to shape and be shaped by political institutions no differently from other resources of immense value.

37. Allan H. Smith, Elena O. Lingas & Mahfuzar Rahman, *Contamination of Drinking-Water by Arsenic in Bangladesh*, 78 BULL. WORLD HEALTH ORG. 1093, 1093-1103 (2000), [http://www.who.int/bulletin/archives/78\(9\)1093.pdf](http://www.who.int/bulletin/archives/78(9)1093.pdf).

38. Somini Sengupta, *On India’s Despairing Farms, a Plague of Suicide*, N.Y. TIMES, Sept. 19, 2006, at A1.

39. KEVIN WATKINS ET AL., UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 3 (2006), <http://hdr.undp.org/en/media/HDR06-complete.pdf>.

40. See Louis A. Helfrich, Richard J. Neves & James Parkhurst, Dep’t of Fisheries & Wildlife Sci., Va. Tech., *Sustaining America’s Aquatic Biodiversity—Why Is Aquatic Biodiversity Declining?* (May 1, 2009), <http://pubs.ext.vt.edu/420/420-520/420-520.pdf>.

41. U.S. E.P.A., LIQUID ASSETS 2000: AMERICA’S WATER RESOURCES AT A TURNING POINT 3 (2000), <http://www.epa.gov/water/liquidassets/assets.pdf>.

42. SNITOW ET AL., *supra* note 7, at 1-24.

43. Mary Robinson, *Property Rights Are Human Rights*, EL PAIS (Madrid, Spain), June 1, 2007, available at <http://www.undp.org/legalempowerment/pdf/EI%20pais.6.1.English%20version.pdf>.

44. TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* 100-05 (2001).

Defining, protecting, and trading this human right can forge the essential steps to promote equity and conservation at a global level. Indeed, beneath the froth of antagonistic rhetoric flows a deep and silent common current. It may prove politically challenging to bring this current to the surface as legislation. But judicious wording can allow “an alienable human right to water” to emerge, by which markets could help eliminate scarcity, promote efficient growth, secure social equity, and conserve nature. A single outcome can be fused from two rival agendas.

IV. CONFLUENCE OF CURRENTS

The word “rival” shares its ancient origins with the word “river.” Both derive from the Latin word *rivalis*, meaning “he who shares one stream.”⁴⁵ Though rivals in means, both liberals and conservatives unite in one goal: to extend our existing ethical outlook, governing what is right and wrong in society, into the uncharted territory lawyers call *aqua incognita*. The ethical debate is rich and vibrant; rivers decline and aquifers diminish while the resource must sustain three billion new parched and hungry mouths. The enormity of the stakes of this emerging right can hardly be overstated. But the birth of such a formalized code was long ago foreseen, remains overdue, and, yet, is still perhaps inevitable.

Six decades ago, in a seminal chapter of *A Sand County Almanac* called “The Land Ethic,” Aldo Leopold eloquently observed how “this extension of ethics is actually a process in ecological evolution.”⁴⁶ The evolving process or “ethical sequence” rippled outward, more inclusively with time, from: 1) personal conduct codes, like the Ten Commandments, which guide relationships between individuals; to 2) social conduct codes, like the Golden Rule or U.S. Constitution, which guide and govern the relationships between people and society; to 3) natural conduct codes, still emerging and undefined, which integrate humans with our complex life support system.⁴⁷ Leopold focused his analysis toward this third category:

An ethic, ecologically, is a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct. These are two definitions of one thing. The thing has its origin in the tendency of interdependent individuals or groups to evolve modes of co-operation. The ecologist calls these symbioses. Politics and

45. Asit K. Biswas, *Management of International Water: Problems and Perspectives*, 9 INT’L J. WATER RES. DEV. 167, 167-78 (1993).

46. *Id.*; ALDO LEOPOLD, *The Land Ethic*, in A SAND COUNTY ALMANAC 158 (1948).

47. Biswas, *supra* note 45, at 9.

economics are advanced symbioses in which the original free-for-all competition has been replaced, in part, by co-operative mechanisms with an ethical content.⁴⁸

Leopold showed that two distinct but equally important schools of thought had been talking past one another. The disciplines had been babbling like independent tributaries that eventually merged quietly together, feeding the same evolutionary river. Drawing on that rationale, and metaphor, this essay argues that a similar political confluence of rights is taking place; free-for-all competition over water, a zero-sum game, is being replaced by win-win cooperation.⁴⁹ Call it “The Water Ethic.”

V. A SHARED CURRENT

By definition, a right is timeless and universal, so any evolving definition of humankind’s relationship with water cannot be mutually exclusive. To win broad acceptance, a water ethic must shrewdly embrace pragmatic elements from both sides of the political stream. Yes, Right Bank conservatives say water must become an economic good that sends price signals and can be privately traded. Yes, Left Bank liberals oppose commodification of an environmental and social necessity that governments must protect as a fundamental human right. Still, both banks in the ideological dispute share a common direction and destination. As vital resources grow scarce, scarcity breeds conflict, and conflict leads to the demand for and definition of new rights related to water.⁵⁰

A. *Common Ground*

Both sides fundamentally grasp how the human demand for water is outstripping a finite supply, with undesirable health and ecological consequences. Both acknowledge that spreading scarcity, rising costs, gross demographic inequalities, and metastasizing political tensions over water can and do lead to deadly violence. Both agree that lack of access to clean water and sanitation has already killed more humans during the past century than any other cause, including war.

48. *Id.*

49. FRANKLIN FISHER & ANNETTE HUBER-LEE, LIQUID ASSETS: AN ECONOMIC APPROACH FOR WATER MANAGEMENT AND CONFLICT RESOLUTION IN THE MIDDLE EAST AND BEYOND, at xvi (2005).

50. See CELINE DUBREUIL, WORLD WATER COUNCIL, THE RIGHT TO WATER: FROM CONCEPT TO IMPLEMENTATION 3-5 (2006), http://www.worldwatercouncil.org/fileadmin/www/library/RightToWater_FinalText_cover.pdf.

Both may dispute the politics, but not the physics, by which scientists confirm that the menace of radical climate change is real and irreversible in the long term. Both agree that it will exacerbate extreme cycles of protracted drought and destructive deluge in the century ahead, and that of all its undesirable impacts, the most will fall upon Africa.⁵¹ Both concur that more suffer from a lack of safe and secure access presently than at any time in history, and that inadequate water routinely kills millions, again, mostly in Africa.⁵²

Finally, both appreciate how water is one of the few naturally occurring resources without which humans cannot survive.⁵³ We can live more or less contentedly without possessing secure access to, say, fire or land. But if denied a certain right to water, to grow food and replenish our metabolism, the otherwise free human is deprived of both life and liberty, enslaved by any who would shut off the supply. Philosophically, water is a property right that becomes our possession when we earn, own, or pay to secure it. It is also a human right that keeps us from being enslaved by those who would seek to steal it from us.

B. Prescribing the Cure

And yet, after such broad-based, warm-hearted consensus in diagnosing the painful symptoms and chronic prognosis, the two ideological rivals cross their arms and vehemently disagree over the cure.

The liberal Left Bank puts unwavering faith in the public trust by responsive and accountable government; it sees water exclusively as a social and environmental necessity. Thus, in the name of universal justice, its leaders demand *a fundamental and inalienable human right to water*. One of its leaders, Maude Barlow, sees the debate as an issue of human rights versus corporate rights.⁵⁴ Indeed, she asserts that access to water may be considered the most important of all human rights.⁵⁵

The conservative Right Bank invests unshakable confidence in the incentives-driven private marketplace. It sees water purely as another scarce economic commodity, like oil, gold, or diamonds. Thus, in the name of efficiency and technological innovation, its leaders demand that *water resources be defined, secured, and protected as a transferable*

51. Solomon et al., *supra* note 14, at 3.

52. WATKINS ET AL., *supra* note 39, at 1-9.

53. At this point someone will cry out, "But, what about air?" The answer is, yes, true absolutely. But fresh air is not yet scarce enough to have universal value; nor have humans developed ways to physically confine or define it as property.

54. See MAUDE BARLOW & TONY CLARKE, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER 79-100, 237-39 (2002).

55. *Id.* at xiv.

property right.⁵⁶ The World Bank, International Monetary Fund, and European Union pushed governments in many nations to privatize their water services.⁵⁷ When critics point to the clouds and say that “water is a gift from God,” one of the Right’s leaders, French corporate water giant Veolia, answers wryly by pointing at the ground: “Yes, but He forgot to lay the pipes.”⁵⁸

C. *Talking Without Listening*

To define this emerging right, robust debate is as healthy and essential as water itself. But since the turn of the century, the global politics of water has grown so bitterly entrenched, so turgid, and so polarized, that both Left and Right appear blind to the slightest weaknesses within their own camp, much less any slight merit on the opposite bank. Through a decade of fruitless global water confabulations, each side increasingly distorts and misrepresents the other’s position. As the conference ends, they collect per diem travel expenses, congratulate themselves for scoring rhetorical points, and jet to the next water symposium to express their concern for the one out of every six people who lacks reliable access to freshwater.

D. *Making Way for Emergence of the Right*

If rival warring hydrocrats could step out of the way, a rights-based Water Ethic might emerge from below. This durable and inclusive human right could take form and content from the thirsty poor who seek to claim their water endowment with the last amount of friction. Indeed, in democratic and market-oriented South Africa, this right is already taking shape on the ground and yielding dividends; it is happening there despite, or rather *because*, South Africa is among the most water-stressed and inequitable countries on earth.⁵⁹

VI. AFRICAN EXCEPTIONALISM

The rival leaders in the Dry War—all largely are based in rainy, secure Europe and North America—claim to speak legitimately and authoritatively for the people, governments, and private ventures in

56. Roger Bate, *Use the Free Market To Solve China’s Water Shortage*, WALL STREET J. ASIA, Aug. 20, 2004, available at <http://www.aei.org/article/21071>.

57. *Promoting Privatization*, *supra* note 7.

58. John Tagliabue, *As Multinationals Run the Taps, Anger Rises over Water for Profit*, N.Y. TIMES, Aug. 26, 2002, at A1.

59. Barbara Schreiner et al., *From Bucket to Basin, in* HYDROPOLITICS IN THE DEVELOPING WORLD: A SOUTHERN AFRICAN PERSPECTIVE, *supra* note 9, at 127.

developing countries, especially Africa. Liberals deny that water can ever be reduced to mere property for these helpless, impoverished Africans; conservatives scoff that water can be equated to a “real” human right in Africa’s young and frail democracies.⁶⁰

With time off the conference circuit, both sides might be pleasantly surprised to find that both forms of rights already coexist in the least likely places. True, these emerging rights are far from perfect; the newborns are still messy, still taking shape, still developing character, still flexing their muscles. That is appropriate. As Leopold pointed out, “[W]e shall never achieve absolute harmony with land [or water], any more than we shall achieve justice or liberty for people. In these higher aspirations the important thing is not to achieve, but to strive.”⁶¹

A. *South Africa’s Water Law*

Starting in 1997, some forty-five million rich and poor South Africans strove to break free not only from their ugly apartheid past and chronic deprivations, but also from imposed global consensus and ironclad assumptions of what is possible in the relationship between humans and water. Their thirsty revolution embarked on an economic and political experiment that built upon, and then transcended, the foundations of a revolution launched by another nation in 1776.

First, in order to ethically extend the health and political autonomy of all—including its poorest, least educated, most marginalized, and discriminated against—South Africa inscribed in its constitution that all citizens were endowed with a certain right to water, a sovereign right that took precedence over all other uses of water.⁶²

Later, in that same constitution, South Africa set out to extend the ethical and economic security of “previously disadvantaged groups” through equity in a property right to water, a right that was, like any property right in the country, inviolate.⁶³

B. *A Global Precedent as Pressure Mounts?*

Taken together, these moves were unprecedented in any nation. But at the time, South Africa’s water was scarce, inequitably distributed,

60. See, e.g., BARLOW & CLARKE, *supra* note 54, at 23-24, 188-89.

61. ALDO LEOPOLD, *ROUND RIVER* 155 (1993).

62. S. AFRICA CONST. ch. 2, § 27 (1996); Schreiner et al., *supra* note 59, at 127.

63. James Workman, *Grapes of Mirth: Fresh Water Becomes Fresh Leverage Behind Race Based Farmland Reform*, ICWA REPORTS, Mar. 2002, at 3.

contentious, and divisive—conditions that are starting to resemble much of the world, including the United States.

In the last few years, water scarcity in the United States has reached unprecedented levels. Colorado River dams sat half empty, Idaho's over-tapped aquifers spurred conflicts, Texas' Rio Grande could not reach the sea, and California's wildland firefighters ran dangerously short of water.⁶⁴ Even Seattle will have to make do with twenty-four million gallons per day less.⁶⁵ Nor was drought uniquely western. Nationwide, many rivers desiccated to record lows. The Great Lakes lowered seven inches below historic levels.⁶⁶ Southeast drought cut Tennessee Valley Authority hydropower in half, exposed Lake Okeechobee's bare bottom, dried \$787 million of Georgia's crops, and left Atlanta, America's fastest-growing city, with sixty days of water.⁶⁷

Proud, patriotic, sovereign America has always been reluctant to take its cues from other countries. But it adapts and improves, tapping into its wellspring of ingenuity. As water scarcity continues to prove politically divisive and economically destructive, we might seek other precedents.

Today in South Africa, poverty, water scarcity, democracy, and capitalism have all combined forces; not coincidentally, it is where the two independently defined rights concerning water arose under distinct or even opposing disciplines.⁶⁸ Water elsewhere was often dictated by an authoritarian state (for example, Egypt, Yemen), or plentiful enough that no economic conflict over access to it existed (for example, Canada, New Zealand).⁶⁹ Even those farmers, miners, and foragers who did fight over access to water created defined, if at times unwritten codes, to protect water property rights and reduce the risks of conflict (northern Chile,

64. Keith Schneider, *U.S. Faces Era of Water Scarcity*, CIRCLE OF BLUEWATER NEWS, July 9, 2009, <http://www.circleofblue.org/waternews/2008/world/us-faces-era-of-water-scarcity/>.

65. Andre Meunier, *Idaho Irrigation Districts Submit Water Plan in Aquifer Conflict*, OR. ENVTL. NEWS, Mar. 13, 2007, http://www.oregonlive.com/environment/index.ssf/2009/03/idaho_irrigation_districts_sub.html; Jim Yardley, *Water Rights War Rages on Faltering Rio Grande*, N.Y. TIMES, Apr. 19, 2002, at A16.

66. See Russ Harding, Mackinac Ctr. for Pub. Policy, *Great Lakes' Water Levels Are Up: Must Be Global Cooling*, <http://www.mackinac.org/10726> (last visited Jan. 22, 2010).

67. Patrick O'Driscoll, *A Drought for the Ages*, USA TODAY, June 8, 2007, at 1A.

68. David Neven et al., *Small Farmer Organizations and Transformed Markets in Southern Africa 10* (staff paper), available at <http://ageconsearch.umn.edu/bitstream/11568/1/sp05-21.pdf>.

69. Tony Allan, *Water Resources in Semi-Arid Regions: Real Deficits and Economically Invisible and Politically Silent Solutions*, in *HYDROPOLITICS IN THE DEVELOPING WORLD: A SOUTH AFRICAN PERSPECTIVE* 23, 23-26 (Anthony Turton & Roland Henwood eds., 2002), available at http://www.internationalwaterlaw.org/bibliography/articles/hydropolitics_book.pdf.

eastern Australia, western United States).⁷⁰ In all cases, and in both disciplines, as Leopold wrote, “these are two definitions of one thing,” the thing being: scarcity leads to competition, competition leads to conflict, conflict leads to rights.⁷¹

VII. THE SLOW BIRTH OF A NEW RIGHT

As Leopold also noted, there is a lag time—sometimes quite long—between the ethic and formalization of any code or belief:

The extension of ethics to this third element in human environment is, if I read the evidence correctly, an evolutionary possibility and an ecological necessity. It is the third step in a sequence. The first two have already been taken. Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land [and water] is not only inexpedient but wrong. Society, however, has not yet affirmed their belief.⁷²

Indeed, whether in Africa, Asia, Europe, Australia, or the Americas, there is a high degree of audacity in what the global Left and Right are each attempting to do from the top down: define and codify our evolving relationship with water in a very short time, as temperatures rise and supplies evaporate. It helps to explain why both sides have grown so radical, adamant, and intransigent. In seeking water as an evolutionary possibility and ecological necessity, they face challenges similar to colonial delegates, who sought to ascribe democracy, individual autonomy, and security of property to humans: the lack of explicit written precedent.⁷³

A. *The Missing Language*

When asked, most people assume that that we clearly enjoy a right to water—at least enough water to survive. Yet curiously, despite its dominance in seventy-one percent of all our biological functions, its near-mythical status in human culture, and its expressed values at the core of every religion on earth, access to fresh water is not now, and has never been, regarded by the United States or the United Nations as a formal, explicit human right.⁷⁴ Nor, for that matter, has the use of fresh

70. Terry Anderson & Pamela Snyder, *Priming the Invisible Pump*, PROP. & ENV'T RES. CTR. POL'Y SERIES (Bozeman, Mt.), Feb. 1997, available at <http://www.perc.org/articles/article746.php>.

71. Leopold, *supra* note 48, at 202.

72. *Id.* at 128.

73. GARRY WILLS, *INVENTING AMERICA* 213 (1978).

74. Stephen C. McCaffrey, *The Human Right to Water*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW* (Edith Brown Weiss et al. eds., 2005).

water ever been parochially defined as a property or usufruct right until relatively recently—and even there, the legal definition is severely confined to very strict uses in narrow and shrinking economic sectors of stable arid regions, namely, irrigation agriculture in America’s arid West, Chile, and Australia.⁷⁵ Until two decades ago, the concepts linking water to rights have remained excluded by political customs and legal institutions, both ancient and modern.⁷⁶

Of course, before Jefferson, “these truths” that all humans “are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness,” were likewise never held to be all that “self-evident.”⁷⁷

B. *Comparison with the Democratic Vote*

His elegant phrases about rights arose naturally from scarcity and conflict and gathered slowly over time and space until they burst forth in a dramatic confluence one warm July 4th in Philadelphia. His quintessentially American sentence gained its currency by affirming diverse streams of Western ethical thought. Ancient sources bubbled up like clear springs from the Roman philosopher Seneca.⁷⁸ They became a trickle under the Protestant Reformation leader, Martin Luther.⁷⁹ They grew into powerful Enlightenment Age tributaries through writings of Francis Hutcheson,⁸⁰ Thomas Hobbes, John Locke, and Jean-Jacques Rousseau.

At first, the Declaration of Independence led to turbulent backflows; its compressed rapids were plugged, diverted, and excluded from flowing to a disenfranchised majority: landless poor, slaves, and females. But through conflict, Leopold’s ethical sequence steadily

75. Anderson & Snyder, *supra* note 70.

76. According to research by David Zetland, the Philippines was the first country with a human right to water, in 1987; the Democratic Republic of the Congo was the most recent, last year. David Zetland, *Water Rights and Human Rights: The Poor Will Not Need Our Charity if We Need Their Water*, FORBES ASIA MAG., Apr. 12, 2010, <http://www.forbes.com/global/2010/0412/companies-technology-human-rights-poverty-ecotech-water.html>; David Zetland, *Water Rights and Human Rights: The Poor Will Not Need Our Charity if We Need Their Water* (Feb. 8, 2010) (unpublished manuscript, on file with author) [hereinafter Zetland, *Water Rights and Human Rights*].

77. DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

78. See generally 3 LUCIUS ANNAEUS SENECA, *MORAL ESSAYS* (John W. Basore trans., 1935).

79. See generally Martin Luther, *Concerning Secular Authority*, in *INTERNATIONAL RELATIONS IN POLITICAL THOUGHT* 204-12 (Chris Brown, Terry Nardin & Nicholas Renggar eds., 2002).

80. See generally FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* 2261-62 (2005).

expanded, gaining energy, momentum, and legitimacy through Jackson's broader democratic reforms, Lincoln's Emancipation Proclamation, and the equal rights and civil rights leadership of Susan B. Anthony and Martin Luther King, Jr. Now those words enshrined in our National Archives continue to stream like a relentless current through U.S. civics classrooms; they permeate city council meetings; they gush through legislative debates; they course through our domestic and foreign policies; they overflow beyond America's borders to inspire and shape the lives, liberties, and the pursuits of happiness by humankind throughout the world.

Unfortunately for our strained metaphor, water itself does not. Yet a similar transcending force, going by the name of God, nature, creator, or more scientifically, climate change, is bringing about the conditional contractions in which a right to water can at last be born.

VIII. THE INESCAPABLE THIRST

Over time, Earth's per capita availability of water has diminished substantially.⁸¹ More humans today compete for worse and less water than ever in history.⁸² Our individual "share" of freshwater has inexorably shrunk.

In the United States, where drinking from taps has been taken for granted for decades, the average American in fact can potentially access only a minute fraction of the healthy, stable fresh waters than he or she could have back in 1776.⁸³ This is largely due to national population growth exploding from two million, when Jefferson put pen to parchment, to three hundred million in today's digital age. Had nothing changed, each citizen would enjoy 150 times less water per capita than our founding fathers. Should nothing change from 1950 to 2025, water availability per capita in developing countries will decline eighty percent; in developed countries, like the United States, the next generation will have access to less than half the fresh water of its predecessors.⁸⁴

A. *Rising Pressure for Reform*

In reality, much has changed. Demands on water increase with affluence; a wealthier world has become a thirstier world. Our total use

81. HUMAN DEV. REPORT OFFICE, BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS, at v (2006), available at <http://hdr.undp.org/en/media/HDR06-complete.pdf>.

82. *Id.*

83. See Schneider, *supra* note 64.

84. *Id.*

of fresh water has quadrupled since 1940.⁸⁵ In the twentieth century, the average per capita consumption doubled from one thousand to two thousand liters per day.⁸⁶ Precipitation does not fall evenly upon the land; the rain in Spain fell so rarely on the plain that rivers flowed at one-third of their normal rate and reservoirs reach only one-fifth of their normal capacity.⁸⁷ Humans now consume one-fifth of the water that comes from rain or snow, leaving less for nature.⁸⁸ We unsustainably mine groundwater at 160 cubic kilometers annually.⁸⁹ Water access grows increasingly inequitable. Populations rise quickly. Water can rise in value above the poor's ability to pay.⁹⁰ The earth is warming, and as Australia discovered, even where rains increase, water evaporates faster.⁹¹ Meanwhile, too many billions of people have no secure and healthy access. The lack of clean water kills two children every minute.⁹²

The aforementioned litany could be easily dismissed as just more gloom and doom, more liberal green alarmism, to be debunked by conservative economists or dispassionate statisticians such as Bjørn Lomborg.⁹³ Except these stories are related by conservative scholars as well. When the most conservative, scrupulously documented, market-friendly water optimists predict that mounting scarcities and stresses mean “tension over water will make up yet another element in a potentially explosive cocktail of international conflicts of interest,” it would seem prudent to offer a pragmatic solution.⁹⁴

B. *Who Manages Whose Water?*

Disappointingly, the best these sources could do was to argue that past “lack of proper water management” meant “we have sufficient water, *but we need to manage it better.*”⁹⁵ Well, yes. But that is true of anything humans value. Substitute for water all that depends upon it—life, liberty,

85. BJØRN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST* 149 (1998).

86. *Id.* at 151.

87. *The Great Desiccation: Drought in South-Western Europe*, *ECONOMIST*, July 23, 2005, at 47, 47-48.

88. MILLENNIUM ECOSYSTEM ASSESSMENT, *ECOSYSTEMS AND HUMAN WELL-BEING: POLICY RESPONSES* 236-39 (2005); HUMAN DEV. REPORT OFFICE, *supra* note 81, at 146.

89. LOMBORG, *supra* note 85, at 157.

90. *Drying Up and Flooding Out*, *ECONOMIST*, May 12, 2007, at 49, 49.

91. *Liquid Assets: Where To Look for Sensible Water Policies*, *ECONOMIST*, July 19, 2003 (special section), at 13, 14-15.

92. LOMBORG, *supra* note 85, at 152.

93. *See generally id.* at 149-58.

94. *Id.* at 156.

95. *Id.* at 157 (emphasis added).

food, health, money, or power—and the utility of such advice quickly vaporizes under the globally rising heat.

IX. THE VIEW FROM THE LEFT BANK

Into this political vacuum stormed the global Left: urgent, purse-lipped, self-righteous, filled with fierce indignation, and waving the bloody shirt of martyrs to their cause. They seized the moral high ground with surprisingly little resistance. Their agenda was provided by Maude Barlow and Tony Clarke's *Blue Gold*, Jeffrey Rothfelders' *Every Drop for Sale*, and most recently, Alan Snitow and Deborah Kaufman's documentary (and now book), *Thirst*.⁹⁶

A. *Making a Manifesto*

While the economists prevaricated, the Left wrote and signed a manifesto that specified steps, timetables, and networks.⁹⁷ Two of its leaders were kind enough to draft the first "Treaty Initiative," which was "unanimously endorsed by the 800 delegates from 35 countries" to accompany demands on behalf of all the world's citizens, including, presumably, you.⁹⁸

The Left's view borrows Jeffersonian language, sprinkled with biblical authority. Their argument essentially reduces to: Never mind your cost-benefit equations, Washington Consensus, competition-driven incentives, technological innovation, and so-called marketplace efficiencies from Economics 101. As *the* essential element without which no living thing can exist, fresh water is not an exploitable resource. It is not a private good. It is not an exchangeable commodity. It is an intrinsic social and environmental necessity, owned by all living species as a collective responsibility that cannot be priced and must be exempt from any export or trade across local, state or national borders. "It cannot be sold by any institution, government, individual, or corporation for profit."⁹⁹

In response, the powers that be yawned and went about their business. Markets grew. Industrial research and development expanded. The World Trade Organization shrugged. The World Bank flicked them

96. See BARLOW & CLARKE, *supra* note 54; JEFFREY ROTHFELDERS, *EVERY DROP FOR SALE* (2001); SNITOW ET AL., *supra* note 7.

97. BARLOW & CLARKE, *supra* note 54, at xviii.

98. *Id.*

99. *Id.*

aside. The media ignored their pronouncements. And legislators and diplomats were focused on other matters, like wars on terror.

But inaction did not defuse water tensions or make the Left go away. To the contrary, events continued to cry out for some resolution. In the Middle East, suicide bombers blew themselves and innocents up, while demanding equal access to West Bank aquifers.¹⁰⁰ In Iraq, the U.S. military destroyed enemy water supply plants in Baghdad, and then failed to rebuild them on time, turning civilians against them.¹⁰¹ In Afghanistan, British forces struggled to hold back the Taliban from blowing up a new water supply dam being financed by the U.S. taxpayer.¹⁰² China, already holding most of the U.S. Treasury bonds but lacking water for hundreds of millions, warned that it was entering what its leaders ominously called a precarious “Dry Age.”¹⁰³

Piling onto existing scarcities after years spent railing against any commodification or privatization of water, liberal social activists borrowed pages from Gandhi, Martin Luther King, Jr., and Gloria Steinem, and began to provoke confrontations over water. In 2000, they chased Bechtel out of Cochabamba, Bolivia.¹⁰⁴ In 2002, they made water executives flee a suburb of Johannesburg, South Africa.¹⁰⁵ In 2004, they stopped Coca-Cola from abstracting water from Kerala, India.¹⁰⁶ Soon, campaigns hit closer to home. In 2005, a French village took back public control of its water from the corporate water giant, Suez.¹⁰⁷ The Left scored similar triumphs against the water barons, most spectacularly, in

100. Jim Giles, *Water and the Wall*, 425 NATURE 435, 445 (Oct. 2, 2003), available at <http://www.nature.com/nature/journal/v425/n6957/pdf/42544a.pdf>.

101. Thomas J. Nagy, *The Secret Behind the Sanctions: How the U.S. Intentionally Destroyed Iraq's Water Supply*, PROGRESSIVE, Sept. 2001, <http://www.commandreams.org/views01/0808-07.htm>.

102. Saeed Ali Achakzai, *Hundreds of Taliban Massing To Attack Dam*, REUTERS, Feb. 12, 2007, <http://www.reuters.com/article/idUSSP235102>.

103. Mark Townsend & Paul Harris, *Disaster Looms*, MAIL & GUARDIAN ONLINE (S. Afr.), Feb. 27, 2004, <http://www.mg.co.za/article/2004-02-27-disaster-looms>; Jehangir Pocha, *China's Water Supply in Danger of Drying Up: With New River Diversion Project, Government Hopes To Avoid Disaster*, S.F. CHRON., Sept. 5, 2004, http://articles/sfgate.com/2004-09-05/news/17444027_1_water_resources-china-institute-world-bank.

104. William Finnegan, *Leasing the Rain*, NEW YORKER, Apr. 8, 2002, at 43, available at http://www.newyorker.com/archive/2002/04/08/020408fa_FACT1; SNITOW ET AL., *supra* note 7, at 16.

105. Alexandru R. Savulescu, *Johannesburg Struggles To Supply Water and Sanitation*, ENV'T NEWS SERV., Sept. 2, 2002, <http://www.ens-newswire.com/ens/sep2002/2002-09-02-03.asp>.

106. Karl Flecker, *Coca-Kerala: The Real Thing Hits Kerala, India*, CANADIAN PERSPECTIVES, 2004, <http://www.canadians.org> (follow “Publications” hyperlink; click on “Canadian Perspectives”; click on “2004”; then “Coca-Kerala: The Real Think Hits Kerala, India”).

107. SNITOW ET AL., *supra* note 7, at 208-09.

Stockton, California, where citizens rose up to overturn a \$600 million municipal water utility privatization contract with the foreign-based multinational, OMI-Thames.¹⁰⁸

B. Eyes on the Prize

Emboldened by early victories, and assuming a global following of millions of angry activists, the Left closed in on the prize. The self-proclaimed Global Water Movement began to call on countries like the United States and organizations like the United Nations to add, correct, or make explicit a few words that their founders “accidentally” neglected.¹⁰⁹ Peasant women from the Mexican countryside, social activists from America, and French intellectuals alike joined forces.¹¹⁰ They demanded formal recognition of a natural right they claimed was imbedded in human beings, yet was overlooked by signatories of the Declaration of Independence in 1776 and later by authors of the Universal Declaration of Human Rights in 1948.

They insisted on equal public access to rivers, lakes, and aquifers. They required an equal share of clean, publicly owned water to meet each human being’s basic needs to drink, wash, and bathe. Where was all this leading? At the industry-dominated Fourth World Water Forum in Mexico City, 20,000 participants from 148 countries agreed in a statement that government, not companies, should take the lead to secure universal access to fresh water.¹¹¹ Yet the Left saw this as defeat because, they said, the declaration failed to adopt stronger language instructing governments and international organizations to invest in all humans “*the fundamental and inalienable right to water.*”¹¹²

Objections to adoption of a human right usually come from socialists in Russia, Myanmar, China, or Cuba. Not this time. The most adamant resistance to a human right to water came from conservatives in the United States.

108. *Id.* at 44.

109. *Id.* at 207.

110. *Id.* at 207-10.

111. Local Government Declaration on Water, United Cities and Local Governments Committee on the Local Management of Water and Sanitation, art. 3 (Mar. 21, 2006), http://www.worldwaterforum5.org/fileadmin/wwc/world_water_forum/wwf4/declarations/local_Authorities_Declaration_english.pdf.

112. Blue Planet Project, The Treaty Initiative To Share and Protect the Global Water Commons, http://www.blueplanetproject.net/documents/A_Plan_of_Action_01.pdf (last visited Jan. 22, 2010).

X. THE VIEW FROM THE RIGHT BANK

Blindsided by vociferous momentum from the Left, one would assume that the Right Bank might be shrinking in retreat. To some extent it is. Leaders of the World Bank, United Nations, and World Water Council left the Forum licking their wounds. In Stockton, California, the formerly pro-privatization newspaper and even some politicians reversed their stands while routing OMI-Thames out the door.¹¹³ Water multinationals largely withdrew from Latin America. Rheinisch-Westfälisches Elektrizitätswerk (RWE) announced that it would not go where it was not welcome.¹¹⁴ A leading water investment analyst, Debra Coy, warned that “aggressive opposition has clearly had a chilling effect” on water privatization efforts.¹¹⁵ But the Right remained quietly confident, and for good reason.

Internationally, the Washington Consensus thrives. The World Bank does not explicitly “force” developing countries to privatize water use—that is, sell infrastructure assets, tender concessions, or award management contracts to private companies.¹¹⁶ According to its spokesman, “[I]t never has.”¹¹⁷ But as the only moneybags in any given banana republic, it hardly needs to. Since the 1990s, in order “to establish incentives for private sector development,” the Bank simply requires privatization as a precondition to receiving loans or grants.¹¹⁸ The percentage of water loans requiring privatization increased from nine percent to eighty-one percent in less than a decade.¹¹⁹ China remains a prime privatization target.¹²⁰

A. *Legal Weight*

Legally, the Right exclusively holds an extensive and century-old body of legal jurisprudence, providing substantial precedent to back up its definition of water as a property right. Moreover, this property right to water was not handed down from above. It was not a charitable gift from a benevolent government. It emerged out of fierce conflicts over water use between competing mining, agricultural, and ranching claims

113. Alan Snitow & Deborah Kaufman, *Taking Back Our Water*, USA TODAY, Aug. 21, 2007, at A12.

114. SNITOW ET AL., *supra* note 7, at 196.

115. *Id.*

116. *Promoting Privatization*, *supra* note 7.

117. *Id.*

118. *Id.*

119. *Id.*

120. JUBILEE S.-ASIA PAC. MOVEMENT ON DEBT & DEV., WATER PRIVATIZATION IN THE ASIA PACIFIC REGION 3, 7-8 (2005), http://www.jubileesouth.org/upload1/water_lo.pdf.

in arid regions that ranged from eleven western states to Chile and Australia.¹²¹

Intellectually, the Right retains a great deal of energy and vibrancy. Though it does claim to offer emotionally resonant environmental and social benefits, the Right is driven mainly by rational discourse dating back to the Enlightenment and resting on the twin pillars of John Locke and Adam Smith. Its precepts boil down to this: all humans are by nature calculating primates; we seek to acquire any resource which is both useful to us and scarce; we reduce risk of conflict by defining valued resources as property; we develop government to protect life, liberty, and property as part of our inherent self. Moreover, they claim that by freely trading our defined and protected property as an asset, we can simultaneously increase personal well-being, allocate scarce resources efficiently, expand economic opportunities, create incentives for technological innovation, secure the general welfare, and enrich civilization. Their argument has changed little in two centuries. The only modification, and it is a big one, is that the scarce and valued resources used to be land, iron, oil, labor, or diamonds. Now the scarce and valued resource is water.¹²²

B. Economic and Political Clout

Economically, the right continues to quietly and absolutely grow its market share, reap profits, and reinvest some dividends in new technology. Suez, Bechtel, Vivendi, and RWE dominate the \$800 billion water services market, operating in hundreds of countries where they enjoy profitable confidence in their concession rights.¹²³ Coca-Cola, Pepsi, and Nestlé all compete in the global private bottled water market, which has soared to at least \$22 billion in the last two decades.¹²⁴ Water securities and stocks have expanded in value, number, and complexity. In the West, farmers, ranchers, cities, and charitable foundations continue to escalate trade in water rights. T. Boone Pickens and the Bass Brothers quietly seized opportunities that Mulholland would have envied.¹²⁵ Online private enterprises like WaterBank.com, iAqua.com, and WaterRightsMarket.com indicate that private sector players not only

121. Anderson & Snyder, *supra* note 70, at 191-93.

122. For discussions surrounding Adam Smith's famous Diamond and Water paradox, see James Salzman, *Is It Safe To Drink the Water?*, 19 DUKE ENVTL. L. & POL'Y F. 1 (2008).

123. BARLOW & CLARKE, *supra* note 54, at 105-06.

124. *Id.* at 142-43.

125. GLENNON, *supra* note 19, at 96-97; Berfield, *supra* note 32, at 40.

support clearly defining water as a property right, but further insist that governments enforce this right.¹²⁶

Politically, this economic clout has been flexed in national and global assemblies whenever competing versions of water rights arise. The White House intervened on behalf of upholding farmers' water property rights on the Klamath over those of tribal salmon fisheries.¹²⁷ The World Water Forum's organizers blocked any reference whatsoever to the final declaration to water as a human right, claiming that doing so would create certain legal obligations and guarantees under international treaties.¹²⁸ Those in power also feel that a human right to water could expose governments to lawsuits and widespread accusations of human rights violations for failing to provide clean water. Some felt that it would end all attempts at responsible cost recovery by forcing nations to supply an unlimited amount of fresh water for free, bankrupting governments and utilities. At national levels, most governments continue to cut public spending on aging water infrastructure, thus increasing dependence on private innovation and investments to take up the slack.¹²⁹

After losing immediate battles, the Right is taking a long-term view. As pressures increase and scarcities in water and public funds mount, time may be on its side. It still possesses most water by use and access. Possession is nine-tenths of the law, at least until any new law defines it otherwise.

XI. LOGICAL EROSION OF RIVAL BANKS

That question of possession and ownership returns us full circle to the bitter political stalemate over precisely how any legally binding property right or human right to water can and should be worded. Having heard the strengths of each side, let us further explore key weaknesses and caveats in both.

A. *Local Water Privatizers*

The Left warns against so-called *commodification*. It is rather facile to paint a picture of foreign corporate conglomerates sneaking in our backyards, coming to steal our water. But the Left fails to concede that in the literal and figurative backwaters of Africa, India, and Latin

126. See BARLOW & CLARKE, *supra* note 54, at 106.

127. Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A01.

128. SNITOW ET AL., *supra* note 7, at 207.

129. *Id.* at 231.

America, for billions of poor, the profit-seeking, stream-sucking, aquifer-depleting greed-head is not a foreign corporate entity like RWE, Suez, or Bechtel. The water businessman is in fact their neighbor.¹³⁰ Millions of black-market water vendors ply the urban slums, dirt roads, and rural pathways of the Third World, selling water from trucks and wheelbarrows in a thriving open market; they do so not by government decree or design, but by default.¹³¹ This vast and deep black market would lend support to the Right in terms that it is efficient and free and relies on decentralized entrepreneurs. It argues for the primordial force of markets in which water inescapably holds economic value.

B. *Hidden Costs of Water Trading*

Conversely, the Right tends to overlook economic water's potential *inequity* and *opportunity costs*. The poor pay cash or barter to the water vendors, yes, but they do so quite literally out the nose. Payment here borders on extortion. The poor fork over more than one-quarter of their income and regularly pay up to twelve times more for water than affluent urban elites.¹³² They pay more, and receive less quality water; their health suffers accordingly, spreading disease, stifling jobs, and suppressing economic growth.¹³³

C. *Monopoly Weaknesses*

If government brought about this situation by incompetence, does this reinforce the argument for *privatizing* services and viewing water as an exclusive property right? Not based on the empirical evidence of history. The Right tends to ignore that America has already experimented with private water services in the past, and that these efforts have all too often failed.¹³⁴ As firms went bankrupt, the public had to pick up the tab.¹³⁵ Firms failed for two reasons.

First, the water sector at early stages had many of the characteristics of a *natural monopoly*.¹³⁶ Without regulation to protect the public interest

130. WATKINS ET AL., *supra* note 39, at 19-20.

131. *Id.*

132. *Id.*

133. *Id.*

134. Alan Snitow & Deborah Kaufman, *The New Corporate Threat to Our Water Supply*, ALTERNET.ORG, Oct. 6, 2008, http://www.alternet.org/water/101177/the_new_corporate_threat_to_our_water_supplies/.

135. *Id.*

136. Econ. & Soc. Dev. Dep't, Food & Agric. Org. of the United Nations, *The State of Food and Agriculture 1993*, § II, <http://www.fao.org/docrep/003/TO800E/t0800eOb.htm> (last visited Apr. 11, 2010).

through intrusive rules on pricing and investment, there are dangers of monopolistic abuse.¹³⁷ These dangers, which ranged from withholding water during a fire to artificially setting prices under exclusive noncompete forty-year contracts, date back to the inception of America, when Aaron Burr and Alexander Hamilton (business partners before they were duelists) formed the corrupt Manhattan Water Company, which later became Chase Manhattan Bank.¹³⁸

Second, the private sector *lacks financial incentives* to service the poor. In any market for water, private firms tend to focus on high-grading their efforts demographically wherever they can maximize return on investments.¹³⁹ Failing that, a firm has incentives to cut investment in services, such as treating water, before delivery. In countries with high levels of poverty, private companies end up relying heavily on public subsidies for extended access.¹⁴⁰ A century ago, most U.S. water systems were private, but failed to serve the poor,¹⁴¹ so cities bought them out and ran them under public ownership. These were the primary reasons that even leading business figures at the World Water Forum did not support handing local water authorities over to private corporations.¹⁴²

D. *New Technology*

The Left's neo-Malthusian argument overlooks the ways in which *technological innovation* is starting to break up any natural water monopoly. Groundwater pumping, processing, storing, and transporting water have all undergone revolutionary changes in recent decades, due to market incentives for entrepreneurs. Borehole drilling, using solar and wind pumps, desalinizing by reverse osmosis, storing in plastic containers, and rainwater harvesting have all triggered decentralized approaches that can potentially offer better services to more people at

137. JAMES G. WORKMAN, HEART OF DRYNESS: HOW THE LAST BUSHMEN CAN HELP US ENDURE THE COMING AGE OF PERMANENT DROUGHT 179-90 (2009).

138. GERALD T. KOEPEL, WATER FOR GOTHAM: A HISTORY 72-86 (2000).

139. PETER H. GLEICK, GARY WOLFF, ELIZABETH L. CHALECKI AND RACHEL REYES, THE NEW ECONOMY OF WATER: THE RISKS AND BENEFITS OF GLOBALIZATION AND PRIVATIZATION OF FRESH WATER, at iii, 6 (2002), available at http://www.pacinst.org/reports/new_economy_of_water/new_economy_of_water.pdf.

140. *Id.*

141. Jon Luoma, *The Water Thieves*, ECOLOGIST, Jan. 3, 2004, at 34; Bill Marsden, *Cholera and the Age of the Water Barons*, WATER BARONS (Ctr. for Pub. Integrity, Wash. D.C.), Feb. 3, 2003, <http://projects.publicintegrity.org/water/report.aspx?aid=44>.

142. Mark Stevenson, *Governments Must Take Lead in Providing Safe Drinking Water, Forum Concludes*, ASSOCIATED PRESS, Mar. 23, 2006.

lower prices.¹⁴³ Of course, these improvements depend on the widest possible open competition within and between public and private providers.¹⁴⁴ Arguably, it makes no more sense to hand one lone public utility a thirty-year concession than it does to grant monopoly protection to a single corporation: both may stifle incentives to improve services or respond to competition.

E. Water Remains Unique

Conversely, the Right overlooks how water is a *fugitive* finite resource that resists control. It cannot be depleted through conversion like oil. It does not stay in one place like land. It cannot be replicated like a patented widget, a song, or a book.¹⁴⁵ Because water's natural quantity and quality in any one place change over time—sometimes over a course of minutes—any law enforcement must adapt quickly. Often, water property rights have proven unable to adapt to dynamic rivers. In the American West, most rivers have been over-allocated. That means that people had more water property rights than the rivers and groundwater contained, even in wet years.¹⁴⁶ In dry years, junior and upstream holders of water rights lost out. In all seasons, agricultural water rights deprived growing cities, other states, industries, and ecosystems of the water they needed to survive, creating much of the friction we see today. In short, if water as a right is held only by a narrow, marginally productive agrarian aristocracy, it grows brittle and vulnerable. It cannot adapt. This is one reason a permanent drought led Australia to take over public control of water.¹⁴⁷

F. Water Markets Not Always Free or Equitable

The Right has a mixed record in *voluntarily* bringing efficiently traded property rights to water. That right emerged historically, out of competing claims, to reduce risks from conflict. But as time changed, the rights hardened. When claimants were no longer the most efficient, wealthy, or productive users of the water, their right did not become easily “fungible” or transferable for efficiency gains. Also, while a

143. INT'L RIVERS, SPREADING THE WATER WEALTH: MAKING WATER INFRASTRUCTURE WORK FOR THE POOR (2006).

144. Franklin M. Fisher, Annette Huber-Lee, Sustainability, Efficient Management, and Conflict Resolution in Water (unpublished manuscript, on file with author).

145. Anthony Turton, *Water Wars*, 2 AFR. DIALOGUE MONOGRAPH SERIES 65, 65-105 (2001).

146. GLEICK, *supra* note 17, at 138.

147. *The Big Dry: Australia's Water Shortage*, ECONOMIST, Apr. 28, 2007, at 81, 81-84.

market orientation may allow sales of water, many holders of the water right prove reluctant to sell; for them, water use represents a way of life and a connection to their community that some find hard to surrender at any price.¹⁴⁸

There is also a *qualitative* issue. With most property rights—a mattress, a house, a pearl necklace—change of ownership does not change the property itself.¹⁴⁹ With water, both change immediately and radically; Owens Valley farm or fishery water converts into Los Angeles tap water, and goes into lawns, or sewerage.

G. *Missing Details of a Human Right*

Finally, the Left tends to downplay, or offer vague reassurances about how a human right to water would affect *liability, quantity, cost, and conveyance*. Longtime pragmatic water experts analyzing water as a human right, such as Peter Gleick, claim that an explicit right to water would not expose governments to lawsuits.¹⁵⁰ Nor, he believes, would a right to water “imply a right to an unlimited amount of water. Resource limitations, ecological constraints, and economic and political factors limit water availability and human use.”¹⁵¹

Both claims appear to be based largely on shaky and wishful thinking; human rights are always and invariably used to bring accountability to governments and responsibility to private institutions; that is the whole point of enshrining rights in law. Also, a human right is pure and absolute; we do not limit free speech to a certain vocabulary, or freedom of religion to seven creeds maximum and no more.

None of these weaknesses and caveats is insoluble; none of their barriers to a right to water is insurmountable. Given finite constraints on time, money, and above all natural resources, how much water would parties agree is necessary to satisfy a human right to water? “Enough solely to sustain a life? Enough to grow all food sufficient to sustain a life? Enough to maintain a certain economic standard of living?”¹⁵²

148. Brian Haisman, *Impacts of Water Rights Reform in Australia*, in WATER RIGHTS REFORM: LESSONS FOR INSTITUTIONAL DESIGN 113, 123-26 (2005), available at <http://www.bvsde.paho.org/bvsacd/cd47/raustralia.pdf>.

149. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 157 (2000).

150. Peter Gleick, *The Human Right to Water*, 1 WATER POL'Y 487, 499-500 (1999).

151. *Id.* at 494-95.

152. *Id.*

XII. QUANTITY AND DELIVERY

To his credit, Gleick explores this nearly ecclesiastical question with sincerity and pragmatism: he draws his answers from international discussions over development, an analysis of the human rights literature, and an understanding of human needs and uses of water.

A. *Quantifying the Right*

Gleick concludes that for basic needs, which include cooking, drinking, and cleaning, a worldwide basic human right is 50 liters (13.2 gallons) per capita, per day (LCD).¹⁵³ Robert Glennon divides 5000 gallons per U.S. household per month, with 2.95 people in each home to average 210 liters per person per day.¹⁵⁴ The average of 18 million Metropolitan Water District users in southern California use 811 LCD (for comparison Beverly Hills residents average 1239 LCD, or 327 gallons).¹⁵⁵

Both in terms of authority and in amount, thirteen gallons did not offer much. But for Nelson Mandela's South Africa, busy drafting a new constitution with a new water law in a political crucible that showed tens of millions of marginalized people grasping for power, security, and water at roughly the same time in history, it was a start.¹⁵⁶ Now others are showing how and why even greater security could come if the right to water included enough nonpotable water to grow enough nutritious food necessary to thrive.¹⁵⁷

B. *Transporting Water to and by Whom?*

Conveyance is a real concern, as it represents the primary cost of water, whether in the hours spent fetching water in buckets by women and children, or the capital costs sunk into laying pipes and pumps by public or private firms. But here, again, there is no reason why the current suppliers—whether water vendors, pipes, groundwater, or rainwater harvesting—could not be made legitimate and operated as

153. *Id.* at 496.

154. See ROBERT GLENNON, UNQUENCHABLE: AMERICA'S WATER CRISIS AND WHAT TO DO ABOUT IT (2009).

155. DAVID ZETLAND, CONFLICT AND COOPERATION WITHIN AN ORGANIZATION: A CASE STUDY OF THE METROPOLITAN WATER DISTRICT OF CALIFORNIA 97 n.2 (2009).

156. Kader Asmal, *Water as a Metaphor for Governance: Issues in the Management of Water Resources in Africa*, 1 WATER POL'Y 95, 95-101 (1999).

157. SWEDISH INT'L DEV. COOP. AGENCY, LET IT REIGN 19 (2005), http://www.siwi.org/documents/Resources/Policy_Briefs/CSD_Let_it_Reign_2005.pdf.

enterprises. That would require expanding the cross-subsidy among users from the privileged to the entire population within a watershed.

C. Can It Be Traded?

At root, the core question is whether in its form and content the equitable human right is inalienable, which means it cannot be traded, as it is integral to a person's existence, nor alienable, in which case it is owned and can be divested. This is a vital distinction. In a true demand-driven economy, those who use less than their full amount can sell the remainder of their right to others. In this case, it has been argued that there is little need to push water to the underserved when water vendors will beat a path to their door.

The economist David Zetland, in *Water Rights and Human Rights: The Poor Won't Need Our Charity if We Need their Water*, has looked at the states which have enacted a human right to water in their constitutions.¹⁵⁸ His comparison found that statutes in the books did little or nothing to improve access on the ground.¹⁵⁹ As this discussion appeared depressing, he asked, "How is it possible to make sure that people get adequate, clean water if constitutional rights don't even bring that water to them?"¹⁶⁰

No one disputes the absolute necessity for a secure quantity of water. So should the Left's cry for a certain inalienable right to water be recognized by the United Nations, World Bank, European Union, or national constitutions? Similarly, no one disputes how markets are more efficient than government. So should we follow the Right's cry to privatize all water and water delivery systems and remove government from the equation? As tempting as both solutions may sound, the answer is no, not while phrased in those precise terms. The Left Bank's hearts are in the right location; it is their minds that are temporarily misplaced. The Right Bank's reasoning is there, but it lacks equity and fails to catalyze trust building among all stakeholders.

Interestingly, Zetland's analysis and conclusion showed that "it would be possible if we look at the question from a different angle. Instead of giving people a right to receive water, give them a property right in water that can be traded for cash. With cash in hand, they can make water come to them."¹⁶¹ His conclusion encapsulates the essence of a pragmatic right to water: it turns de Soto's "dead capital"—water

158. Zetland, *Water Rights and Human Rights*, *supra* note 76.

159. *Id.*

160. *Id.* at 9.

161. *Id.*

which adds no value and offers no incentives for either conservation or equity—into transformative “live capital” that organizes itself into both an efficiently used economic good and an equitable human ethic.¹⁶²

XIII. HOW TO CODIFY THE RIGHT

Ironically, the one word designated to compel that transformative capital to all humans may in fact be holding it back: inalienable. “Inalienable” plugs and traps the flow of such an ethical extension. “Inalienable” leads to gridlock, stalemate, waste, distrust, and inaction. It does so by bogging down the right to water as inherently useless, or what modern development economists describe as “dead capital.” Transformation of a right to water into a useful or truly “live” natural resource requires us to erase the word’s first two letters.

A. *Protecting, not Providing, a Right*

To become efficient, equitable, and responsive, the conservative basis for rights must remain. The emerging consensus around liability, quantity, quality, cost, and conveyance depends not on government providing the right to water, but rather on governments ensuring that the right to water service is provided.

Moving from scarcity and conflict to rights and security can happen, because both Left Bank and Right Bank arguments are fused into one certain, *alienable* right. Nations can bring peace and harmony to the Dry War and act as midwives in the fitful birth of a new human right through three reasonable, pragmatic, moderately conservative steps.

B. *Three Steps to Success*

First, agree to protect a basic equal share of water, owned by the people. No one disputes how every human requires a certain amount to survive independently. No one disputes how history, geography, and now climate deny that equitable amount to half the world’s population, even in the United States. No one disputes that government can secure law, order, life, liberty, and general welfare through a certain statutory human right to water.

Second, address the legitimate concerns, noted above in the seven caveats,¹⁶³ which such a right provokes. Proponents on the Left concede such questions relating to water quality, quantity, cost, and conveyance.

162. *Id.*

163. *See infra* Part XI.

Opponents on the Right warn that if water becomes a human right, food, housing, medicine, and electricity will follow, sliding toward socialism and waste. Yet neither practical nor ideological concerns have shown themselves to be manifestly insoluble. Indeed, solutions to both have strong precedents, here and abroad.

Individuals daily require at least ten potable gallons for drinking, cooking, cleaning, health, and sanitation.¹⁶⁴ Kenya, South Africa, Ecuador, and Belgium preserve such a right, as do Massachusetts and Pennsylvania.¹⁶⁵ Others argue that people require 135 liters per day for human health, economic, and social development,¹⁶⁶ less than a third of the amount even the greenest Californians average.¹⁶⁷ Another 1500 liters of untreated water could be included to cover the amount sufficient to grow basic nutritional food. A secure four hundred gallons covers the entire human right.

If this amount and approach sounds radical, recall that Chile, Australia, and America's western states have secured more abundant free rights to water for more than a century.¹⁶⁸ In these cases, water is a property right—tightly confined by use and inherited by a tiny, marginally productive agrarian aristocracy—rather than a human right democratically enjoyed by all. Such restrictions leave water rights vulnerable, brittle and unable to adapt to rising demand or shrinking supply. Since 2000, South Africa has embarked on making water available as an equity right to its poorest, most marginalized citizens.¹⁶⁹

Third, and critically, resist the temptation to define rights to water as somehow “inalienable.” That Jeffersonian word cements overdependence on fickle governments or charities while smothering incentives to protect and conserve. The language locks up water, blocks trade, restricts freedom, and turns rivers and aquifers into economist Hernando de Soto's dead capital. To bring currents back to life, the right to water must be fungible and transferable.

164. Water.org, Water Facts, <http://water.org/learn-about-the-water-crisis/facts/> (last visited Apr. 11, 2010).

165. DE SOTO, *supra* note 149, at 157.

166. Int'l Envtl. Law Research Ctr., Human Right to Water: Selected Documents, http://www.ielrc.org/water/doc_hr.htm (last visited Dec. 12, 2009).

167. Jonathan Chenoweth, *Minimum Water Requirement for Social and Economic Development*, 229 DESALINATION 245, 245-56 (2008).

168. 3 MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: POLICY RESPONSES 236-39 (2005).

169. See G.J. Pienaar & E. Vander Schyff, *The Reform of Water Rights in South Africa*, 3/2 ENV'T & DEV. J. 179, 193-94 (2007), available at <http://www.lead-journal.org/content/07179.pdf>.

XIV. CONCLUSION

The casual visitor roughing it off the tourist track in Africa and Asia will see how the poor have long trucked, bartered, and exchanged water. Indeed, the oldest continuous civilization in the Kalahari Desert has practiced Xaro, a highly efficient but informal community water resources rights exchange network for 30,000 years.¹⁷⁰ In America's West, conservationists, tribes, and landowners are finally beginning to lease, buy, bank, and donate water rights for nature.¹⁷¹ In both worlds, scarcity bred conflict and competition; competition spurred trade; trade brought economic efficiencies; and efficiency conserved water.¹⁷²

More universal conservation could result if all citizens were legitimately engaged, under a right. Equity and efficiency would result if dams were managed more like water banks, with lending and borrowing on interest, or if municipalities and irrigation boards were run as responsive enterprises. This would also bring security, freedom, and flexibility. A basic lifeline could never be forcibly rationed from above, yet excess shares of water could always be voluntarily conserved from below and traded laterally.

Indeed, analysts Franklin Fisher and Annette Huber-Lee argue that exchanges could alleviate national security tensions, even in the Middle East. By giving an economic value to water and making it a tradable resource, parties will realize ways to resolve water disputes through cooperation.¹⁷³ Consequently, such trades are not "a zero sum game but rather a win-win opportunity."¹⁷⁴

Imagine the social equity if three hundred million Americans, and eventually six to nine billion Earthlings, could own, conserve, and choose how to invest their four-hundred-gallon-a-day share. Imagine the economic efficiency as farmers, industries, or governments all bid for water shares from willing citizens.

This Essay argues that water ethic no longer lies hypothetically in the future. It has been anchored in the past and is inexorably taking shape today in many forms all over the world. Rather than fight and resist the current pressures as they build an informal and tradable right to

170. James G. Workman, *Timeless H2ownership: An Ancient and Equitable Tradition of Efficient Water Resource Trading in Desert Cultures*, GLOBAL WATER INTELLIGENCE MAG. (forthcoming May 2010); WORKMAN, *supra* note 137, at 145-49.

171. Anderson & Snyder, *supra* note 70.

172. RICHARD L. STROUP, ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT 10 (2003).

173. FISHER & LEE, *supra* note 49, at 64.

174. *Id.* at 66.

water, the global Left and the Right could help most by allowing it to emerge, flowing forth from below in a confluence of its own.