

# FREEDOM FROM THIRST: A RIGHT TO BASIC HOUSEHOLD WATER

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## INTRODUCTION

Among the fundamental needs shared by all humans, water is one of the most universally recognized. Yet, in the United States the idea that household water for drinking and basic hygiene is a constitutional right has seldom been embraced at any level of government. Instead, there are notorious examples of massive water shutoffs in Detroit and

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Baltimore,<sup>1</sup> and routine water shutoffs in many other communities.<sup>2</sup> While many states and local authorities across the country suspended water shutoffs temporarily during the officially-declared COVID-19 crisis, others did not.<sup>3</sup> Moreover, these suspensions were not open-ended; shutoffs for non-payment resumed long before the economic impacts of the pandemic were resolved.<sup>4</sup> In the middle of a pandemic where handwashing and hygiene are critical to public health, water shutoff practices nationwide were a crazy-quilt of discretionary actions or omissions by local authorities.<sup>5</sup>

Even in the best of times, access to household water in the United States is legally protected only at the margins, if at all.<sup>6</sup> The U.S. Constitution does not directly mention water. Procedural due process protections may apply to water service but do nothing to prevent shutoffs for nonpayment.<sup>7</sup> A handful of state constitutions articulate a right to water, but their provisions have not been expansively

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<sup>1</sup> Luke Broadwater, *City Shuts Off Water to Delinquent Residents; Hits Baltimore Co. Homes Hardest*, BALT. SUN (May 15, 2015, 6:20 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-water-shutoffs-20150515-story.html> [<https://perma.cc/7U4B-QTNB>]; Joel Kurth, *Detroit Shut Off Water to 11,800 Homes This Year. Most Are Still Off*, BRIDGE MICH. (Aug. 19, 2019), <https://www.bridgemi.com/urban-affairs/detroit-shut-water-11800-homes-year-most-are-still> [<https://perma.cc/Q6YF-SEKZ>].

<sup>2</sup> See, e.g., MARTHA F. DAVIS, NE. UNIV. SCH. OF L.: PROGRAM ON HUM. RTS. AND THE GLOB. ECON., *A DROP IN THE BUCKET: WATER AFFORDABILITY POLICIES IN TWELVE MASSACHUSETTS COMMUNITIES* (2019).

<sup>3</sup> See, e.g., Nina Lakhani, *Ninety US Cities and States Suspend Water Shutoffs to Tackle Coronavirus Pandemic*, GUARDIAN (Mar. 16, 2020, 5:00 AM), <https://www.theguardian.com/world/2020/mar/16/90-us-cities-and-states-suspend-water-shutoffs-to-tackle-coronavirus-pandemic> [<https://perma.cc/UNM6-WT4A>]; Nina Lakhani, *“It Feels Like Nobody Cares”: The Americans Living Without Running Water amid Covid-19*, GUARDIAN (May 1, 2020, 5:00 AM), <https://www.theguardian.com/environment/2020/may/01/water-shutoffs-us-coronavirus-utilities-economy> [<https://perma.cc/N2RJ-K7AV>].

<sup>4</sup> See, e.g., Adam Wagner & Charlie Innis, *Are Your Utility Bills Past Due Because of COVID-19? Prepare to Pay as NC Order Expires*, NEWS & OBSERVER (July 21, 2020, 6:58 PM), <https://www.newsobserver.com/news/local/article244139627.html> [<https://perma.cc/CLZ8-WT5T>].

<sup>5</sup> Meron Yohannes, *Providing Critical Water Services Through the COVID-19 Crisis*, BIPARTISAN POL’Y CTR. (Apr. 17, 2020), <https://bipartisanpolicy.org/blog/providing-critical-water-services-through-the-covid-19-crisis> [<https://perma.cc/P9MV-YA3F>] (explaining “fragmented system of entities” regulates water).

<sup>6</sup> *Id.* (noting lack of federal laws on shutoffs). This contrasts with water quality, which is highly, if imperfectly, regulated. See, e.g., U.S. ENV’T PROT. AGENCY (EPA), EPA-823-B-17-001, *WATER QUALITY STANDARDS HANDBOOK* (2017), <https://www.epa.gov/wqs-tech/water-quality-standards-handbook> [<https://perma.cc/WN76-8K7M>].

<sup>7</sup> *In re City of Detroit*, 841 F.3d 684, 699–700 (6th Cir. 2016).

construed.<sup>8</sup> The United States even abstained from the United Nations vote to recognize an international human right to water in 2010; the resolution passed in the General Assembly and the Human Rights Council without U.S. support.<sup>9</sup> By statute, California does recognize water as a human right; the laudable statutory requirements increase transparency but fall short of an enforceable mandate.<sup>10</sup> Racial discrimination in water administration remains legally actionable under the federal Constitution and federal fair housing laws, but the proof required under current laws generally demands significant resources to uncover.<sup>11</sup> In any event, this is limited relief; the impacts of water deprivation are devastating regardless of whether illegal discrimination can be established as a factor leading to the shutoffs.<sup>12</sup>

What is household water's constitutional status, then? Using Cass Sunstein's framework for grounding the protection of basic human needs in constitutional theory, Sharmila Murthy has argued that in the United States the right to water is a "constitutive commitment"; that is, while the right to water falls short of constitutional status, it merits near-constitutional protection and cannot, as a practical matter, be withdrawn without a fundamental shift in the understanding of

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<sup>8</sup> See, e.g., James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* 305 (James R. May ed., 2011).

<sup>9</sup> United States Abstains on General Assembly Resolution Proclaiming Human Right to Water and Sanitation, 104 AM. J. INT'L L. 672, 672–73 (2010) [hereinafter U.S. Abstention]; see also G.A. Res. 64/292 (July 28, 2010); Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Sept. 30, 2010).

<sup>10</sup> See generally ANGÉLICA SALCEDA, KIMYA SAIED & CHRISTINE ZÜLOW, *THE HUMAN RIGHT TO WATER BILL IN CALIFORNIA: AN IMPLEMENTATION FRAMEWORK FOR STATE AGENCIES* (2013); California Law on Human Right to Water Sets Example for Others—UN Expert, UN NEWS (Sept. 28, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43118&Cr=water+and+sanitation&Cr1#.URmxDqVJPJI> [https://perma.cc/4LG8-LPRU].

<sup>11</sup> COTY MONTAG, NAACP LEGAL DEF. & EDUC. FUND, *WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICA'S CITIES* 63–69 (2019), [https://www.naacpldf.org/wp-content/uploads/Water\\_Report\\_FULL\\_5\\_31\\_19\\_FINAL\\_OPT.pdf](https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf) [https://perma.cc/25VE-E4P9]; see Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 964 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–21 (1987); see also Areeba Haider, *Three Ways HUD Is Using Regulatory Attacks to Dismantle Fair Housing Protections*, CTR. FOR AM. PROGRESS (Jan. 30, 2020, 9:06 AM), <https://www.americanprogress.org/issues/poverty/news/2020/01/30/479898/3-ways-hud-using-regulatory-attacks-dismantle-fair-housing-protections> [https://perma.cc/6XFG-FS6X].

<sup>12</sup> The class action complaint filed by the NAACP Legal Defense Fund and others challenging water shutoffs during COVID-19 sets out stories of individual plaintiffs that demonstrate these effects. Complaint at 58–78, *Taylor v. City of Detroit* (No. 2:20-cv-11860), 2020 WL 3891425 (E.D. Mich. July 9, 2020).

government obligations.<sup>13</sup> Writing in 2004, Sunstein listed “the right to some kind of social security program; the right not to be fired by a private employer because of your skin color or your sex; [and] the right to protection through some kind of antitrust law” as examples of constitutive commitments.<sup>14</sup> Water is certainly a strong candidate for that list. Like social security or protection from discrimination, water is an end in itself, not merely a means to a beneficial end.<sup>15</sup> Further, as Murthy observes, water is popularly viewed as tantamount to a right.<sup>16</sup> For example, in a 2017 poll of voters in western states, ninety-seven percent registered support for “[e]nsuring safe, affordable drinking water for everyone,” with only one percent opposing the proposition.<sup>17</sup>

In this Article, however, I argue that access to basic household water is more than a constitutive commitment and should instead be recognized as a constitutional right. This argument is sharpened by the COVID-19 pandemic. The human need for water did not change between March 12, 2020, and March 13, 2020, the day when the pandemic was formally recognized in the United States; the need for water remains constant and immutable. Rather, the pandemic reveals why household water for drinking and basic hygiene is not only critical for “life,” but also necessary to achieving one of the Constitution’s fundamental goals, the nation’s “general Welfare.”<sup>18</sup>

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<sup>13</sup> Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C. J.L. & SOC. JUST. 159, 160–62 (2016).

<sup>14</sup> Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt’s Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 217 (2005); see also CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 61–62 (2004).

<sup>15</sup> Indeed, Murthy is not alone. A number of commentators have argued that household water should receive constitutional or quasi-constitutional protection in the United States, particularly in the wake of the water crisis in Flint, Michigan. See, e.g., Emily M. Thor, *The Human Right to Water in the United States: Why So Dangerous?*, 26 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 315 (2013); Erin Mette, *A Constitutional Right to Safe, Affordable, Accessible Drinking Water*, 32 TUL. ENV’T. L.J. 189 (2019); Lauren Madison, *Substantive Due Process as Recourse for Flint Water Crisis Plaintiffs*, 64 WAYNE L. REV. 531 (2019); Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 190 (2017) (arguing that access to drinking water is a liberty interest).

<sup>16</sup> Murthy, *supra* note 13, at 162.

<sup>17</sup> Mitch Tobin, *Twelve Takeaways from New Water Foundation Poll of Twelve Western States*, WATERPOLLS.ORG (Nov. 6, 2017), <https://waterpolls.org/water-foundation-poll-2017> [<https://perma.cc/75VC-ZC2Y>].

<sup>18</sup> U.S. CONST. pmbl. The word “general,” an often-overlooked term in the Constitution’s Preamble, quite plainly underscores that the government’s purpose is not simply to benefit individuals, but to promote community well-being. John W. Welch & James Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1075 (2018) (noting that prior to 1787, “‘general,’ like ‘common,’ was used in a collective . . . sense”). On the interpretive role of the Constitution’s Preamble, see Brian Leiter, Carole E. Handler, & Milton Handler, A

Were it recognized as a constitutional right, sufficient water to meet basic human needs could only be denied if the government met the highest standards of proof, showing that any denial of household water was narrowly limited to instances that are “compelling.”<sup>19</sup> Further, constitutional protection would provide a permanence that is lacking in the status of constitutive commitment or in statutory protections, which by definition may be subject to changing political winds.<sup>20</sup> Given its unique status and characteristics, I argue that basic household water should be recognized as a constitutional right under United States law even though—just as with established fundamental rights such as marriage and privacy—it is not explicitly identified in the constitutional text.<sup>21</sup>

Like Murthy, my argument takes note of the fundamental assumptions made at the individual and community level regarding government protections for water. Access to household water has long been an expected baseline in the United States.<sup>22</sup> Indeed, COVID-19 has convincingly demonstrated that water authorities may be loath to shut off household water even when consumers are unable to afford their water bills in the short term.<sup>23</sup>

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Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation, 12 *CARDOZO L. REV.* 117, 122 (1990) and ERWIN CHEMERINSKY, *WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY* 53 (2018).

<sup>19</sup> See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 342–43 (1972). The government is not required to affirmatively provide for exercise of the right, but it cannot burden it any more than is necessary. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980). However, the line between a positive right and a negative right is not always clear. See Evan Caminker, *A Constitutional Commitment to Access to Literacy: Bridging the Chasm Between Negative and Positive Rights*, *VERDICT* (Apr. 30, 2020), <https://verdict.justia.com/2020/04/30/a-constitutional-commitment-to-access-to-literacy-bridging-the-chasm-between-negative-and-positive-rights> [https://perma.cc/UJ39-FUQ8].

<sup>20</sup> See Sunstein & Barnett, *supra* note 14, at 223–25.

<sup>21</sup> See generally RODNEY M. PERRY, *CONG. RSCH. SERV.*, R44143, *OBERGEFELL V. HODGES: SAME-SEX MARRIAGE LEGALIZED* (2015), <https://fas.org/sgp/crs/misc/R44143.pdf> [https://perma.cc/QB2X-Y24W]; *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (“[T]he Constitution does not speak in so many words of the right of privacy in marriage.”).

<sup>22</sup> See, e.g., Hum. Rts. Council, Rep. of the Special Rapporteur on the Hum. Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, at 5, U.N. Doc. A/HRC/18/33/Add.4, (Aug. 2, 2011).

<sup>23</sup> See, e.g., Jessica Boehm, *Water Will Stay On During the Pandemic, but You’ll Eventually Have to Pay*, *AZ CENT.* (Apr. 9, 2020, 3:39 PM), <https://www.azcentral.com/story/news/local/phoenix/2020/04/08/water-stay-on-during-coronavirus-pandemic-but-still-have-pay-your-bills-arizona-cities-warn/5100128002> [https://perma.cc/J87Z-K3KF]; COVID-19 Response, *AM. WATER*, <https://www.amwater.com/corp/customers-and-communities/covid-19-response> [https://perma.cc/8JHZ-LK2Z]; Kelly Byer, *Stark County Governments Forgo Water Shutoffs, Seek to Ease Coronavirus’ Impact*, *ALL. REV.* (Mar. 21, 2020, 11:48 AM), <https://www.the-review.com/news/20200321/stark-county-governments-forgo-water-shutoffs-look-to-ease->

But, I assert, the scourge of COVID-19 demonstrates that household water is not properly viewed as a mere commodity available for purchase by those with the means, and that the failure to press for its recognition as a constitutional right has serious consequences that are exacerbated by dramatic rises in water costs in recent years.<sup>24</sup> The absence of constitutional protection for water access enables its manipulation in ways that reflect and reinforce political power, at the expense of human wellbeing.<sup>25</sup> It is no coincidence that the communities in the United States that are least likely to have ready access to potable water are Indigenous peoples and communities of color, a fact that COVID-19 has brought into stark relief.<sup>26</sup> It is no accident that because water is not considered to have constitutional weight in its own right, there is little legal recourse when those in power simply accept the absence of potable drinking water, with its consequent hardship and disease for some already marginalized communities.<sup>27</sup> The dynamics of the coronavirus pandemic drive home the fact that these impacts are not only individual, but community-wide.

In considering how a constitutional right to household water might be recognized in the United States, I take inspiration from the reasoning set out in the initial ruling in *Gary B. v. Whitmer*, in which a three-judge panel of the Sixth Circuit Court of Appeals upheld a federal constitutional right to basic literacy.<sup>28</sup> Though the decision was later vacated by the Court of Appeals sitting en banc, the majority of the

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coronavirus's impact [https://perma.cc/XU3N-HBW3] (quoting local water authority stating that “[w]e have a long history of working with people before they shut off their utilities”).

<sup>24</sup> Elizabeth A. Mack & Sarah Wrase, A Burgeoning Crisis? A Nationwide Assessment of the Geography of Water Affordability in the United States, PLOS ONE (Jan. 11, 2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0169488 [https://perma.cc/8F55-GMUN].

<sup>25</sup> This is not unique to the United States. See Maryam Nastar, Navigating Troubled Waters: An Analysis of How Urban Water Regimes in the Global South Reproduce Inequality (Apr. 25, 2014) (Ph.D. dissertation, Lund University), https://portal.research.lu.se/ws/files/5833135/4379516.pdf [https://perma.cc/U4BZ-KWFM]; Martha F. Davis & Natasha Ryan, Inconvenient Human Rights: Water and Sanitation in Sweden's Informal Roma Settlements, HEALTH & HUM. RTS. J. (Dec. 4, 2017), https://www.hhrjournal.org/2017/12/inconvenient-human-rights-water-and-sanitation-in-swedens-informal-roma-settlements [https://perma.cc/AH5Q-CHZP].

<sup>26</sup> Maria Givens, The Coronavirus Is Exacerbating Vulnerabilities Native Communities Already Face, VOX (Mar. 25, 2020, 8:50 AM), https://www.vox.com/2020/3/25/21192669/coronavirus-native-americans-indians [https://perma.cc/EM6P-LGUW]; Elise Gout & Cathleen Kelly, Bridging the Water Access Gap Through COVID-19 Relief, CTR. FOR AM. PROGRESS (Aug. 5, 2020, 9:01 AM), https://www.americanprogress.org/issues/green/news/2020/08/05/488705/bridging-water-access-gap-covid-19-relief [https://perma.cc/28GT-F5MN].

<sup>27</sup> For discussion of disparate impact, see *supra* notes 11–12.

<sup>28</sup> *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), vacated, 958 F.3d 1216, 1216 (6th Cir. 2020) (ordering that “the previous decision and judgement of this court are vacated, the mandates are stayed, and these cases are restored to the docket as pending appeals”).

initial three-judge panel found that the right to basic literacy underlies explicit protections in the Constitution, such as the right to free speech and to vote.<sup>29</sup> Likewise, I argue that federal constitutional text—drafted to protect the “general Welfare” and providing explicit protections for “life” and “liberty”—supports an implicit “freedom from thirst,” i.e., a right to basic household water needed to support life.<sup>30</sup> This argument has been explored before by others, but the context of COVID-19 gives it new urgency and resonance.<sup>31</sup> In particular, the pandemic draws attention to the Constitution’s textual support for construing substantive rights in ways that protect the “*general Welfare*,” furthering the community-centered purposes set out in the Constitution’s Preamble.<sup>32</sup>

This Article explores the human right to drinking water from several angles that together suggest a roadmap for recognizing the constitutional status of household water for drinking and basic hygiene. In Part I of this Article, I offer a snapshot of the treatment of household water in times of economic hardship, suggesting that there are deep roots for water as a special case. In the Great Depression of the 1930s and more recently during COVID-19, water’s status is sometimes elevated on a temporary, situational basis. These policies are driven by public health and moral concerns as much as by law, often informed by the recognition of collective impacts.<sup>33</sup> James Salzman traces this special treatment back to ancient times, denominating it as a customary “right to thirst” that recognized an unwritten obligation to share water with a person who was thirsty.<sup>34</sup>

In Part II, I shift the focus to trace the trajectory of the right to water in the international human rights context, where over time, water’s clear significance and unique, enduring qualities overcame objections that the right was not explicitly articulated in founding

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<sup>29</sup> Gary B., 957 F.3d at 653.

<sup>30</sup> U.S. CONST. pmbl.; id. amend. XIV, § 1.

<sup>31</sup> Murthy, *supra* note 13, at 162. As recently as 2016, the Sixth Circuit Court of Appeals rejected the claim that shutoffs of household water violated a fundamental constitutional right. *In re City of Detroit*, 841 F.3d 684, 699–700 (6th Cir. 2016). Here, I argue for a more nuanced right: that the COVID-19 pandemic and the Constitution’s concern for “general” well-being support a fundamental right to basic household water for hygiene and drinking.

<sup>32</sup> See generally Welch & Heilpern, *supra* note 18.

<sup>33</sup> PATRICIA A. JONES & AMBER MOULTON, UNITARIAN UNIVERSALIST SERV. COMM., *THE INVISIBLE CRISIS: WATER AFFORDABILITY IN THE UNITED STATES* 1 (2016), <https://www.uusc.org/wp-content/uploads/2018/10/UUSC-Invisible-Crisis.pdf> [<https://perma.cc/S2XV-ZA84>] (“Making clean, affordable water available to all U.S. residents is a civil rights challenge for this century and a moral challenge requiring immediate action.”); id. at 3 (“Lack of access to safe, affordable water . . . is a public health . . . crisis in the United States.”).

<sup>34</sup> JAMES SALZMAN, *DRINKING WATER: A HISTORY* 33–35 (rev. ed. 2017).

international law documents.<sup>35</sup> Subsequent international instruments singling out water for protection confirm the understanding that water is a human right.<sup>36</sup>

Part III examines the status of the right to water as a matter of comparative law, looking at foreign constitutional provisions and case law to understand the potential scope of the legal right. As this examination reveals, identifying a constitutional right to basic drinking water does not resolve all the issues that might arise concerning the production and distribution of household water; there is plenty of work for governments and courts to do in implementing the right. In this respect, the right to basic household water is no different from other important constitutional rights, such as the amorphous Fourteenth Amendment rights to due process or equality under the law in the United States, which have been honed through case law and changing circumstances over more than 150 years.<sup>37</sup>

Part IV of this Article applies these lessons to drinking water in the domestic constitutional context. I examine several state constitutional provisions addressing water to ascertain their meaning and intention.<sup>38</sup> I then turn to the federal Constitution, comparing the right to basic household water to other fundamental rights identified by courts, particularly focusing on the right to literacy.<sup>39</sup> I argue that the Constitution's purpose of promoting the "general Welfare" supports a construction of the rights to life and liberty that takes account of community-wide impacts of denying basic water.

I conclude that access to basic drinking water is not only an international human right, but should also be a recognized federal constitutional right, as a component of the substantive due process protections of life and liberty. This argument has always been potent. The pandemic demonstrated its urgency.

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<sup>35</sup> See generally George S. McGraw, *Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 *LOY. U. CHI. INT'L L. REV.* 127, 137–50 (2011).

<sup>36</sup> See discussion of the international approach *infra* pp. 878–82.

<sup>37</sup> See, e.g., *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>38</sup> *Infra* pp. 885–86.

<sup>39</sup> *Infra* pp. 886–87.



## I. A FIFTH FREEDOM?

In 1932, the Great Depression was near its nadir.<sup>40</sup> In July of that year, the stock market reached its lowest point, a ninety percent drop since the crash in 1929.<sup>41</sup> Nearly one in four Americans were unemployed.<sup>42</sup> Less than a year later, President Franklin D. Roosevelt's administration would initiate a series of interventions to turn the economy around and provide wages for workers—programs like the Civil Works Administration (CWA) (1933–1934), the Civilian Conservation Corps (CCC) (1933–1942), and the Works Progress Administration (WPA) (1935–1943).<sup>43</sup> However, 1932 was an election year. Roosevelt was running on the Democratic ticket, and President Herbert Hoover, a Republican and native Iowan who was philosophically opposed to federal intervention in the economic market, was still in the White House.<sup>44</sup>

At the Des Moines Water Works (DMWW), as unemployment grew more widespread, water administrators needed more than philosophy to solve the issues that they faced. Thousands of men in the community were out of work and unable to pay their family's water bills.<sup>45</sup> A state law barred the water authority from discriminating between consumers.<sup>46</sup> In the DMWW's view, there could be no special

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<sup>40</sup> José A. Tapia Granados & Ana V. Diez Roux, *Life and Death During the Great Depression*, *PROC. NAT'L ACAD. SCI. U.S.* (Oct. 13, 2009), <https://doi.org/10.1073/pnas.0904491106> [<https://perma.cc/332S-HGGY>] (noting the United States reached its historical maximum unemployment rate of 22.9% in 1932).

<sup>41</sup> Andrew Glass, *Great Depression Hits Bottom*, *Politico* (July 8, 2009, 4:58 AM), <https://theconversation.com/how-high-will-unemployment-go-during-the-great-depression-1-in-4-americans-were-out-of-work-135508> [<https://perma.cc/EM8W-FBLB>].

<sup>42</sup> Jay L. Zagorsky, *How High Will Unemployment Go? During the Great Depression, One in Four Americans Were Out of Work*, *CONVERSATION* (Apr. 16, 2020, 9:18 AM), <https://theconversation.com/how-high-will-unemployment-go-during-the-great-depression-1-in-4-americans-were-out-of-work-135508> [<https://perma.cc/G3V4-67FH>].

<sup>43</sup> FDR Timeline, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, <http://www.fdrlibrary.marist.edu/archives/resources/pdfs/timelinedoc.pdf> [<https://perma.cc/3RFW-FN5D>]; Work Progress Administration, *BRITANNICA*, <https://www.britannica.com/topic/Works-Progress-Administration> [<https://perma.cc/WB6V-Q66N>]; BONNIE FOX SCHWARTZ, *THE CIVIL WORKS ADMINISTRATION, 1933–1934: THE BUSINESS OF EMERGENCY EMPLOYMENT IN THE NEW DEAL* (1984).

<sup>44</sup> RUSSELL FREEDMAN, *FRANKLIN DELANO ROOSEVELT* 77 (1992) (“Hoover was not willing to commit the federal government to a large-scale relief program for the unemployed. Relief was the task of local governments and private charities, he said.”).

<sup>45</sup> See *Projects in D.M. Allow 4,500 to Pay Water Bills*, *DES MOINES REG.*, Nov. 26, 1933. Male breadwinners were prevalent in the 1930s. See, e.g., Steven Ruggles, *Patriarchy, Power, and Pay: The Transformation of American Families, 1800–2015*, 52 *DEMOGRAPHY* 1797 (2015).

<sup>46</sup> IOWA CODE, § 314.6184 (1927). This provision is not unusual. For example, the General Law Village Act of Michigan states that villages are to “establish just and equitable water rates.”

arrangements, no discounts or debt forgiveness; either every customer paid the established rate or no customer paid, despite differences in need.<sup>47</sup> But shutting off the water supply of neighbors and friends was a tough business, particularly given the broad scope of the problem and the potential for public health consequences that could affect an even wider swath of Iowans.<sup>48</sup>

It was good news, then, when the local water works board and Charles Denman, the DMWW manager, came up with a plan.<sup>49</sup> Starting in August 1932, months before federal work programs would be announced, DMWW customers could have the opportunity to “work off” their bills.<sup>50</sup> Laboring for \$0.40 per hour, a fair wage at the time, the men planted trees and shrubs on the water works grounds, inspected hydrants, and laid pipes for the water main.<sup>51</sup> With the average family water bill per quarter at \$2.25, just six hours of work would pay for three months of household water service.<sup>52</sup>

Contemporaneous newspaper accounts describe the program as a resounding success.<sup>53</sup> In November 1933, the *Des Moines Register* reported that 4,500 men had taken advantage of the initiative.<sup>54</sup> The extensive plantings beautified the city, and the other work moved infrastructure projects forward ahead of schedule.<sup>55</sup> The workers were apparently happy too. Dale L. Maffitt, a water works manager, told the press, “Many have expressed their satisfaction at the opportunity to

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MICH. COMP. LAWS SERV. § 71.6 (LexisNexis 2020); see NICK LEONARD, ERIN METTE, & ODAY SALIM, NAT’L WILDLIFE FED’N, LEGAL PATHWAYS TO INCOME-BASED DRINKING WATER RATES IN MICHIGAN 4 (2020), <https://www.nwf.org/-/media/Documents/PDFs/NWF-Reports/2020/Legal-Pathways-to-Income-Based-Drinking-Water-Rates-in-Michigan> [https://perma.cc/T5FU-BKX8] (explaining that income-based rates would likely meet this standard).

<sup>47</sup> Pat Ripley, Water During the Economic Depression of the 1930s, DSM: H20 (June 7, 2012), <http://www.dsmh2o.com/tag/history-of-des-moines-water-works> [https://perma.cc/W253-X4VN] (noting state law barring discrimination in water pricing).

<sup>48</sup> Id.; City Ponders Water Bills, DES MOINES TRIB., May 12, 1932, at A12 (“[L]ack of water facilities means jeopardy to public health and might develop into a condition which would prove intolerable.”); H. A. Dill, Collection of Water Bills During a Depression, 26 J. AM. WATER WORKS ASS’N 319, 319–21 (1934) (noting importance of water to family and community health).

<sup>49</sup> Projects in D.M. Allow 4,500 to Pay Water Bills, *supra* note 45 (describing origins of the program).

<sup>50</sup> Id.

<sup>51</sup> Ripley, *supra* note 47.

<sup>52</sup> Id.

<sup>53</sup> See generally DES MOINES WATER WORKS, HISTORY OF DES MOINES WATER WORKS VOL. 3, 1932-1943.

<sup>54</sup> Projects in D.M. Allow 4,500 to Pay Water Bills, *supra* note 45.

<sup>55</sup> Wise Beautifying, DES MOINES TRIB., May 9, 1933, at 6 (describing beautification projects).

work out their bills. They feel they are earning at least a part of their living. It helps them keep their self respect.”<sup>56</sup>

DMWW was not alone in adopting this approach. Beyond Iowa, other states in the Missouri Valley section of the American Water Works Association, which included Kansas, eastern Nebraska, South Dakota, and Missouri, permitted “worthy” delinquents to “work out the bills.”<sup>57</sup> Miles away, in Dover, New Jersey, water customers were also employed for short stints to pay off their water bill debt, though with a slight difference.<sup>58</sup> The Dover program paid the workers in cash rather than in water credits, giving them some autonomy in deciding how to allocate their wages. In 1934, George Steffany, President of the Dover Board of Water Commissioners, described the program:

We have no common laborers in our employ. We hire for that purpose those who want to work out their water bill. Usually two days will suffice. They are paid in cash. Then they pay the water bill and usually have a few dollars left over. . . . Our employment is for work that must be done for proper maintenance or extension purposes. A man can get this employment almost anytime, even to leaving his pay check in escrow to pay a water bill not yet rendered.<sup>59</sup>

In the midst of a widespread economic depression, local water authorities latched on to these approaches because the alternative, shutting off household water, seemed untenable, mean, and potentially harmful. When they could, consistent with their legal constraints, water authorities would delay bills, develop payment plans, and in some instances, accept partial payments.<sup>60</sup> In a time of high unemployment, when even those who were formerly “comfortably well-to-do” could not pay their bills, there was little to be gained by further jeopardizing public health and shutting off water completely.<sup>61</sup>

One contemporaneous author, E. Grosvenor Plowman, labeled this a “social responsibility” approach to water management, and noted that during the Great Depression, water utilities were “forced to

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<sup>56</sup> Projects in D.M. Allow 4,500 to Pay Water Bills, *supra* note 45. This theme was echoed in later federal programs. See generally MELISSA BASS, *THE POLITICS AND CIVICS OF NATIONAL SERVICE: LESSONS FROM THE CIVILIAN CONSERVATION CORPS, VISTA, AND AMERICORPS* (2013).

<sup>57</sup> R. M. Finch, Dana E. Kepner, W. J. Klevorn, W. Scott Johnson, C. A. Haskins, W. W. Towne, J. W. McEvoy & Earle L. Waterman, *Society Affairs*, 25 J. AM. WATER WORKS ASS’N 282 (1933).

<sup>58</sup> George F. Steffany, *Collecting Bills in Dover, New Jersey*, 26 J. AM. WATER WORKS ASS’N 355 (1934).

<sup>59</sup> *Id.* at 356.

<sup>60</sup> M. F. Hoffman, *Delinquent Water Bills in the Depression*, 25 J. AM. WATER WORKS ASS’N 1636 (1933); Samuel William Zerman, *The Attorney System as a Modern Method of Collecting Water Accounts*, 28 J. AM. WATER WORKS ASS’N 1669 (1936).

<sup>61</sup> *DES MOINES WATER WORKS*, *supra* note 53.

acquiesce in the social responsibility point of view by delaying turnoff of thousands of delinquent customers for months.”<sup>62</sup> This “force” was of their own making; the law, in Iowa and elsewhere, often cut the other way, to require equal treatment of those who had equal need for basic drinking water but unequal capacities to pay for it.<sup>63</sup> Given the realities of the situation, Plowman concluded that “[w]ater utilities must soon face the fact that their monopoly of portable water supply carries as its natural converse the responsibility of furnishing water for the necessities of life to all without charge or taint of charity.”<sup>64</sup>

Just a few years later, in 1941, President Roosevelt delivered his famous Four Freedoms speech, which identified freedom of speech, freedom of worship, freedom from want, and freedom from fear, as central American values that should be shared with the world.<sup>65</sup> Offered in the wake of the Great Depression and in the midst of World War II, Roosevelt outlined these four freedoms as necessary pillars of a peacetime society and economy. “Freedom from want,” he opined, was necessary to achieve a “healthy peacetime life” after the war.<sup>66</sup> It encompassed concrete items such as jobs, and also more general feelings of economic security and well-being.<sup>67</sup>

In 1944, Roosevelt expanded on these ideas and offered a more detailed list, now denominated as rights, in his proposed Second Bill of Rights.<sup>68</sup> This “economic bill of rights” included rights to a decent home, to food, to adequate wages, to adequate medical care, and to a good education.<sup>69</sup> Roosevelt did not suggest that these were constitutional rights, but rather offered this list as a legislative agenda for Congress.<sup>70</sup> These are the proposed statutory rights that Cass Sunstein has labeled “constitutive commitments.”<sup>71</sup>

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<sup>62</sup> E. Grosvenor Plowman, *Municipal Water-Utility Management*, 11 J. BUS. UNIV. CHI. 161, 182 (1938).

<sup>63</sup> *Supra* note 46 and accompanying text.

<sup>64</sup> Plowman, *supra* note 62, at 182.

<sup>65</sup> Franklin D. Roosevelt, *Address of the President of the United States* (Jan. 6, 1941), in 87 CONG. REC. 44, 46–47 (1941).

<sup>66</sup> *Id.* at 46.

<sup>67</sup> *Id.*; see also Michael H. Posner, Assistant Sec’y, Bureau of Democracy, Hum. Rts., and Lab., *Four Freedoms Turns Seventy*, *Address to the American Society of International Law* (March 24, 2011).

<sup>68</sup> FRANKLIN D. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1944-45: VICTORY AND THE THRESHOLD OF PEACE* 41 (Samuel I. Rosenman ed., 1950).

<sup>69</sup> *Id.*

<sup>70</sup> See Sunstein & Barnett, *supra* note 14, at 205–09.

<sup>71</sup> *Id.* at 217.

Water was not a part of Roosevelt's formulation in either instance. Given that unemployed individuals just a few years before had been unable to pay their water bills, it seems unlikely that this was deliberate omission and that Roosevelt intended to convey that water was not important or that it was a matter of charity rather than a right.<sup>72</sup> Possibly President Roosevelt assumed that household drinking water would continue to be made available by local water authorities, secure and inviolate as a part of the peacetime economy, and that any issues with its cost would be resolved through efforts to increase employment and wages.<sup>73</sup> Possibly Roosevelt believed that a right to water already existed.

The omission was nevertheless consequential. The New Deal programs mounted from 1933 to 1939 assisted water authorities with infrastructure needs and provided employment so that families could afford basic amenities.<sup>74</sup> However, these initiatives did not touch long-established bureaucratic arrangements that placed water access in the hands of local and regional authorities, or private entities, rather than the federal government.<sup>75</sup> Likewise, because the vision articulated by Roosevelt did not identify access to water as a critical "freedom" or "right" to be addressed through federal initiatives, there was no suggestion that a right to water might be necessary to further the President's vision.

For decades, water in the United States remained inexpensive relative to other basic needs, and there was little public pressure for federal oversight of water prices. As recently as 2007, a Note in the *Harvard Law Review* asserted that "[i]n the United States . . . water is considered much like air: both are important in the abstract, but are so

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<sup>72</sup> As Governor of New York, Roosevelt registered special concern about the cost to consumers of electricity—costs that were significantly greater than the cost of water at the time. Franklin D. Roosevelt, Unemployment, Water Power, Milk Racketeering, Radio Address, Albany (Oct. 13, 1930), in FRANKLIN D. ROOSEVELT, "THE GREAT COMMUNICATOR": THE MASTER SPEECH FILES, 1898, 1910–1945, FRANKLIN D. ROOSEVELT'S POLITICAL ASCENSION 764, 766, [http://www.fdrlibrary.marist.edu/\\_resources/images/msf/msf00399](http://www.fdrlibrary.marist.edu/_resources/images/msf/msf00399) [<https://perma.cc/7FQT-Z97U>].

<sup>73</sup> Cf. Louis R. Howson, Fifty Years' Experience with Water Utility Costs and Revenues, 51 J. AM. WATER WORKS ASS'N 693 (1959). Public utilities, the norm at the time, are generally less costly to consumers than private operations. See Questions & Answers: A Cost Comparison of Public and Private Water Utility Operation, FOOD & WATER WATCH (June 2009), [https://www.foodandwaterwatch.org/sites/default/files/qa\\_public\\_private\\_water\\_fs\\_june\\_2009.pdf](https://www.foodandwaterwatch.org/sites/default/files/qa_public_private_water_fs_june_2009.pdf) [<https://perma.cc/XF65-SJAM>].

<sup>74</sup> See, e.g., U.S. PUB. WORKS ADMIN., THE STORY OF PWA IN PICTURES: VOLUMES 31–34 (1936) (describing PWA's installation of hundreds of new waterworks systems and the impacts on communities).

<sup>75</sup> Rate-setting, in particular, was handled locally. Ronald C. Griffin, Effective Water Pricing, 37 J. AM. WATER RES. ASS'N 1335, 1335 (2001); see also Howson, *supra* note 73.

abundant that the value Americans ascribe to them is relatively low.”<sup>76</sup> Whatever the truth of this statement in 2007, it is certainly not the case for many Americans now. According to one analysis, water prices increased by an average of eighty percent between 2010 and 2018.<sup>77</sup> Another study indicates that by 2022, more than one-third of Americans will find their household water bills to be unaffordable.<sup>78</sup>

When the COVID-19 pandemic began in 2020, the implications of water’s unprotected status became even clearer. Across the country, local water authorities and state and local governments acted independently and with varying levels of clarity to address household water needs amid growing unemployment and economic hardship.<sup>79</sup> With hygiene and handwashing identified as key activities to stem the COVID-19 virus, access to household water was critical.<sup>80</sup> At the same time, water rates reached record levels as local authorities struggled to maintain water infrastructure despite deep cuts in federal financial support over a period of years.<sup>81</sup>

Many local authorities adopted moratoria on water shutoffs for a time, sometimes in conjunction with the state governor’s declaration of a COVID-19 emergency, and perhaps paired with a moratorium on evictions.<sup>82</sup> However, few (if any) local governments offered forgiveness

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<sup>76</sup> Note, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 HARV. L. REV. 1067, 1067 (2007).

<sup>77</sup> Nina Lakhani, *Revealed: Millions of Americans Can’t Afford Water as Bills Rise Eighty Percent in a Decade*, GUARDIAN (June 29, 2020, 12:51 PM), <https://www.theguardian.com/us-news/2020/jun/23/millions-of-americans-cant-afford-water-bills-rise> [https://perma.cc/NQH3-RQK6].

<sup>78</sup> Mack & Wrase, *supra* note 24, at 1. In the United States, affordability of water and wastewater services is generally identified as 4.5% of median household income. *Id.* at 4.

<sup>79</sup> Talia Buford & Sean Campbell, *Some Towns Still Haven’t Halted Utility Shut-offs for Unpaid Water Bills During Coronavirus, Even as Federal Lawmakers Demand It*, PROPUBLICA (Mar. 13, 2020, 1:30 PM), <https://www.propublica.org/article/some-towns-still-havent-halted-utility-shut-offs-for-unpaid-water-bills-during-coronavirus-even-as-federal-lawmakers-demand-it> [https://perma.cc/N7RX-6VTZ]; Larry Levine, *Congress & States Must Protect Water Access During COVID-19*, NRDC (Aug. 7, 2020), <https://www.nrdc.org/experts/larry-levine/congress-states-must-protect-water-access-during-covid-19> [https://perma.cc/F4P5-2RKT] (noting that only sixteen states plus Washington, D.C. and Puerto Rico adopted shutoff moratoria at any point during the pandemic). See generally *State Action on Coronavirus (COVID-19)*, NAT’L CONF. STATE LEGISLATURES (Sept. 18, 2020), <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx> [https://perma.cc/B9ML-CAHC].

<sup>80</sup> Ibraheem M. Karaye & Jennifer A. Horney, *The Impact of Social Vulnerability on COVID-19 in the U.S.: An Analysis of Spatially Varying Relationships*, 59 AM. J. PREVENTIVE MED. 317, 321 (2020).

<sup>81</sup> CONG. RSCH. SERV., *WATER INFRASTRUCTURE FINANCING: HISTORY OF EPA APPROPRIATIONS* (2019).

<sup>82</sup> See, e.g., Jesus Reyes, *Coachella Extends Eviction Moratorium & Suspension of Water Service Shutoffs*, KESQ (May 28, 2020, 7:08 PM), <https://kesq.com/news/2020/05/28/coachella-extends-eviction-moratorium-suspension-of-water-service-shutoffs> [https://perma.cc/L5Z6-

of accumulating bills and reinstatement of water service, even during the emergency declaration, was the rare exception rather than the rule.<sup>83</sup> Further, all of these measures were temporary. In many communities, consumers remained liable for the bills that accumulated during the moratorium and that came due when regular billing was reinstated.<sup>84</sup> Many jurisdictions resumed water shutoffs for lack of payment long before there were signs of economic recovery and despite rising rates of COVID-19.<sup>85</sup>

Unlike the 1930s, water managers who were reluctant to curtail water access during the twenty-first century pandemic could not realistically offer consumers the opportunity to work off their bills; a myriad of legal and practical constraints stood in their way.<sup>86</sup> Yet water authorities, and local communities more generally, are well aware of the impact that water shutoffs can have on individuals and families, and the downward economic spiral that such a shutoff can trigger.<sup>87</sup> No wonder, then, that massive shutoffs like those initiated in Detroit set off widespread condemnation and a class action lawsuit.<sup>88</sup>

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YSZY]; Press Release, Office of Governor Gavin Newsom, Governor Newsom Takes Executive Action to Establish a Statewide Moratorium on Evictions (Mar. 27, 2020), <https://www.gov.ca.gov/2020/03/27/governor-newsom-takes-executive-action-to-establish-a-statewide-moratorium-on-evictions> [<https://perma.cc/7R4W-NNTB>].

<sup>83</sup> Michigan was one of the few states where reinstatement was ordered. See Rick Pluta, Governor Whitmer Extends Water Shutoff Moratorium, MICH. RADIO (July 8, 2020), <https://www.michiganradio.org/post/governor-whitmer-extends-water-shutoff-moratorium> [<https://perma.cc/SQG7-NRSJ>].

<sup>84</sup> Brett Walton, Water Shutoffs Are Suspended, but the Bills Will Still Be Due, CIRCLE OF BLUE (2020), <https://www.circleofblue.org/2020/world/water-shutoffs-are-suspended-but-the-bills-will-still-be-due> [<https://perma.cc/G9JQ-TQ32>]; see also As Twelve Million Americans Lose Water Protection, New York Passes Landmark Utility Shutoff Law, FOOD & WATER WATCH (June 18, 2020), <https://www.foodandwaterwatch.org/news/12-million-americans-lose-water-protection-but-new-york-passes-landmark-utility-shutoff-law> [<https://perma.cc/R5FX-SKBC>].

<sup>85</sup> Coronavirus Latest: Baltimore Resumes Distribution of Water Bills, CBS BALT. (May 8, 2020, 5:43 AM), <https://baltimore.cbslocal.com/2020/05/08/coronavirus-latest-baltimore-resumes-distribution-of-water-bills> [<https://perma.cc/4PQN-UFMP>]; see also Coronavirus: US Economy Sees Sharpest Contraction in Decades, BBC (July 30, 2020) <https://www.bbc.com/news/business-53574953> [<https://perma.cc/7344-CSKH>].

<sup>86</sup> For instance, many water authority employees are unionized. See, e.g., Luther Turmelle, Regional Water Authority Union Workers Picket Outside New Haven Headquarters, NEW HAVEN REG. (Feb. 21, 2019, 8:01 PM), <https://www.nhregister.com/business/article/Regional-Water-Authority-union-workers-picket-13635169.php> [<https://perma.cc/4RTF-4CND>].

<sup>87</sup> See, e.g., Walton, *supra* note 84 (quoting water authorities considering extending repayment periods).

<sup>88</sup> Steve Neavling, Civil Rights Coalition Files Class-Action Lawsuit to Ban Water Shutoffs in Detroit, DETROIT METRO TIMES (July 10, 2020, 10:00 AM), <https://www.metrotimes.com/news-hits/archives/2020/07/10/civil-rights-coalition-files-class-action-lawsuit-to-ban-water-shutoffs-in-detroit> [<https://perma.cc/4A2W-U23E>].

As described in the next Part, such policies allowing water shutoffs for households that cannot pay their bills violate the human right to water.

## II. FINDING THE HUMAN RIGHT TO WATER

In some respects, the human right to water is relatively new. It was not until 2010 that the United Nations General Assembly approved a resolution recognizing the human right to water as a matter of international law.<sup>89</sup> Yet it would be misleading to date the right to that official act of international recognition. In fact, the human right to water traces back to the Universal Declaration of Human Rights (UDHR), and the recognition of the rights to life (Art. 3) and to an adequate standard of living (Art. 25).<sup>90</sup> The 2010 General Assembly resolution did not establish a new right, but simply made explicit what was already implicitly understood by virtue of the UDHR and the subsequent treaties implementing its provisions, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, these instruments, beginning with the UDHR in 1948, hold that there is a human right to basic drinking water.<sup>91</sup>

The UDHR is a declaration, not a treaty, though it holds substantial weight as a statement of international human rights norms.<sup>92</sup> However, the UDHR was followed by two treaties that expanded on its basic provisions, both opened for signature in 1966: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights

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<sup>89</sup> U.S. Abstention, *supra* note 9. The resolution also confirmed the right to sanitation, a separate and critical right that is beyond the scope of this Article. For background on the right to sanitation, see Inga T. Winkler, *The Human Right to Sanitation*, 37 U. PA. J. INT'L L. 1331 (2016).

<sup>90</sup> G.A. Res. 217A, Universal Declaration of Human Rights (Dec. 12, 1948); see, e.g., Water, Health and Human Rights, WORLD HEALTH ORG. (Feb. 2001), [https://www.who.int/water\\_sanitation\\_health/en/humanrights.html](https://www.who.int/water_sanitation_health/en/humanrights.html) [<https://perma.cc/AB6V-JAMC>] (stating water is a fundamental human right implicitly protected under the UDHR).

<sup>91</sup> Collectively, the UDHR, ICESCR, and the ICCPR are known as the “international bill of rights.” U.N. OFF. HIGH COMM’R FOR HUM. RTS., Fact Sheet No. 2, (Rev. 1) *The International Bill of Rights* 1 (1996), <https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf> [<https://perma.cc/V57U-CCYB>]; see also Sarah A. Seo, *A Shattered Dream: The American Law Institute and the Drafting of the International Bill of Rights*, 30 T. JEFFERSON L. REV. 179 (2007).

<sup>92</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMPAR. L. 287, 323 (1996).



(ICESCR). The United States has ratified the ICCPR but has only signed the ICESCR.<sup>93</sup>

The ICCPR, dealing with civil and political rights, does not explicitly touch on water. However, Article 6 of the ICCPR provides that “[e]very human being has the inherent right to life,” a right for which water is a necessary precursor.<sup>94</sup>

The ICESCR, addressing economic and social rights, is also silent on the issue of water.<sup>95</sup> However, Matthew Craven, who analyzed the drafters’ intentions by examining the travaux préparatoires for the ICESCR, found that water was among the possible rights considered in the drafting of Article 11 on the “right to an adequate standard of living.”<sup>96</sup> The notes of the negotiation indicate that Article 11 was intended to be broad; water is not identified in Article 11, but the list set out in the treaty—singling out the rights to food, clothing, and housing—was not meant to be exhaustive.<sup>97</sup>

Following the ICESCR and the ICCPR, by the 1970s, the right to water began to appear in both soft law and treaty language. According to Hall, Van Koppen, and Van Houweling:

One of the first *explicit* references to the human right to water for domestic uses in an international text is found in the conference report from the 1977 United Nations Water Conference in Mar del Plata, which positioned the right to drinking water in the context of basic needs: “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”<sup>98</sup>

Two years later, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly referenced women’s rights to water.<sup>99</sup> Focusing on living conditions of rural women, CEDAW called for the elimination of discrimination

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<sup>93</sup> Evgeny Krasnov, Note, Freedom from Food: On the Need to Restore FDR’s Vision of Economic Rights in America, and How It Can Be Done, 41 HOFSTRA L. REV. 735, 754–75 (2013).

<sup>94</sup> International Covenant on Civil and Political Rights, art. 6, adopted Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>95</sup> International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3.

<sup>96</sup> MATHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 287–349 (1995).

<sup>97</sup> *Id.* at 289–90.

<sup>98</sup> Ralph P. Hall, Barbara Van Koppen, & Emily Van Houweling, The Human Right to Water: The Importance of Domestic and Productive Water Rights, 20 SCI. ENG’G ETHICS 849, 854 (2014) (emphasis added).

<sup>99</sup> Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, S. TREATY DOC. NO. 96-53, 1249 U.N.T.S. 13.

against women and stated that women have the right “[t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”<sup>100</sup>

As Murthy observes, soft law declarations such as the Mar del Plata statement, followed by specialized treaty provisions such as CEDAW’s addressing specific communities, “paved the way for the eventual recognition of the right to water and sanitation as within the scope of rights recognized by the [ICESCR].”<sup>101</sup> That formal recognition came in in 2003, when the U.N. Committee on Economic and Social Rights issued a General Comment titled “the right to water,” clarifying that the ICESCR protects the human right to water.<sup>102</sup> The committee located the right in Article 11, on an adequate standard of living; Article 12, on the right to health; and in the more general rights to life and human dignity.<sup>103</sup> In 1989, the Convention on the Rights of the Child (CRC) reiterated the connection between water and the “highest attainable standard of health.”<sup>104</sup> The CRC is the most widely ratified human rights treaty in the world.<sup>105</sup> To fulfill their obligations under the CRC, states parties undertake “[t]o ‘combat disease and malnutrition . . . through, inter alia . . . the provision of adequate nutritious foods and clean drinking-water.’”<sup>106</sup>

Beyond treaty language, the international community has also embraced several other mechanisms for ensuring the human right to water. The Millennium Development Goals (MDG), issued by the United Nations in 2000, included specific targets for expanded drinking water access to be achieved by 2015, recognizing access to water as an important component of global environmental sustainability.<sup>107</sup> In

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<sup>100</sup> *Id.* at art. 14(2)(h).

<sup>101</sup> Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy over Privatization*, 31 *BERKELEY J. INT’L L.* 89, 92 (2013).

<sup>102</sup> U.N. Econ. & Soc. Council, *Comm. on Econ., Soc. & Cultural Rts.*, General Comment No. 15 (2002), *The Right to Water* (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

<sup>103</sup> *Id.*

<sup>104</sup> Convention on the Rights of the Child, art. 24(1), adopted Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>105</sup> 25th Anniversary of the Convention on the Rights of the Child: Questions and Answers, *HUM. RTS. WATCH* (Nov. 17, 2014, 11:50 AM), <https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child> [https://perma.cc/XWE2-F47E]. The United States is one of only three countries that has not ratified the CRC. *Id.*

<sup>106</sup> CRC, *supra* note 104, at art. 24(2)(c).

<sup>107</sup> Millennium Development Goals (MDGs), *WORLD HEALTH ORG.*, [https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-\(mdgs\)](https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-(mdgs)) [https://perma.cc/P9VZ-8N3H]; U.N. Secretary-General, *Road Map Towards the Implementation of the United Nations*

2008, a full two years before the U.N. General Assembly adopted its water rights resolution, the U.N. Human Rights Council created a new position of independent expert on the human rights to safe drinking water and sanitation.<sup>108</sup> The experts serving in the role have done much to develop the real-world contours of the human right to water as they apply the right in practical contexts through country visits and thematic reports.<sup>109</sup>

In sum, the General Assembly's 2010 Resolution did not so much create the human right to water as endorse the many developments—beginning with the UDHR—that led up to its explicit recognition. In the wake of the 2010 Resolution, the international community has continued to build on the human right to water, particularly with the widely embraced Sustainable Development Goal (SDG) 6, committing to “[e]nsure access to water and sanitation for all.”<sup>110</sup> In force as of January 2016, the SDGs are targeted to be achieved by 2030.<sup>111</sup> More recently, COVID-19 heightened international attention to the issue of water rights. For example, in March 2020, several United Nations experts joined to “call on governments to immediately prohibit water cuts to those who cannot pay water bills” and to “provide water free of cost for the duration of the crisis to people in poverty and those affected by the upcoming economic hardship.”<sup>112</sup>

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Millennium Declaration: Report of the Secretary-General, U.N. Doc. A/56/326, at 91–92 (Sept. 6, 2001).

<sup>108</sup> U.N. Hum. Rts. Council, Special Rapporteur on the Hum. Rts. to Safe Drinking Water and Sanitation: Overview of the Mandate, <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWATER/Pages/Overview.aspx> [<https://perma.cc/6QL5-YWLH>]. The position has since been converted to the status of Special Rapporteur. Hum. Rts. Council Res. 16/2, U.N. Doc. A/HRC/RES/16/2 (Mar. 24, 2011).

<sup>109</sup> Léo Heller, Catarina De Albuquerque, Virginia Roaf, & Alejandro Jiménez, Overview of Twelve Years of Special Rapporteurs on the Human Rights to Water and Sanitation: Looking Forward to Future Challenges, 12 *WATER* 2598 (2020).

<sup>110</sup> The U.N. SDGs build on the earlier MDGs and encourage voluntary reporting. MDGs, *supra* note 107; 2020 Voluntary National Reviews (VNRs), U.N. OFF. HIGH COMM’R FOR HUM. RTS, <https://www.ohchr.org/EN/Issues/SDGS/Pages/2020VoluntaryNationalReviews.aspx> [<https://perma.cc/3GND-DNWX>]; Sustainable Development Goals, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/sustainable-development-goals> [<https://perma.cc/HY49-DQJX>]. In July 2020, the U.N. stated that efforts to achieve SDG 6 were “badly off track” and announced a new framework to accelerate progress toward achieving the SDG. Press Release, UN-Water, United Nations Launches Framework to Speed Up Progress on Water and Sanitation Goal, U.N. Press Release ENV/DEV/2037 (July 9, 2020).

<sup>111</sup> Sustainable Development Goals: 17 Goals to Transform Our World, U.N. NEWS CTR. (Dec. 30, 2015), [https://www.un.org/development/desa/statements/wp-content/uploads/sites/12/2016/01/Overview\\_SDGs\\_EN.pdf](https://www.un.org/development/desa/statements/wp-content/uploads/sites/12/2016/01/Overview_SDGs_EN.pdf) [<https://perma.cc/4DLG-S3NL>].

<sup>112</sup> COVID-19 Will Not Be Stopped Without Providing Safe Water to People Living in Vulnerability—UN Experts, U.N. HUM. RTS. OFF. HIGH COMM’R (Mar. 23, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25738&LangID=E> [<https://perma.cc/H8R2-EZHR>].

In the United States, where the federal government is on record withholding its support for the human right to water in 2010, and local governments are left to decide these issues for themselves without national coordination, the United Nations' calls have had little national impact.<sup>113</sup> However, there are some notable examples of local embrace of human rights norms, with United States cities stepping into the gap left by federal inaction. As mentioned above, in 2012, California became the first state in the United States to declare that every human being in the state "has a right to clean, safe, affordable, and accessible water adequate for human consumption and sanitary purposes."<sup>114</sup> The law does not create a private cause of action, but rather, all relevant state agencies must consider the human right to water when "revising, adopting, or establishing policies, regulations, and grant criteria pertinent to water uses."<sup>115</sup>

New York City articulated its commitment to the human right to water in its 2018 report on the city's efforts to attain the SDGs.<sup>116</sup> New York was the first city in the world to submit such a report, denominated as a Voluntary Local Review (VLR), to the United Nations.<sup>117</sup> Since the United States government has largely stood aside from the SDG effort and has not completed a national review, VLRs take on an added significance in the United States.<sup>118</sup> In its VLR, New

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<sup>113</sup> California, with its Human Right to Water law, is the exception. See BALAZS ET AL., *infra* note 114. Calls for a coordinated federal response to water shutoffs have so far not resulted in policy changes. See New Senate Data Underscores Urgent Need for Federal Moratorium on Utility Shut-offs, FOOD & WATER WATCH (July 23, 2020), <https://www.foodandwaterwatch.org/news/new-senate%C2%A0data-underscores-urgent-need-federal-moratorium-utility-shut-offs> [<https://perma.cc/6Z9S-KGCS>].

<sup>114</sup> CAROLINA BALAZS, JOHN B. FAUST, JESSICA J. GODDARD, KOMAL BANGIA, EMILIE FONS, & MOLLY STARKE, CAL. ENV'T PROT. AGENCY-OFF. OF ENV'T HEALTH HAZARD ASSESSMENT, *ACHIEVING THE HUMAN RIGHT TO WATER IN CALIFORNIA: AN ASSESSMENT OF THE STATE'S COMMUNITY WATER SYSTEMS 1* (2019), <https://oehha.ca.gov/media/downloads/water/report/achievinghr2w08192019.pdf> [<https://perma.cc/9GXM-M8VQ>].

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

<sup>116</sup> N.Y.C. MAYOR'S OFF. FOR INT'L AFFS., *GLOBAL VISION/URBAN ACTION: VOLUNTARY LOCAL REVIEW: NEW YORK CITY'S IMPLEMENTATION OF THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT* 26–30 (2018), [https://www1.nyc.gov/assets/international/downloads/pdf/NYC\\_VLR\\_2018\\_FINAL.pdf](https://www1.nyc.gov/assets/international/downloads/pdf/NYC_VLR_2018_FINAL.pdf) [<https://perma.cc/RP2M-Z54N>] [hereinafter *GLOBAL VISION*].

<sup>117</sup> New York City's review was patterned on the Voluntary Reviews being undertaken by many countries at the national level worldwide. ANTHONY F. PIPA & MAX BOUCHET, *NEXT GENERATION URBAN PLANNING: ENABLING SUSTAINABLE DEVELOPMENT AT THE LOCAL LEVEL THROUGH VOLUNTARY LOCAL REVIEWS 2*, BROOKINGS (2020), <https://www.brookings.edu/research/next-generation-urban-planning-enabling-sustainable-development-at-the-local-level-through-voluntary-local-reviews-vlrs> [<https://perma.cc/2X4J-LCQS>].

<sup>118</sup> Anthony F. Pipa & Kaysie Brown, *American Leadership on the Sustainable Development Goals*, BROOKINGS: UP FRONT (Oct. 14, 2019), <https://www.brookings.edu/blog/up-front/2019/10/14/american-leadership-on-the-sustainable-development-goals> [<https://perma.cc/ZJ9L->

York City identifies SDG 6, setting goals for clean water and sanitation, as a priority issue for the city.<sup>119</sup> The report describes a number of city-based initiatives intended to attain SDG 6, including the Water Debt Assistance Program designed to assist vulnerable residents in paying water bills.<sup>120</sup>

Los Angeles's VLR also highlights its efforts to achieve targets under SDG 6. For example, Los Angeles identifies a goal of establishing "permanent drinking water access in Skid Row," a location where the city's homeless residents are concentrated.<sup>121</sup> Orlando, Florida, the first mid-sized United States city to undertake a VLR, has indicated SDG 6 will be a focal point of its forthcoming report.<sup>122</sup>

Several more United States-based VLRs are expected in the coming months and years.<sup>123</sup> Local embrace of the human right to water through SDG 6 is a welcome development that demonstrates, if more proof was needed, the extent to which Americans view water access as fundamental to community well-being. At the same time, the VLR movement in the United States reiterates the fragmentary way that water access is addressed (or not) in the absence of a federal baseline.

### III. THE CONSTITUTIONAL RIGHT TO WATER AROUND THE WORLD

Beyond international law, there is value in examining how other countries have addressed the human right to water in their domestic legal systems. Comparative law can be a vehicle for testing assumptions, as well as a source of ideas and inspiration. As Supreme Court Justice

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9DYT] (noting that the United States is the only OECD and G-20 country that has not volunteered to report on its SDG progress).

<sup>119</sup> GLOBAL VISION, *supra* note 116, at 26–30.

<sup>120</sup> *Id.* at 29–30.

<sup>121</sup> SDG–L.A. & MAYOR'S FUND FOR L.A., LOS ANGELES SUSTAINABLE DEVELOPMENT GOALS: A VOLUNTARY LOCAL REVIEW OF PROGRESS IN 2019 75 (2019), [https://sdg.lamayor.org/sites/g/files/wph1131/f/LA%27s\\_Voluntary\\_Local\\_Review\\_of\\_SDGs\\_2019.pdf](https://sdg.lamayor.org/sites/g/files/wph1131/f/LA%27s_Voluntary_Local_Review_of_SDGs_2019.pdf) [<https://perma.cc/6Y2X-X5TK>]; see also Jay Neuner, Los Angeles Joins NYC, Bristol in Publishing Voluntary Local Review, *TRENDS* (July 31, 2019), <https://www.sdsntrends.org/blog/2019/7/31/los-angeles-presents-vlr> [<https://perma.cc/58RV-WX6G>].

<sup>122</sup> Kale Roberts, Localization of the SDG Process, *CITYTALK* (June 30, 2020), <https://talkofthecities.iclei.org/localization-of-the-sdg-process> [<https://perma.cc/Y33N-934S>].

<sup>123</sup> For example, Hawai'i issued its VLR in late 2020. See HAW. GREEN GROWTH, ALOHA+ CHALLENGE 2020 BENCHMARK REPORT: HAWAI'I'S VOLUNTARY LOCAL REVIEW OF PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS (2020), <https://www.hawaiigreengrowth.org/voluntary-local-review> [<https://perma.cc/V5P4-K4UF>].

Breyer has indicated, comparative law can also be a vehicle for reinforcing the rule of law across democratic systems.<sup>124</sup>

One way that other countries have approached the right to water is by explicitly including it in their constitutions. Worldwide, dozens of national constitutions address the right to water, sometimes creating enforceable rights and other times setting out less concrete goals or commitments.<sup>125</sup> Many of these provisions have been added in recent years, as nations incorporate contemporary human rights standards into their governing instruments.<sup>126</sup>

South Africa's constitutional provision regarding water, providing simply that "[e]veryone has the right to have access to sufficient food and water," has received particularly robust implementation.<sup>127</sup> The constitutional provision is implemented through South Africa's 1997 Water Services Act.<sup>128</sup> Among other things, that Act guarantees a very basic level of water for drinking and hygiene: "Every household should receive the first 6,000 liters of water a month for free."<sup>129</sup> Above that amount, households pay for water based on a rising tariff, i.e., "the more you use, the more it costs."<sup>130</sup> The law also states that no consumer can be without water for more than seven days per year.<sup>131</sup> South African courts have acted to enforce these provisions. For instance, in 2011, the Supreme Court of Appeal held that the City of Cape Town had a "constitutional and statutory obligation to supply water to users," and

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<sup>124</sup> STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 271–84 (2015).

<sup>125</sup> See generally Rhett B. Larson, *The New Right in Water*, 70 *WASH. & LEE L. REV.* 2181 (2013).

<sup>126</sup> Jootaek Lee & Maraya Best, *Attempting to Define the Human Right to Water with an Annotated Bibliography & Recommendations for Practitioners*, 30 *GEO. ENV'T L. REV.* 75, 90–103 (2017); see also Norbert Brunner, Vijay Mishra, Ponnusamy Sakthivel, Markus Starkl, & Christof Tschohl, *The Human Right to Water in Law and Implementation*, 4 *LAWS* 413 (2015). In 2020, Costa Rica amended its constitution to add a right to water. *Costa Rica Now Considers Access to Water as a Constitutional Right*, *TICO TIMES* (June 5, 2020), <https://ticotimes.net/2020/06/05/costa-rica-now-considers-access-to-water-as-a-constitutional-right> [https://perma.cc/3MDQ-KKY7].

<sup>127</sup> S. AFR. CONST., 1996, sec. 27(1)(b). See generally David Takacs, *South Africa and the Human Right to Water: Equity, Ecology, and the Public Trust Doctrine*, 34 *BERKELEY J. INT'L L.* 55 (2016).

<sup>128</sup> Water Services Act 108 of 1997 (S. Afr.).

<sup>129</sup> S. AFR. HUM. RTS. COMM'N, *THE RIGHT TO WATER & SANITATION* 4 (2018), <https://www.sahrc.org.za/home/21/files/SAHRC%20Water%20and%20Sanitation%20revised%20pamphlet%2020%20March%202018.pdf> [https://perma.cc/UNM4-PME9] [hereinafter S. AFR., *RIGHT TO WATER*].

<sup>130</sup> *Id.*; see also WORLD WATER COUNCIL, *THE RIGHT TO WATER: FROM CONCEPT TO IMPLEMENTATION* 17, 36 (2006), [https://www.worldwatercouncil.org/fileadmin/www/Library/RightToWater\\_FinalText\\_Cover.pdf](https://www.worldwatercouncil.org/fileadmin/www/Library/RightToWater_FinalText_Cover.pdf) [https://perma.cc/8MH4-5NJB].

<sup>131</sup> S. AFR., *RIGHT TO WATER*, *supra* note 129, at 3.

could not cut off a resident's water supply because of failure to keep up with payments.<sup>132</sup>

However, a constitutional provision addressing water does not ensure implementation on the ground. Similar to South Africa, the Zimbabwe Constitution of 2013 provides that "[e]very person has the right to safe, clean, and potable water."<sup>133</sup> The commitment remains aspirational, as Zimbabwe has struggled to provide clean, affordable, and accessible water to its residents. In 2019, Amnesty International estimated that two million Zimbabweans lacked access to water.<sup>134</sup> Nevertheless, the constitution and statutes implementing it do provide a mechanism for individuals and communities to raise complaints, and Zimbabwe's courts have found that the constitutional commitment creates justiciable rights providing a forum for addressing individuals' concerns.<sup>135</sup>

Explicit constitutional language is not the only means for enforcing the right to water. In many countries, courts have found a constitutional right to water in the absence of a specific reference to water rights in the constitution. Courts in India, for example, have construed the constitutional "right to life" in Article 21 of the Indian Constitution to include the rights to water and sanitation.<sup>136</sup> Similar to the U.S. Constitution's Due Process Clause, India's Article 21 states that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>137</sup> Also like the U.S. Due Process Clause, India's provision has been read to include substantive as well as procedural rights.<sup>138</sup> As one among several examples, in 2014,

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<sup>132</sup> *City of Cape Town v. Strümpher* 2012 (4) SA 207 (SCA). See discussion of Strümpher in C.B. Soyapi, *Water Security and the Right to Water in Southern Africa: An Overview*, 20 PER/PELJ 2, 15 (2017). On the other hand, some have been critical in their evaluation of the law's enforcement. See Richard Stacey, *Falling Short of Constitutional Norms: Does "Normative (In)Congruence" Explain the Courts' Inability to Promote the Right to Water in South Africa?*, 43 L. & SOC. INQUIRY 796 (2018).

<sup>133</sup> ZIM. CONST., § 77(a) (2013).

<sup>134</sup> Zimbabwe 2019, AMNESTY INT'L, <https://www.amnesty.org/en/countries/africa/zimbabwe/report-zimbabwe> [https://perma.cc/AY7V-28YC].

<sup>135</sup> See, e.g., *Hopcik Inv. (PVT) Ltd. v Minister of Env't, Water & Climate*, 16 ZWHHC 137 (Zim. Feb. 17, 2016).

<sup>136</sup> Brunner et al., *supra* note 126, at 425–26. Zambia has also interpreted its constitutional "right to life" to encompass a right to water. Soyapi, *supra* note 132, at 12–14.

<sup>137</sup> India Const. art. 21.

<sup>138</sup> Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216, 217 (2010).

the Bombay High Court held that Article 21's "right to life" provision barred the government from depriving illegal slum dwellers of water.<sup>139</sup>

Botswana's constitution is also silent on the question of water rights, but a court nevertheless found constitutional protection for water in *Matsipane Mosetlhanyane v. Attorney General*.<sup>140</sup> The applicants, members of a community lawfully residing on the Central Kalahari Game Reserve, charged that the government violated their human right to water when it sealed the boreholes on the reserve. Finding for the applicants, the court inferred a human right to water from the provision of the Botswana Constitution protecting individuals from inhumane and degrading treatment.<sup>141</sup>

In Colombia, the Constitutional Court found that the rights to life, human dignity, health, and a healthy environment, all explicitly set out in the constitution, supported an implicit constitutional right to safe and sufficient water.<sup>142</sup> The respective constitutions of Ireland, France, and Belgium have also been construed to protect the right to water under their constitutional "right to life" clauses.<sup>143</sup> In Portugal, where the constitution is silent on the right to water, the Supreme Constitutional Court ruled that the constitutionally protected right to health was violated when the government threatened a water shutoff to coerce payment.<sup>144</sup> In Argentina, national courts found the right to water as part of the constitution's right to environmental protection.<sup>145</sup>

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<sup>139</sup> *Pani Haq Samiti v. Brihan Mumbai Mun. Corp.*, (2014) PIL-10-2012 (Bombay High Ct.) (India). The case law of India relating to the right to water is quite extensive. See McGraw, *supra* note 35, at 169–73 (discussing Indian jurisprudence).

<sup>140</sup> *Matsipane Mosetlhanyane v. Att'y Gen.*, No. CACLB-074-10 (Bots. Ct. App. 2011).

<sup>141</sup> *Id.* For a discussion of the human right to water under Uganda's Constitution, see Phiona Muhwezi Mpanga, *Interpreting the Human Right to Water as a Means to Advance Its Enforcement in Uganda*, 16 AFR. HUM. RTS. L.J. 204 (2016).

<sup>142</sup> Corte Constitucional [C.C.] [Constitutional Court], 4th Chamber, mayo 22, 2003, Sentencia T-410/03, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

<sup>143</sup> McGraw, *supra* note 35, at 168–69. See generally CTR. ON HOUS. RTS. & EVICTIONS, *LEGAL RESOURCES FOR THE RIGHT TO WATER AND SANITATION: INTERNATIONAL AND NATIONAL STANDARDS* (2d ed. 2008), [https://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right\\_to\\_Water/Pdf\\_doct/RWP-Legal\\_Res\\_1st\\_Draft\\_web.pdf](https://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/RWP-Legal_Res_1st_Draft_web.pdf) [<https://perma.cc/8UTL-G8TZ>].

<sup>144</sup> Tribunal Constitucional [Constitutional Court], Precedent no. 817/2002 of 25-06-2002, Proceedings no. 685/2004, DR 73 Series II of 14-04-2005, 6031, <https://dre.pt/application/file/a/1687102> [<https://perma.cc/8SGS-E7PP>]; see also WASH. UNITED & WATERLEX, *THE HUMAN RIGHTS TO WATER AND SANITATION IN COURTS WORLDWIDE: A SELECTION OF NATIONAL, REGIONAL AND INTERNATIONAL CASE LAW* 219–20 (2014), [http://hrbaportal.org/wp-content/files/Human-rights-to-water-and-sanitation-in-courts\\_WEB\\_2015.pdf](http://hrbaportal.org/wp-content/files/Human-rights-to-water-and-sanitation-in-courts_WEB_2015.pdf) [<https://perma.cc/PV8J-5FRU>].

<sup>145</sup> M. Belén Olmos Giupponi & Martha C. Paz, *The Implementation of the Human Right to Water in Argentina and Colombia*, 15 ANUARIO MEXICANO DE DERECHO INTERNACIONAL [MEX. Y.B. INT'L L.] 323, 351 (2015).



Having identified a constitutional right to water, courts may then be called on to grapple with the complex issues involved in implementing the right. For example, in *Mazibuko v. City of Johannesburg*,<sup>146</sup> the court considered, inter alia, whether South Africa's statutory minimum allocation of water met the constitutional standard. Applying a reasonableness test to ascertain constitutional compliance, the court upheld the statutory minimums against a challenge from low-income consumers in Soweto.<sup>147</sup> In short, the existence of a constitutional right does not require that a government take steps beyond what is reasonable in South Africa, or in United States' legal terminology, to ignore compelling circumstances limiting water access. Yet the recognition of a constitutional right can create an important baseline for water access. Notably, in South Africa, access to an improved drinking water source grew from 76.6% of the population in 1996 to 90.8% in 2013.<sup>148</sup> By 2018, these numbers had slipped somewhat, with only 89% of the population reporting having access to drinking water, but the constitutional baseline remains a lodestar shaping public expectations and government standards.<sup>149</sup>

#### IV. CONSTITUTIONAL RIGHTS TO BASIC WATER UNDER UNITED STATES LAW

Constitutional recognition of water is not foreign to the United States. Water is specifically mentioned in several state constitutions. Article XI, Section 7 of the Hawai'i State Constitution embodies the public trust doctrine, providing that "[t]he State has an obligation to

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<sup>146</sup> *Mazibuko v. City of Johannesburg* 2008 (4) All SA 471 (W), aff'd on other grounds, 2009 (3) All SA 202 (SCA), rev'd, 2010 (4) SA 1 (CC) (S. Afr.). For a critical examination of the case, see Lucy A. Williams, *The Justiciability of Water Rights: Mazibuko v. City of Johannesburg*, 18 WILLAMETTE J. INT'L L. & DISP. RESOL. 211 (2010). See also Gov't of the Republic of S. Afr. v. Grootboom 2001 (1) SA 46 (CC) (S. Afr.) (holding socio-economic rights do not exist only on paper but rather are justiciable and the government should take steps to ensure realization of those rights); *Residents of Bon Vista Mansions v. S. Metro. Loc. Council* 2001 (6) BCLR 625 (W) (S. Afr.) (ordering the reconnection of water supply).

<sup>147</sup> *Mazibuko*, 2010 (4) SA 1 (CC) at 5 para. 9; see also Greenwell Matchaya, O'Brien Kaaba, & Charles Nhemachena, *Justiciability of the Right to Water in the SADC Region: A Critical Appraisal*, 7 LAWS 18 (2018).

<sup>148</sup> REPUBLIC OF SOUTH AFRICA, *MILLENNIUM DEVELOPMENT GOALS* (2015), [http://www.statssa.gov.za/MDG/MDG\\_Goal7\\_report\\_2015\\_.pdf](http://www.statssa.gov.za/MDG/MDG_Goal7_report_2015_.pdf) [https://perma.cc/YL2Z-9KYZ].

<sup>149</sup> GENERAL HOUSEHOLD SURVEY ix, S. AFR. DEP'T STATISTICS (2018), <http://www.statssa.gov.za/publications/P0318/P03182018.pdf> [https://perma.cc/5YVQ-L4D8]; see Greenwell Matchaya, O'Brien Kaaba, & Charles Nhemachena, *Justiciability of the Right to Water in the SADC Region: A Critical Appraisal*, 7 LAWS 18 (2018).

protect, control and regulate the use of Hawai[‘i]’s water resources for the benefit of its people.”<sup>150</sup> Article XCVII of the Massachusetts State Constitution asserts that “[t]he people shall have the right to clean air and water.”<sup>151</sup> With similar wording, the Pennsylvania State Constitution provides that “[t]he people have a right to clean air, [and] pure water.”<sup>152</sup> To date, courts have viewed these provisions through the lens of environmental law rather than applying them to regulate consumption of household water for drinking and hygiene.<sup>153</sup> Yet the language of the provisions—for example, the Hawai‘i Constitution’s specific reference to the “use” of water—seems equally applicable to protection of access to household water. With the growth of environmental constitutionalism more generally, as well as increased awareness of water policy during the pandemic, state courts may soon be asked to consider whether their state constitutions require that states or localities provide basic water access for the benefit of “the people.”

In contrast to these state constitutions, the federal Constitution is silent on water. The Supreme Court has noted the significance of water to human life but has not squarely ruled on whether it has status as a fundamental right.<sup>154</sup> To date, the handful of lower courts addressing that question have declined to find such a right.<sup>155</sup>

However, the door to a fundamental right to basic household water is far from closed. The Supreme Court has found—when compelling circumstances are presented—that the Constitution protects “fundamental rights” that are not specifically identified in the text but reflect important values or actions “implicit in the concept of ordered liberty” and “deeply rooted in this Nation’s history and traditions.”<sup>156</sup> In *Obergefell v. Hodges*, marriage was confirmed to be

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<sup>150</sup> HAW. CONST. art. XI, § 7; HAW. CMTY. FOUND., A BLUEPRINT FOR ACTION: WATER SECURITY FOR AN UNCERTAIN FUTURE: 2016–2018 9 (2015), [https://issuu.com/hcfhawaii/docs/fresh\\_water\\_blueprint\\_final\\_062215?e=1137810/68588624](https://issuu.com/hcfhawaii/docs/fresh_water_blueprint_final_062215?e=1137810/68588624) [<https://perma.cc/AE5C-NXAE>].

<sup>151</sup> MASS. CONST. art. XCVII.

<sup>152</sup> PA. CONST. art. I, § 27.

<sup>153</sup> Kacy Manahan, The Constitutional Public Trust Doctrine, 49 ENV’T. L. 263, 270–79 (2019) (discussing Hawai‘ian and Pennsylvanian constitutional provisions).

<sup>154</sup> For an extensive discussion of water’s consideration by the U.S. Supreme Court, see Murthy, *supra* note 13.

<sup>155</sup> See, e.g., *In re City of Detroit*, 841 F.3d 684, 699–700 (6th Cir. 2016). At least one pending case will offer another opportunity for a federal court to visit this question. Complaint, *Taylor v. City of Detroit*, No. 2:20-cv-11860, 2020 WL 3891425 (E.D. Mich. July 9, 2020). The NAACP’s complaint includes constitutional claims that denial of water violated the bodily integrity of the plaintiffs. *Id.*

<sup>156</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

such a protected activity.<sup>157</sup> As a result of the ruling, the state restrictions on same-sex marriage at issue in *Obergefell* were struck down.<sup>158</sup>

Other fundamental rights recognized by the Court but not articulated in the Constitutional text include the rights to privacy, to bodily integrity, and to travel.<sup>159</sup> Similar to some of the comparative jurisprudence cited above, particularly from India, these substantive rights emerge from the Constitution's guarantee of procedural protections for life, liberty, and property.<sup>160</sup> The jurisprudence of substantive due process remains controversial in some quarters, but several fundamental rights—such as the rights to bodily integrity and travel—are widely embraced as natural and necessary outgrowths of the constitutional text.<sup>161</sup>

Should the right to water join this list of fundamental constitutional rights? Despite the domestic case law to the contrary, there is strong support for a court to reach such a conclusion in the appropriate case. The fundamental nature of water is well understood and widely accepted.<sup>162</sup> Further, the COVID-19 pandemic underscores the critical place of water in American society, while also demonstrating that access to water cannot be adequately protected through the fractured regulations at the local level.<sup>163</sup>

Recognition of new fundamental rights is not a common occurrence. However, a panel of the Sixth Circuit Court of Appeals recently broke new ground when it considered a claim from Detroit parents that the education being provided by the Detroit public schools violated the fundamental right to a basic minimum education.<sup>164</sup> That case, *Gary B. v. Whitmer*, sets out guideposts that are also relevant to the consideration of water's constitutional status.

In concluding that the Constitution protects a right to a basic minimum education, the court examined both prongs of the judicial

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<sup>157</sup> *Obergefell v. Hodges*, 576 U.S. 644, 663–75 (2015); see Matthew R. Grothouse, *Implicit in the Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021 (2016).

<sup>158</sup> *Obergefell*, 576 U.S. at 675–76.

<sup>159</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Saenz v. Roe*, 526 U.S. 489 (1999).

<sup>160</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1999).

<sup>161</sup> *Id.* at 1508–10.

<sup>162</sup> See, e.g., Press Release, U.N. Secretary-General, *Nothing More Fundamental to Life than Water, No More Crucial Year for Action, Secretary-General Says at High-Level Conference in Tajikistan*, U.N. Press Release SG/SM/16831-ENV/DEV/1525-OBV/1478 (June 9, 2015).

<sup>163</sup> In this sense the right is parallel to other fundamental rights, such as the right to same-sex marriage. See *supra* notes 156–58 and accompanying text.

<sup>164</sup> *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), vacated, 958 F.3d 1216 (6th Cir. 2020).

test for finding a fundamental right, i.e., that the proposed right must be (1) implicit in our scheme of ordered liberty, and (2) deeply rooted in our nation's traditions.<sup>165</sup>

As to the first inquiry, the court noted the interrelationships between established constitutional rights such as free speech or voting and the newly asserted right to basic literacy.<sup>166</sup> Without basic literacy, the court concluded, these other rights were essentially meaningless.<sup>167</sup> Lack of literacy strikes at the core of democracy, depriving individuals of a full opportunity to cast a well-informed vote or to engage in robust debate concerning the challenges facing the community.

As to the second prong of the test, the *Gary B.* court examined the Supreme Court's jurisprudence on education, noting the many instances in which the Court had acknowledged the critical importance of education in the United States. The idea that a minimum education, such as basic literacy, is "deeply rooted" in our nation's traditions was supported by cases from *Brown v. Board of Education* to *Plyler v. Doe*.<sup>168</sup> Though not a fact cited by the Supreme Court, education is also mentioned in the constitution of every state.<sup>169</sup>

The *Gary B.* court concluded that a basic minimum education (notably basic literacy, not some higher level of education) was a constitutional right. According to the court:

[T]he right defined in this opinion is narrow in scope. It does not guarantee an education at the quality that most have come to expect in today's America (but that many are nevertheless denied). Rather, the right only guarantees the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system.<sup>170</sup>

The court outlined some of the components that could make up a basic minimum education, such as facilities, books, and teachers that could plausibly support acquisition of basic literacy.<sup>171</sup> However, the opinion left to the district court a determination of more specific requirements, following fact-finding in the matter.<sup>172</sup>

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<sup>165</sup> Id. at 643–44.

<sup>166</sup> Id. at 648–50.

<sup>167</sup> Id. at 653–54.

<sup>168</sup> Id. at 643–50 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Plyler v. Doe*, 457 U.S. 202 (1982)).

<sup>169</sup> Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 706 (2012).

<sup>170</sup> *Gary B.*, 957 F.3d at 659.

<sup>171</sup> Id. at 660.

<sup>172</sup> Id. at 661–62.

The majority's reasoning in *Gary B.* is analogous to the standard that could be applied to evaluate the claim of a fundamental right to basic household water for drinking and sanitation. Water's place within our nation's scheme of ordered liberty is comparable to that of a basic minimum education.<sup>173</sup> To an individual or community lacking the level of water needed for life and health, and struggling with life-threatening thirst or lack of hygiene, the rights to vote, speak, travel, and marry have little meaning.

As to the "deep roots" prong, importantly, while water does not have the same rich legacy of Supreme Court jurisprudence as education, water rights have been considered by the Court multiple times in contexts involving both federal reservations and riparian rights. Scholars have observed that in *Winters v. United States*, the Supreme Court acknowledged the critical importance of water for life when it recognized that "when the federal government holds natural resources on behalf of a community, it must provide enough water for that community to be sustainable."<sup>174</sup> The *Winters* doctrine first applied to reservations but has now been extended to other federal lands, such as national parks and monuments.<sup>175</sup> In 2017, the Ninth Circuit Court of Appeals recognized that the doctrine extended to groundwater as well as surface water.<sup>176</sup> According to the Court, "[w]ater is inherently tied to the . . . ability to live permanently," and without these water rights, a community's way of life "would be entirely defeated."<sup>177</sup>

Importantly, the "deep roots" needed to support a fundamental right are not only found in case law. Historical examples in which individuals and communities refused to deny critical water access in times of hardship, from the ancient "right to thirst" to the Great Depression's contrived work programs, contribute to the argument that access to basic household water for drinking and hygiene is a deeply rooted American value.<sup>178</sup>

The *Gary B.* decision is also instructive since it recognizes the limits of the fundamental right, even while recognizing it. The *Gary B.*

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<sup>173</sup> See generally Murthy, *supra* note 13. Though Murthy stops short of calling for a constitutional right to water, she examines this standard in depth. *Id.*

<sup>174</sup> Matthew J. McKissick, *The Well's Run Dry: Considering Water as a Fundamental Right Using an Interdisciplinary Approach*, 19 NEV. L.J. 341, 349 (2018) (discussing *Winters v. United States*, 207 U.S. 564 (1908)).

<sup>175</sup> See Todd A. Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077, 1081–84 (1984) (discussing extension of *Winters* doctrine to non-Indian lands).

<sup>176</sup> *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270–71 (9th Cir. 2017).

<sup>177</sup> *Id.* at 1270.

<sup>178</sup> See *supra* notes 34, 40–64 and accompanying text.

majority opined that students were entitled only to basic minimum education, not to higher levels of educational attainment.<sup>179</sup> Likewise, a right to water may be limited to the basic level that is necessary to support the exercise of other rights and to support the general welfare of the community. South Africa, for example, fulfills the right by providing individuals with free access to basic amounts of water.<sup>180</sup>

A right to water in the United States would not require that the government provide unlimited, free water to all. Indeed, the international human right to water recognizes that potable water is costly to produce. Under human rights norms, those who can pay for water should pay for it; it is only when an individual cannot pay that a basic amount of water must still be provided without charge as a matter of human rights law.<sup>181</sup> Whether one can or cannot pay may require some level of proof of income relative to the cost of household water, but as stated by David Lilienthal, President Franklin Roosevelt's appointee to the Tennessee Valley Authority:

The question is not whether the consumers are able to pay the rates by sacrificing everything else, but rather whether there is a reasonable choice between spending available income for the utility service at the existing rate or doing without the service and spending the money for another necessity.<sup>182</sup>

Lilienthal was writing about public utilities such as electricity and gas.<sup>183</sup> Presumably with regard to water, the calculus should be even more generous, since it is not feasible to “do without.”

Given the difficulties of defining the scope of a right to water, a court might be tempted to frame it as a negative right. Consistent with many other constitutional rights, this would be a right not to be shut off from basic household water, rather than an affirmative right to receive household water.<sup>184</sup> Such a federal constitutional right would bar water shutoffs to individuals who have water service but cannot pay, but it

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<sup>179</sup> *Gary B. v. Whitmer*, 957 F.3d 616, 659–60 (6th Cir.), vacated, 958 F.3d 1216 (6th Cir. 2020).

<sup>180</sup> See *supra* notes 127–32 and accompanying text.

<sup>181</sup> Hum. Rts. Council, Rep. of the Special Rapporteur on the Hum. Right to Safe Drinking Water and Sanitation, U.N. Doc. A/HRC/30/39, at 10 (Aug. 5, 2015) (“Disconnections are only permissible if it can be shown that households are able to pay but are not paying.”).

<sup>182</sup> David E. Lilienthal, *Regulation of Public Utilities During the Depression*, 46 HARV. L. REV. 745, 762 (1933).

<sup>183</sup> See generally *id.*

<sup>184</sup> Framed in this way, the right is even more modest than the right to literacy found by the *Gary B.* three-judge panel. Such a right would have some parallels to *Goldberg v. Kelly*, 397 U.S. 254 (1970), which mandated “continuing” aid pending a hearing on whether the recipient was entitled to support. In this instance, there would be a presumption of eligibility that would continue pending a determination of ability to pay.

would not require that governments provide more than minimum water service without charge. Further, under this negative rights approach, water authorities would not be obliged to expand water infrastructure to areas of the region that are underserved.<sup>185</sup> Such an approach might fit more neatly into our constitutional system of negative rights, though it could provide a disincentive to add infrastructure in low-income communities.

There is one additional aspect of the constitutional text that supports the fundamental right to water: the Preamble's statement that one of the purposes of the Constitution is to "promote the general Welfare."<sup>186</sup> For many years, the Preamble has been viewed as a nullity,<sup>187</sup> despite the basic canon of construction that the Constitution should be read so as to give meaning to all of its words. Recent scholarship has reestablished the Constitution's Preamble as a source of interpretive guidance, if not substantive rights.<sup>188</sup> According to the exhaustive study published by John Welch and James Heilpern, the "general Welfare" clause (which appears in conjunction with the "common defence" clause) reflects the Framers' concern with community well-being rather than individual welfare.<sup>189</sup>

The term "general Welfare" has particular resonance as we have come to see access to water for handwashing as a primary means to avoid community spread of COVID-19 or other communicable diseases.<sup>190</sup> Individual water access is important not just for the individual, but for general welfare of the community. By emphasizing the community-focused purposes the Constitution is intended to further, the Preamble supports an interpretation of *Palko*'s fundamental rights test that takes into account the broad implications of water access for the general community, beyond the individual. This was not identified as a factor in *Gary B.*, and perhaps is less pertinent in the context of literacy. In contrast, these community impacts are of critical importance, and constitutional magnitude, when considering the potential right to water.

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<sup>185</sup> Anti-discrimination laws may be effective in mandating expanded services, as opposed to restricting shutoffs. See *Kennedy v. City of Zanesville, Ohio*, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

<sup>186</sup> U.S. CONST. pmbl.

<sup>187</sup> See discussion of the Preamble in Welch & Heilpern, *supra* note 18, at 1100–26.

<sup>188</sup> *Id.* at 1132–37.

<sup>189</sup> *Id.* at 1077.

<sup>190</sup> See Mamdooh Alzyood, Debra Jackson, Helen Aveyard, & Joanne Brooke, COVID-19 Reinforces the Importance of Handwashing, 29 J. CLINICAL NURSING 2760 (2020).

## CONCLUSION

The COVID-19 pandemic revealed what is at stake in having and enforcing a right to water under United States law. If there were a constitutional right to water, basic household water would be available even to those who are unable to pay. Consumers would not have to live in fear that their water would be completely shut off if they faced financial hardship. Communities would not have to worry that neighbors were unable to engage in basic behaviors promoting public health because they lacked water.

Even before the pandemic, rising water prices were leading to harsh consequences across the country. Individuals on fixed incomes looked for ways to reduce their expenses by not flushing toilets, by not taking medicines, or by refraining from gardening.<sup>191</sup> Guaranteeing a basic level of water access, relieving individuals of the stress of worrying that their water would be shut off, would make a significant difference to individual and community well-being and health.

During the Great Depression, water authorities were able to provide temporary employment to household heads who fell behind with their water bills. Other individuals could hope that water authorities would find them sufficiently deserving to merit an extended payment plan or some other accommodation. But something so critical to every individual's life, and to every community's general welfare should not be a matter of bureaucratic discretion or largesse. Our constitutional system requires, at the very least, that basic household water for drinking and hygiene not be denied to those who cannot pay.

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<sup>191</sup> Mariana Sarango, *Keeping Our Heads Above Water: Unaffordable Water, Public Health, and Equity in the United States* 75 (Apr. 2020) (Ph.D. Dissertation, Northeastern University) (on file with the Digital Repository Service, Northeastern University Library).