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**TOO SIMPLE RULES FOR A COMPLEX WORLD? PRIOR APPROPRIATION
WATER RIGHTS AS NATURAL RIGHTS**

Vanessa Casado Pérez[†]

Abstract

This Article assesses the fit of Professor Claey's theory of Natural Property Rights to traditional prior appropriation, the regime that allocates water in the West, and its capacity to fit the future of the regime. Natural Property Rights does not offer clear answers to the conflicts under the prior appropriation doctrine of water when there is scarcity. This Article explores the lack of determinacy of Claey's theory and the maladjustment between the theory and some of the foundational prior appropriation principles, which cannot be ignored even in the most stylized form of the regime. In particular, the Article analyzes the interaction between the definition of the right and the type of use, the necessity proviso in a market context, the role of greed in prior appropriation trades, and the public trust doctrine.

Professor Claey's theory of natural property rights offers something similar to Richard Epstein's famous call for "simple rules for a complex world,"¹ but in setting forth his basic, foundational concepts and principles in his current monograph, his theory is perhaps too simple in its rules. This Article identifies some of the ways in which Claey's theory fails to provide the determinacy and guidance necessary to resolve conflicts over claims to water.

Claey's *Natural Property Rights* puts forward a—not the—theory of property based on natural law,² and he does not limit it to real property as is often the case. One of the examples that pervades the book is water

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1. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 21 (1995).

2. Eric Claey, *Natural Property Rights* (Sept. 17, 2021) (unpublished manuscript) (on file with Texas A&M Journal of Property Law); see also Eric R. Claey, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415 (2023) [hereinafter "Claey, *Introduction*"].

rights. Property is far more than land. Land tends to be our focal point, and our 1L courses focus, perhaps too much, particularly in the time we live in, on it. However, property is far more than land, and we often fall into the trap of using the same framework for land as for everything else or trivializing whatever does not fit the land or the personal property mold. A theory that can cut across different property types is not commonly found. Claeys's book also helps readers understand when rights to other resources are bundled with land and when they stand alone. I contend that water may be a better vehicle to understand how Claeys's theory applies beyond dirt to other contemporaneous forms of property that pop up and where claims are less boundable, such as data, even if the book focuses on tangible resources. But water is also challenging not because of its natural properties but its social ones. It is often the case across jurisdictions that water as a resource is conceived as public property, but we allocate private rights of use (usufructuary rights).³ This Article offers a moderate critique of Claeys's natural rights approach regarding both its explanatory power and his normative prescription in relation to contemporary water challenges. As this Article will explain, in my opinion, Claeys's theory (1) lacks enough determinacy and (2) fails to account for some of the normative principles built into the structure of water law from its historical inception that can provide guidance on how to resolve disputes over water.

Claeys engages with both the regime that allocates water in the United States humid East, riparianism, and the regime that allocates water in the West, prior appropriation. Riparianism grants rights to those who have land bordering a river on a reasonable use basis.⁴ Prior appropriation is a doctrine born in mining camps in arid climes and allocates water based on who puts the water to beneficial use first.⁵ When, as often happens in the West, there is not enough water, those with older water rights receive water first. Interestingly enough, the 100th meridian is often used, dividing riparian and prior appropriation states maps precipitation.⁶ Once rainfall drops below 20 inches per year, prior appropriation flourishes. Claeys uses the stylized common law form of

3. Dale Whittington, *Ancient Instincts: Implications for Water Policy in the 21st Century*, 2 WATER ECONS. & POL'Y (2016); Noah Hall & Joseph Regalia, *Waters of the State*, 59 NAT. RES. J. 59, 69 (2019) (explaining what it means for water to be considered public in different states).

4. BARTON H. THOMPSON JR. ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES & MATERIALS 27-38 (W. Acad. Publ'g, 6th ed. 2018).

5. *Id.* at 173-78.

6. Nisha D. Norojan, *Prior Appropriation, Agriculture and the West: Caught in a Bad Romance*, 51 JURIMETRICS 181, 196 (2011).

those regimes. While today many states have codified their water regimes,⁷ the rules, to a large extent, absorb the common law. Hence understanding their roots can help guide the path forward and the responses to climate change challenges. The aim of this Article is to assess the fit of Claeys's theory to the traditional form of prior appropriation, as well as understand its capacity to both predict the future of prior appropriation and evaluate it. This Article covers four issues: first, the definition of the right itself through productive use; second, the necessity proviso and its fit with markets; third, the sufficiency proviso and the role of greed in water markets; and, finally, the role of public goods in water as embodied in the public trust doctrine among others.

Prior appropriation perfectly illustrates the idea of how someone is entitled to a natural right. To get a prior appropriation water right, the user must put the water to beneficial use. Beneficial use is both the type of use and a measure of the quantity he will be entitled to in perpetuity. A farmer would divert water to irrigate his alfalfa. They communicate their claim to others by diverting the water from the river. Building a ditch sends a message to the outside world of the user's claim. Historically prior appropriation required diversion and beneficial use to establish a water right,⁸ illustrating the signaling effect of use. Thus, Claeys's theory accounts for some central tenets of prior appropriation, namely the central role of usufructuary rights in such a regime and their signaling effect.

What Claeys's theory of natural property rights fails to offer, in my modest opinion, is a dynamic component, something prior appropriation is also lacking. Prior appropriation rights often date back to the 19th Century. A productive use 200 years ago is very different from a productive use today, particularly if productive use captures the measure as well as the type of right. Claeys chooses perhaps the best well-known, and one of the very few examples, of productive use limiting certain inefficient uses of water. He comments on the case of a water user drowning gophers with his water right and that being considered a wasteful use.⁹ However, applying his theory to a much more common, much harder situation could have offered more guidance. If a farmer in

7. ROBERT W. ADLER ET AL., *MODERN WATER LAW, PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS* 281-342 (2d ed. 2018).

8. *Id.* at 155-69.

9. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 1007 (Cal. 1935). Another case where the irrigator was considered to have put water to non-beneficial use was one where the irrigator had used water to prevent frosting. *In re Imperial Irrigation Dist.*, No. 1600, 1984 WL 947798, at *2-5 (Cal. St. Wat. Res. Control Bd. June 21, 1984) (order).

the 19th Century used twice as much water to grow a cereal crop than best practices today suggest and nowadays, we have many more competing claims for such water, from, for example, urban areas, productive use could be an ever-evolving limitation, not just justification, of existing rights offering a way for the system to update itself. Unfortunately, Claeys does not give us the answer, but certainly current practice in prior appropriation states is not to consider productive use as a dynamic concept.

Claeys puts forward two, and only two, justifications to impose limits on usufructuary rights beyond the limits arising from the nature of the resource itself, such as water's fugitive nature: the sufficiency proviso and the necessity proviso.¹⁰ These two provisos fit prior appropriation but not completely; at turns, the regime does not honor them; at turns, these two provisos do not capture the portfolio of limitations. The necessity proviso "covers scenarios in which one person needs to use someone else's property to stave off a grave threat."¹¹ The sufficiency proviso "covers scenarios in which a proprietor has taken more of a resource than is sufficient for others to have equal opportunities to appropriate and use that same resource."¹² The following paragraphs analyzed the fit of the necessity and sufficiency provisions with prior appropriation and the public good component of water law embodied in the Public Trust Doctrine.

Times of emergency could trigger the necessary proviso when some users are without water and could justify curtailing others' water rights.¹³ This situation is today more relevant than ever as scarcity is the new normal in many areas of the West of the United States and across the world,¹⁴ as they suffer what some label a "megadrought."¹⁵ Scarcity

10. Claeys, *supra* note 2, at 19; *see also* Claeys, *Introduction, supra* note 2, at 437–38.

11. Claeys, *supra* note 2, at 19; *see also* Claeys, *Introduction, supra* note 2, at 437.

12. Claeys, *supra* note 2, at 19; *see also* Claeys, *Introduction, supra* note 2, at 437–38.

13. In the United States, water quantity is governed at the state level. As such, administrative reallocations in times of drought happen within a state (notwithstanding the effects that one state's decision may have on water availability on shared basins within the parameters of the compact governing such shared basin). There have been calls about interbasin transfers between the Great Lakes states and the West but that would require federal action and seems unlikely. Jennifer Yachnin, *Arid West Starts Dreaming About Piping in Water From Afar*, E&E NEWS (Aug. 25, 2022, 1:08 PM), <https://www.eenews.net/articles/arid-west-starts-dreaming-about-piping-in-water-from-afar/> [<https://perma.cc/TYZ7-FCVR>].

14. Claire Klobucista & Kali Robinson, *Water Stress: A Global Problem That's Getting Worse*, COUNCIL ON FOREIGN RELS. (Aug. 2, 2022, 12:02 PM), <https://www.cfr.org/backgrounder/water-stress-global-problem-thats-getting-worse> [<https://perma.cc/NQR2-NZJF>].

15. A. Park Williams, Benjamin I. Cook & Jason E. Smerdon, *Rapid Intensification of*

inevitably will lead to conflict as there will not be water for all uses and users, and allocative decisions will have to be made. One can imagine a situation where households are without water and the water authority orders curtailing the right of agricultural users. This, in fact, happens often during droughts. The necessity proviso seems to justify the use of emergency powers. But there are two unresolved issues. First, the necessity proviso cannot be used in a decentralized manner without some sort of coordination device, as it would lead to conflict. There needs to be some decisionmaker who is going to set the bar as to what constitutes a “great threat”; otherwise, the risk is to spiral into self-help. It is unclear how we can apply the necessity proviso to each case in situations where we have little water and many disparate claims. Beyond the satisfaction of basic needs such as hygiene, drinking, and cooking that would justify anyone taking water from someone else, it is not clear when a farmer who is going to lose his cereal crop and, thus, his livelihood is justified in claiming water being used by someone else. Could he take some water from another user who is facing a similar situation? What about taking water from a manufacturing company employing thousands of workers?

Second, the use of the necessity proviso could deny the basic tenant of prior appropriation: “first in time, first in right.”¹⁶ One of the key differences between prior appropriation and riparianism is this principle of apportionment in times of scarcity. In Western states, periodic droughts are the lay of the land, and often there is not enough flow to satisfy every water right, even in non-drought conditions, because streams are overallocated.¹⁷ When that happens, those with older water rights get water. Those rights are extremely valuable, and those junior to them could buy or lease those water rights.¹⁸ But often, when the situation is dire, the priority system gets abrogated. Claeys does not offer much guidance on the limitations of such a limit. In particular, I wonder if the possibility of engaging in market transactions reduces or eliminates the possibility of necessity. If it does not, Claeys seems to suggest that there is a naturally implicit ranking of uses where the needs of households, and rightly so, are at the top. While that is a ranking that

the Emerging Southwestern North American Megadrought in 2020-2021, 12 NATURE CLIMATE CHANGE 232, 232 (Feb. 2022).

16. ADLER ET AL., *supra* note 7, at 176–86.

17. For an account of the majority of California’s water basins see Theodore E Grantham & Joshua H Viers, *100 years of California’s water rights system: patterns, trends and uncertainty*, 9 ENV’T RSCH. LETTERS 5 (2014).

18. ADLER ET AL., *supra* note 7, at 192–99.

exists in riparianism¹⁹ and in some jurisdictions where water is subject to administrative licenses, it is not a principle in prior appropriation. Cities may be without water, and farmers with older water rights may be irrigating alfalfa. In practice, though, emergency measures tend to quench the cities' thirst, but it is outside the water regime framework.²⁰

Claeys beautifully explains how riparianism's reasonableness principle embodies the sufficiency proviso,²¹ but he does not engage in illustrating it with prior appropriation. The sufficiency proviso is embodied more in the spirit than in the law of prior appropriation. John Locke maintained that an individual could own as much property as "anyone can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in: whatever is beyond this, is more than his share, and belongs to others."²² As such, the translation into a prior appropriation principle should prompt internal rules to prevent the concentration of ownership over water rights. But the only provision in this regard is the "use it or lose it" principle and its corollary, the forfeiture doctrine. Water rights must be put to use. If a water right remains unused for a period of time, it is forfeited.²³ While one may read this principle of mandatory use as having a signaling function, it is most often understood as an anti-speculation doctrine. Water is not an investment asset, and, as such, there is no room for speculators who would sit on their water rights waiting to sell them to whoever pays a higher price. Yet this doctrine does not fully capture the sufficiency proviso as it does not do much to police concentration; it just polices greed motivation.

The focus on speculation without any deconcentrating measure in prior appropriation is quite a departure from the antimonopoly principle and wide distribution of rights that permeates natural resources policy in public lands in the United States, from homesteading to fisheries. However, historian David Schorr argues that prior appropriation was built on the basis of distributive justice principles inherited from the codes of the mining camps.²⁴ In fact, prior appropriation itself may be the embodiment of the sufficiency proviso since it does not require land

19. In riparian systems, courts give priority to "natural" uses like use of water by households over "artificial" uses like use of water for industry. See *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955).

20. Vanessa Casado Pérez, *All Dried Out: How Responses to Drought Make Droughts Worse*, 51 TULSA L. REV. 731, 739-46 (2016).

21. Claeys, *supra* note 2, at 136.

22. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 31 (1690).

23. ADLER ET AL., *supra* note 7, at 186-91.

24. David Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 ECOLOGY L.Q. 3 (2005).

ownership to perfect a water right and, as such, prevents the monopoly of capitalists. Current events may put the sufficiency proviso to the test: recently, large companies, some of them Wall Street financial ones, have invested in water.²⁵ Water Asset Management, in particular, has triggered the worries of water users and the state of Colorado by becoming the main landowner and the main water rights holder in several mutual irrigation districts.²⁶ Colorado is worried about the ultimate goal of such transactions.²⁷ It believes Water Asset Management is trying to profit from selling those water rights. Prior appropriation does not offer any tool to prevent such concentration from happening. But the sufficiency proviso suggests it is against the spirit of such a water regime. However, Claeys affirms that distributive concerns are less at the forefront of prior appropriation, given the need to invest in diverting water.²⁸ Such a statement would help if these rights were assigned from scratch and scale was necessary to divert water. In that scenario, we should accept large holders of water rights. But when the concentration happens due to subsequent transactions, the distributive justice concerns are revived; particularly when the concentration is coupled with the treatment of water as a commodity, not as a production asset. Regulatory changes in response to Wall Street-like investment may translate the sufficiency proviso into legislation.²⁹

Finally, the Public Trust Doctrine³⁰ can arguably cover part of the public good aspects of water resources, which Claeys does not engage

25. Nelson D. Schwartz, *Investors Are Mining for Water, the Next Hot Commodity*, N.Y. TIMES (Sept. 24, 2015), <https://www.nytimes.com/2015/09/25/business/energy-environment/private-water-projects-lure-investors-preferably-patient-ones.html> [<https://perma.cc/G8J8-4EWC>].

26. Heather Sackett & Luke Runyon, *Western Colorado Water Purchases Stir Up Worries About the Future of Farming*, ASPEN JOURNALISM (May 29, 2020), <https://aspjournalism.org/western-colorado-water-purchases-stir-up-worries-about-the-future-of-farming/> [<https://perma.cc/M596-YZ92>].

27. Thy Vo & Michael Booth, *Colorado Wants to Keep Investors from Flipping Water Rights. Let the Speculation Begin*, THE COLORADO SUN (Dec. 14, 2021, 4:08 AM MST), <https://coloradosun.com/2021/12/14/colorado-water-speculation-draft-legislature/> [<https://perma.cc/983X-8R9G>].

28. Claeys, *supra* note 2, at 185.

29. Colorado passed a bill in 2022. *See* S.B. 22-029, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022), https://leg.colorado.gov/sites/default/files/documents/2022A/bills/2022a_029_01.pdf [<https://perma.cc/876L-B9SB>]. Washington State is also considering measures to curb these speculative investments. *See* Levi Pulkkinen, *Lawmakers Want to Protect Water Rights in Washington From Wall Street Speculation.*, CROSSCUT (Feb. 4, 2020), <https://crosscut.com/2020/02/lawmakers-want-protect-water-rights-washington-wall-street-speculation> [<https://perma.cc/DP3Y-TJUB>].

30. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 485–86 (1970).

with in his theory, at least as it appears in the available version of his monograph. The Public Trust Doctrine dates back to Emperor Justinian and 10443, “the public right to use ‘things [that] are common to mankind: the air, running water, the sea, and consequently the shores of the sea.’”³¹ While Claeys does treat prior appropriation rights as usufructuary, engaging with the Public Trust Doctrine would have ensured readers received a complete picture. One approach could attempt to paint the Public Trust Doctrine as unconnected to water. The traditional form of this doctrine applies to the beds and banks of a river and the wet sand area in the ocean. However, states like California have applied the Doctrine to the resource itself: water. In the famous Mono Lake case, California’s superior court saw the Public Trust Doctrine as a mandate, albeit without guidance, to curtail Los Angeles water rights to protect the environment. Claeys covers the idea of water bodies as a commons, where the sufficiency proviso combined with whatever is deemed the best productive use leads us to declare some resources as open to all.³² This could be the anchorage of the Public Trust Doctrine in his theory, but it begs the question of how to prioritize between environmental uses and uses that divert water. While in arid places, putting water to use is essential, and that drives the difference between riparianism and prior appropriation, we are no longer living in the 19th century when ditch building was a complex arduous enterprise.³³ Today many of the consumptive uses of water may not have engaged in such activities. Claeys seems to suggest that environmental uses should be a lower priority.³⁴ But if the work to put water to use is lacking today or if it only existed 200 years ago, then Claeys’s theory offers little guidance to decide between competing uses. It is safe to say that today many prior appropriation jurisdictions have moved to accept instream uses for environmental purposes as beneficial uses,³⁵ but it seems a move not entrenched in the idea of productivity Claeys espouses.

Natural Property Rights premises can be illustrated by prior appropriation in its purest form, but those premises do not offer clear answers to the conflicts under the prior appropriation doctrine of water when

31. Dotty E. Lemieux, *The Public Trust Doctrine: Venerable and Besieged*, ON THE COMMONS (Dec. 19, 2005) <https://www.onthecommons.org/public-trust-doctrine-venerable-and-besieged> [<https://perma.cc/2SU5-XPKG>].

32. Claeys, *supra* note 2, at 151; *see also* Claeys, *Introduction*, *supra* note 2, at 464.

33. Claeys, *supra* note 2, at 185.

34. *Id.* at 301–03.

35. LEON F. SZEPTYCKI ET AL., ENVIRONMENTAL WATER RIGHTS TRANSFERS: A REVIEW OF STATE LAWS 9 (2015), <https://waterinthewest.stanford.edu/sites/default/files/WITW-WaterRightsLawReview-2015-FINAL.pdf> [<https://perma.cc/L4QE-FZ7J>].

there is scarcity. Such scarcity is growing due to climate change, and thus these conflicts abound. This short Article is a call to hear more from Professor Claeys about how his natural property rights approach, which certainly captures a lot of the intuitions behind water regimes, can guide us into the arid future where natural and social conditions put prior appropriation systems to the test.