TAKINGS PROPERTY AND APPROPRIATIVE WATER RIGHTS

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The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[1] *While courts and academics have put considerable amounts of effort into discussing the meaning of "taken" or "public use," they have given far less attention to the phrase "private property." Notable scholars have provided a set of definitions and frameworks to determine when a particular right qualifies as* takings property. *However, courts and commentators have yet to define the types of rights that are entitled to constitutional protection with sufficient precision to avoid an inconsistent and inefficient application of the Takings Clause.*

This Article argues that, while these definitions of takings property *lead to sound and consistent outcomes when applied to traditional rights such as a fee simple absolute or an easement, they produce underwhelming results when tested against less conventional interests. The Article assesses how these frameworks perform with a property interest as elusive as appropriative water rights and provides broader lessons about both* takings property *and water law. First, it becomes apparent that the existing literature and court opinions have unreasonably sanctified rights in land while decrying other types of interests as non-property by applying inconsistent standards. Second, the analysis of these existing frameworks reveals some critical shortcomings in their design that had not yet been described. To address these issues, this Article proposes a solution that harmonizes some of the central components of existing* takings property *definitions.*

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1 U.S. CONST. amend. V.

TABLE OF CONTENTS

INTRODUCTION

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[2] As this language makes abundantly clear, the Takings Clause only applies when "private property" is implicated.[3] While a careful examination of this threshold question may not be necessary in some cases, it can be deceptively complicated and outcome determinative in many others.[4]

What is, then, the meaning of "private property" for takings purposes? Even though no universal answer exists, courts and scholars have been trying to provide a workable definition of *takings property* for decades.[5] To be sure, it is possible to identify easy cases, that is, those where there is ample agreement among scholars. For example, not many academics or courts would question that a fee simple absolute constitutes private property both under the common law and as a matter of state and federal constitutional law.[6] Easements are also uniformly viewed as *takings property*, as confirmed by the Supreme Court in its 2021 opinion, *Cedar Point Nursery v. Hassid*.[7] However, whether these protections extend to interests such as common law water rights, bailments, security interests, trusts, or even taxicab licenses is far less clear.[8]

The scholarly debate on the nature and scope of *takings property* cannot be untethered from the broader conversation exploring whether there is a definition of *constitutional property*—which asks this same question, not only focusing on the Takings Clause, but also in the context

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2 U.S. CONST. amend. V.

3 *See id.*

4 *See infra* Section III.B (addressing the controversy over whether water rights are property for takings purposes).

5 *See infra* Section I.B.

6 ROBERT MELTZ, THE CONSTITUTIONAL LAW OF PROPERTY RIGHTS "TAKINGS": AN INTRODUCTION 3 (2008) ("Almost all common interests in land . . . are indisputably property . . . .").

7 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021) ("[T]he Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement."); *see* James Y. Stern, *Property's Constitution*, 101 CAL. L. REV. 277, 289 (2013) (explaining that the Supreme Court views easements as *takings property*).

8 Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 777 (2001) (noting that the general status of bailments, security interests, and trusts has been intensely debated); *see infra* notes 112–14 and accompanying text (explaining the debate around whether water rights should be viewed as "property"); Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REGUL. 125, 137–38 (2013) ("An interesting question is whether [taxicab licenses] are also protected by the Takings Clause . . . .").

of the Due Process Clause.[9] Three main answers have been proposed in the literature. The first—advanced, for example, by Harvard Law School Professor Maureen Brady—is that Supreme Court precedent does not support the notion that there is a separate definition of property for constitutional purposes.[10] In other words, courts should generally decide these cases based on whether a particular right is considered to be property under state common law.[11]

The second approach is supported by scholars who argue that there is a distinct definition of constitutional property. Stated differently, while nonconstitutional sources—such as state law—may determine the features of a particular right, the right in question will only receive constitutional protection if it meets certain constitutional requirements.[12] The third approach, taken by Professor Thomas Merrill in his seminal article, *The Landscape of Constitutional Property*, proffers not one but three different definitions of constitutional property, each of which applies to a particular context, that is, substantive due process, procedural due process, and takings.[13]

The scholars endorsing the second approach have had to face the added challenge of providing a workable framework to determine when a particular right will be deemed *takings property*. Professor John Echeverria, relying on key language provided in Supreme Court precedent, has noted that only two requirements are necessary.[14] First, the right must be "specific and identifiable," and second, it must include "the authority to exclude others from accessing or using it."[15] Professor Merrill, on the other hand, has argued that *takings property* is present when the right that is being examined presents the following three features: it confers the *right to exclude* others, it is *irrevocable*, and it involves "*specific assets*"—which is a clarification and a considerably

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9 *See infra* Section III.B.

10 Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1218 (2016) (explaining that "[t]here is nothing remotely close to a definition of federal constitutional property in Supreme Court case law").

11 *Id.* at 1168. This author recognizes, however, that there is Supreme Court case law deviating from this general rule—the Court has refused to automatically apply state law definitions of property in some takings cases. *See id.* at 1218–19.

12 *See* Stern, *supra* note 7, at 286–87.

13 Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893 (2000). This author explains the historical reasons behind having different interpretations of the word "property" for the purposes of the Takings and Due Process Clauses. *See id.* at 955–59.

14 John D. Echeverria, *Public Takings of Private Contracts*, 38 ECOLOGY L.Q. 639, 663 (2011) (first citing E. Enters. v. Apfel, 524 U.S. 498, 541–45 (1998) (Kennedy, J., concurring); and then citing Merrill, *supra* note 13, at 893).

15 *Id.*

more detailed interpretation of the Supreme Court's "specific and identifiable" requirement.[16] Professor James Stern proposes yet another approach, that is, one under which rights that meet the requirements to be considered in rem—as opposed to in personam—are also constitutional property.[17] According to the latter scholar, to be deemed in rem, a right must pertain to a "discrete thing," which is essentially another variation of what the Supreme Court has called "specific and identifiable."[18]

This Article argues that existing tests for *takings property* focus excessively on traditional property rights and present numerous challenges when applied to other, less conventional types of interests.[19] This is extremely problematic because the goal of these types of tests should be to allow courts, lawyers, and legal scholars to determine whether a particular right constitutes *takings property*, not when the answer to this question is obvious, as tends to be the case with land, but in situations in which there could be a reasonable disagreement as to whether the right being analyzed should, in fact, be viewed as *takings property*.

To expose the shortcomings of these tests, this Article provides an in-depth analysis of a less traditional type of property, that is, water rights. The focus of this analysis is on appropriative rights, a particular type of water right conferred under the common law in western states (i.e., the judge-made law developed in these jurisdictions), which gives priority to water users based on when they acquired the right—a principle often referred to as "first in time, first in right."[20]

The overwhelming majority of commentators agree that common law appropriative rights are property under state law.[21] Whether this

16 *See* Merrill, *supra* note 13, at 969 (emphasis added).

17 *See* Stern, *supra* note 7, at 284.

18 *See id.* at 297 (noting "[a] right in rem exhibits two distinguishing characteristics: it pertains to the use of a particular thing," which the author later refers to as a "discrete thing," "and it avails against the world generally").

19 *See infra* Section IV.A.

20 *See* Kirk v. Bartholomew, 29 P. 40, 41 (Idaho 1892); Granite Ditch Co. v. Anderson, 662 P.2d 1312, 1317 (Mont. 1983); Westlands Water Dist. v. United States, 337 F.3d 1092, 1101–02 (9th Cir. 2003); Fox v. Skagit County, 372 P.3d 784, 789 (Wash. Ct. App. 2016).

21 Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 732 (2008) ("[I]nterests in water can be considered . . . common law property . . . ."); James L. Huffman, Hertha L. Lund & Christopher T. Scoones, *Constitutional Protections of Property Interests in Western Water*, 41 PUB. LAND & RES. L. REV. 27, 28–35 (2019); Nicole L. Johnson, *Property Without Possession*, 24 YALE J. ON REGUL. 205, 209 (2007) (noting that "[w]ater rights are often considered an 'advanced' form of property rights"); Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445, 452 (2008) (explaining that appropriative rights are property rights that were created to internalize important externalities).

conclusion holds true when examining whether appropriative rights are *takings property* for the purposes of the United States Constitution has been a more contested issue.[22] Despite the fact that some scholars have argued vehemently for the opposite view,[23] this Article shows that appropriative rights qualify for constitutional protection under the most widely used definitions of *takings property*, as well as under Supreme Court precedent.[24]

It is worth highlighting that the fact that common law appropriative rights are *takings property* does not necessarily mean that any interference with these rights by the government will require compensation. This will only occur in situations in which the right has actually been *taken*, which involves an entirely separate inquiry focused on the application of the appropriate takings tests.[25] Part of this analysis will entail assessing whether any defenses to takings claims would be applicable, especially those that courts and scholars have highlighted as being particularly relevant in the water context.[26]

Examining whether—and to what extent—appropriative water rights constitute *takings property* allows this Article to make two broader contributions to the constitutional property literature. First, the scholarly debate on this question reflects a tendency to associate property with rights in land, which, in turn, diminishes the status of other less traditional types of property rights even if they otherwise meet the

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22 *See* Huffman, Lund & Scoones, *supra* note 21, at 27 ("As a result of [the] unique character [of water rights], the muddle that currently exists in takings jurisprudence is further exacerbated when applied to water right takings claims."); Zellmer & Harder, *supra* note 21, at 732 ("Courts and commentators alike are split regarding the treatment of interests in water as takings property . . . .").

23 *See, e.g.*, Zellmer & Harder, *supra* note 21, at 745 (concluding that water users are precluded "from having takings property"); Shelley Ross Saxer, *The Fluid Nature of Property Rights in Water*, 21 DUKE ENV'T L. & POL'Y F. 49, 111–12 (2010) (explaining that water right holders should not be compensated when their rights are taken by the government because "[w]ater is fluid and too unlike land to be treated as a property interest"). *But see* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990).

24 *See infra* Section III.B.

25 There is considerable controversy around whether these claims should be examined under a physical or a regulatory takings analysis. *See* Dave Owen, *Taking Groundwater*, 91 WASH. U. L. REV. 253, 273 (2013) (explaining that "some commentators have opined that courts should make much more extensive use of categorical takings tests" in the water context); Huffman, Lund & Scoones, *supra* note 21, at 49, 53.

26 *See, e.g.*, Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENV'T L. 395, 399 (2011); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983) (concluding that the public trust doctrine imposes limitations on water diversions and that, consequently, those holding rights to that resource "can assert no vested right to use those rights in a manner harmful to the trust"); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 953 (2012).

objective requirements to qualify as such.[27] Second, and relatedly, these tests make it very hard to analyze rights that do not relate to land or traditional forms of personal property. These challenges become particularly apparent when one attempts to determine whether the right in question is "specific and identifiable."[28] When asking if water has this particular feature, *takings property* tests that are almost identical on the surface answer this question very differently, thus revealing some of the flaws in their design.[29]

This Article proceeds in four parts. Part I explores the scholarly debate surrounding *takings property*, which focuses on whether this separate category of property exists as well as the requisites that a right must meet in order to be afforded that status. Part II provides an overview of the basic features of water rights and appropriative rights in particular. Part III addresses the question of whether appropriative rights constitute property for takings purposes by first reviewing state court decisions and then applying the definitions of *takings property* proposed by courts and legal scholars to appropriative rights. In Part IV, this Article explains the broader lessons that can be extracted from the analysis in Part III and how they can be used to address some of the shortcomings in the constitutional property literature.

I. CONSTITUTIONAL AND *TAKINGS PROPERTY*

Property rights are typically created and defined by state law.[30] This seems both appropriate and convenient given that property rights will typically be enforced by state courts, for example, in tort actions for trespass or conversion.[31]

However, there are some instances in which a plaintiff may bring an action in court to seek the protection of a property right relying on federal law. For example, the plaintiff's claim may be based on a right that originates in a federal statute. In *Ormet Primary Aluminum Corp. v. Ohio Power Co.*, two parties claimed to be the rightful holder of an atypical

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27 *See infra* Section IV.A.

28 *See infra* Section IV.B.

29 *See infra* Section IV.B.

30 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 482 (2005); Drye v. United States, 528 U.S. 49, 58 (1999); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

31 State courts may, in turn, also distinguish between common law property and constitutional property under their state constitutions.

form of property, that is, pollution emission allowances created under a federal statute, the Clean Air Act.[32]

Another example of a scenario in which a plaintiff relies on federal law to protect a property right is where the claimant invokes the protection afforded by the United States Constitution in connection with a state-created property right. This occurs, for instance, when landowners bring a claim under the Takings Clause of the Fifth Amendment to the United States Constitution, alleging that their property was taken without just compensation.[33]

In addition to the different bases on which these two types of federal claims are brought—statutory law on the one hand and constitutional on the other—there is an important difference between them. In the first scenario, the plaintiff invokes the protection of the so-called horizontal dimension of property rights, which focuses on the courts' role in preventing interference by one private actor with the property of another private actor.[34] The dispute referenced above, in which the plaintiff's competitor was attempting to appropriate the plaintiff's pollution allowances, is an example of this type of interference.[35] The vertical dimension of property rights, which is relevant to the second example noted above, protects private parties against governmental interference with their property rights.[36]

A. Takings Property

This Article focuses on the second dimension of federal adjudication of property rights, which, as noted above, is based on the protections afforded by the Takings Clause of the Fifth Amendment to the United States Constitution and equivalent state constitutional provisions. The Takings Clause provides that "private property [shall not]

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32 Ormet Primary Aluminum Corp. v. Ohio Power Co., 207 F.3d 687, 688 (4th Cir. 2000). As Professor Daniel Cole pointed out, this dispute "was about the allocation of property between rival claimants." Daniel H. Cole, *Property Creation by Regulation: Rights to Clean Air and Rights to Pollute*, *in* PROPERTY IN LAND AND OTHER RESOURCES 147–48 (Daniel H. Cole & Elinor Ostrom eds., 2012).

33 *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). If the defendant is the state, the claim would also have to rely on the Fourteenth Amendment, which makes the provisions in the Fifth Amendment applicable to states. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005) ("The Takings Clause of the Fifth Amendment [is] made applicable to the States through the Fourteenth . . . ." (citing Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897))).

34 John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. L. & PUB. POL'Y 1, 6 (2019).

35 *See supra* note 32 and accompanying text.

36 Sprankling, *supra* note 34, at 5.

be taken . . . without just compensation," but it supplies no further guidance as to what may or may not constitute property for the purposes of this constitutional protection. A critical question this language raises and that is central to this Article is: how should courts make this determination? Or, in other words, how should courts decide what constitutes *takings property*?[37]

The Supreme Court has addressed—although not fully answered—this question in a series of cases. In *Board of Regents of State Colleges v. Roth*, the Court adopted what has been referred to as the positivist approach to defining property.[38] The Court provided some guidance when examining whether an assistant professor who had been dismissed had a property right in his continued employment that justified granting him procedural protections under the Fourteenth Amendment to the United States Constitution.[39] In the opinion delivered by Justice Stewart, the Court explained that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[40]

In *Phillips v. Washington Legal Foundation*, the Court evaluated whether the interest in a particular type of lawyer trust account should be considered property under the Takings Clause.[41] Justice Rehnquist reiterated that the Constitution does not create property interests, but rather protects those interests that have been created by, again, an independent source of law, which is often to be found in state law.[42]

The reason why these statements do not completely answer the question of what constitutes property under the Takings Clause is that they are somewhat ambiguous with respect to the role that state law plays

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37 In some cases, such as when we are dealing with common interests in land, the answer is obvious. MELTZ, *supra* note 6, at 3 ("Almost all common interests in land . . . are indisputably property . . . .").

38 *See* Merrill, *supra* note 13, at 920 (describing the positivist approach as embracing the view "that nonconstitutional law establishes the terms and conditions under which individuals may acquire interests in 'property' protected by the Due Process Clause").

39 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571, 574 (1972).

40 *See id.* at 577. This language does not clarify whether state law should specify that the interest in question is property or whether that determination can be made based on the features of the right as defined by state law. It is also important to pay attention to the expression "such as." This is necessary as federal law may also be the relevant source in some instances.

41 Phillips v. Wash. Legal Found., 524 U.S. 156, 163 (1998).

42 *See id.* at 163–64. It is important to note, however, that the independent source of law could also be a federal statute. *See* Hage v. United States, 35 Fed. Cl. 147, 170 (1996) (considering, without ruling out that possibility *ab initio*, whether the plaintiff had a property right created by federal law based on the circumstances of that particular case).

in this determination.[43] Should we interpret Supreme Court precedent to mean that federal courts should view property as a derivative constitutional right?[44] In other words, are state courts' conclusions as to whether a particular right qualifies as property under state law determinative of whether it should be entitled to protection under the Takings Clause? Or, alternatively, should federal courts simply look at state law to determine the features of the right, and then apply a federal standard to decide whether the right in question amounts to property for takings purposes?[45] Under this second view, there would be a direct constitutional right of property.

Some scholars and courts have claimed that Supreme Court case law seems to support the first option.[46] Professor Maureen Brady has noted that "[t]here is nothing remotely close to a definition of federal constitutional property in Supreme Court case law" and added that "a unique federal definition of constitutional property is both a nonobvious proposition and one that would likely be of limited assistance."[47] The Court of Appeals for the Ninth Circuit has adopted this position in numerous cases and has insisted that the question of whether an interest should be viewed as property for the purposes of the Takings Clause should be answered based solely on state law.[48]

According to Professor Michelman, however, other Supreme Court opinions can be read to support the direct constitutional right to

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43 DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 62–63 (2002); Laura E. Allen, Note, *Defining Private Property Interests in America's New Economic Reality: The Case for the Primacy of Federal Law in Takings Litigation*, 31 J.L. & COM. 225, 233 (2013).

44 *See* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1099 (1981).

45 *See id.* This is the approach that has been adopted to determine whether a particular interest constitutes "property" or a "right to property" under I.R.C. § 6321. *See* Drye v. United States, 528 U.S. 49, 52 (1999); Jon David Weiss, Note, *A Taxing Issue: Are Limited Entry Fishing Permits Property?*, 9 ALASKA L. REV. 93, 96–98 (1992).

46 *See* Brady, *supra* note 10, at 1168. This has not always been the case. *See* Michelman, *supra* note 44, at 1101 (noting that the *Lochner* era Supreme Court would uphold "direct claims to the effect that a disputed interest or relation was *constitutionally* entitled to protection as property regardless of its recognition as such by the contemporaneously applicable extra-constitutional law").

47 Brady, *supra* note 10, at 1218.

48 Vandevere v. Lloyd, 644 F.3d 957, 963 (9th Cir. 2011) ("In several earlier cases, too, we expressed the principle that we look to state law to determine what property rights exist and therefore are subject to 'taking' under the Fifth Amendment." (first citing Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327, 1330 (9th Cir. 1977); and then citing United States v. Puget Sound Power & Light Co., 147 F.2d 953, 954–55 (9th Cir. 1944))).

property.[49] The Court of Appeals for the First Circuit has also endorsed this interpretation in a case dealing with the issue of whether seniority credits granted to military veterans under a state statute should be considered property under the Takings Clause.[50]

This second view raises a question that will be examined immediately below: if we read Supreme Court precedent to support the idea that there is a federal definition of property, what is the appropriate test that courts should follow to ascertain whether a federally protected property right is present in a particular case?

B. *The Different Definitions of Constitutional Property*

Professor Thomas Merrill has been one of the main proponents of the argument that there are certain constitutional standards that determine whether a particular interest qualifies as "property" for constitutional purposes.[51] In his article, *The Landscape of Constitutional Property*, Professor Merrill highlights the dangers associated with the positivist approach, or what other scholars have referred to as the "positivist trap."[52] This occurs, according to Merrill, in situations in which federal courts decide to leave to the states the decision of what should be regarded as property for constitutional purposes. In his view, this can lead to state courts adopting too broad a notion of the type of property rights that the Constitution protects or one that is too narrow.[53]

Of course, those who defend the need to have a unified definition of constitutional property face the challenge of having to articulate what its precise definition should be. Professor Merrill proposes a test under which only those interests that meet three specific requirements will qualify as *takings property*.[54] The relevant question is whether the source

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49 Michelman, *supra* note 44, at 1107 ("[T]he standing law external to the [F]ifth [A]mendment itself did not purport to entitle Kaiser Aetna to compensation . . . . The property right vindicated in the *Kaiser Aetna* decision must, then, have been a direct constitutional right, not a derivative one.").

50 Hoffman v. City of Warwick, 909 F.2d 608, 610, 615 (1st Cir. 1990) ("That the property interest allegedly protected by the federal Due Process and Takings Clauses arises from state law does not mean that the state has the final say as to whether that interest is a property right for federal constitutional purposes. Rather, federal constitutional law determines whether the interest created by the state rises to the level of 'property,' entitled to the various protections of the Fifth and Fourteenth Amendments.").

51 *See* Merrill, *supra* note 13, at 893.

52 *Id.* at 892.

53 *Id.* at 923.

54 *Id.* at 969. The author of this article proposes two other definitions of property for substantive and procedural due process purposes. *Id.* at 893.

of law creating the interest "confer[s] an *irrevocable right* on the claimant to *exclude others* from *specific assets*."[55]

Professor James Stern, on the other hand, has suggested an approach that, while similar, relies on the traditional distinction between rights in personam and rights in rem.[56] In his view, only in rem rights are property rights.[57] In turn, according to this scholar, rights must meet the following two conditions in order to be considered in rem: they must be "centrally concerned with some particular, singular, discrete thing," and they must be "good against the world."[58] While this "discrete thing" condition could easily be viewed as a mere variation of Merrill's "specific assets" prong, Stern describes it as the requirement "that the thing be identified with enough specificity to exclude any other candidate or substitute for the thing."[59] The author then adds that rights expressed solely based on quantities, values, or substitutes only represent a simple abstraction instead of the thing itself.[60]

Other scholars have taken intermediate positions. Professor John Echeverria, for example, has posited that, while Supreme Court precedent seems consistent with the idea that the Takings Clause leaves it to the states to define property interests, this approach has the theoretical danger of allowing states to bypass constitutional protections.[61] For example, states that would like to eliminate an existing property right completely without requiring the payment of compensation could simply redefine the interest and characterize it as nonproperty.[62] This author, however, notes that, in practice, other Supreme Court precedent forecloses this possibility.[63] Other scholars have interpreted this same body of case law to support this view.[64]

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55 *Id.* at 969 (emphasis added).

56 Stern, *supra* note 7, at 296.

57 *Id.* The author also acknowledges that certain in personam rights may receive takings protections, but "only when the rights are reassigned or transferred, rather than extinguished outright." *Id.* at 284.

58 *Id.* at 297–98.

59 *Id.* at 297.

60 *Id.* The author cites the work of James H. Foster, who makes a similar argument in the context of transferable development rights. *See* James H. Foster, Comment, *The Transferability of Development Rights*, 53 U. COLO. L. REV. 165, 170 n.32 (1981).

61 Echeverria, *supra* note 14, at 663.

62 *See id.*

63 *See id.* (citing Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010)).

64 Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 715 (2019) ("[S]tates may not roll back recognition of property to 'sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.'" (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458

There is a significant level of overlap and agreement among scholars on what a *takings property* test or definition should look like. Professor Echeverria has noted that the Supreme Court has provided some guidance on the features that a particular interest must present in order to "qualify as property under the Takings Clause."[65] He highlights two requirements that were also addressed, with some important modifications, by Professor Thomas Merrill, that is, the interest must be "specific and identifiable" and it must include "the authority to exclude others from accessing or using it."[66] These factors are also similar to those outlined by Professor Stern.[67]

These different definitions of *takings property* are useful in a variety of contexts and are not particularly difficult to apply to traditional property rights, such as rights in land. Easements, for example, fulfill all the necessary requirements to qualify as property both under the common law and for constitutional purposes.[68] The real challenge for *takings property* frameworks and definitions is whether they can be applied with ease and consistency to less conventional rights. Part II lays out the main features of a property interest that will be used later in this Article to assess the consistency and flexibility of these *takings property* definitions.

II. WATER RIGHTS

Water rights are a particularly good example of a *sui generis* type of right that can provide very useful insights on the limits and consistency of these *takings property* frameworks.[69] The following discussion will first provide a definition and some general features of water rights and will then delve into the complexities of one of the main doctrines that governs the allocation of water resources in the United States.[70]

U.S. 419, 439 (1982) (providing that "the government does not have unlimited power to redefine property rights"))).

65 Echeverria, *supra* note 14, at 663.

66 *Id.* (first citing E. Enters. v. Apfel, 524 U.S. 498, 541–45 (1998) (Kennedy, J., concurring); and then citing Merrill, *supra* note 13, at 893).

67 *See supra* notes 56–60 and accompanying text.

68 *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021) ("[G]overnment-authorized physical invasions [are] takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement."); Stern, *supra* note 6, at 289 (explaining that the Supreme Court views easements as *takings property*).

69 *See* Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530 (1989) ("In many ways, water is the most thoroughly advanced form of property, and its model should prove particularly influential.").

70 *See infra* Sections II.A–II.B.

A. *Defining Water Rights*

Water rights are a somewhat elusive concept.[71] Part of the reason why that is the case is that, as will be addressed shortly, there are many different types of water rights.[72] At their core, however, water rights typically confer on their holder the ability to *use* water for, at least, a socially acceptable purpose.[73] This can include, for example, depending on the jurisdiction, the right to use the surface of the water for recreation, to divert a certain flow of surface water for manufacturing purposes, or to withdraw groundwater to be used for irrigation.[74]

This Article focuses on rights to divert surface water. Unlike with groundwater in certain parts of the United States, surface water rights are regarded as a right to *use* rather than ownership of the water itself.[75] For this reason, courts and scholars have often described them as "usufructuary," meaning, a right held by a person or firm to use water that the state owns.[76]

Water rights can be broken down into two components. The first, which I will refer to as "present water," is the power to put to use a specific amount of that resource that has already been diverted.[77] Of course, this right to use water is limited in a variety of ways. For example, a water user may only be permitted to use that resource for a particular purpose and

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71 *See* Ronald N. Johnson, Micha Gisser & Michael Werner, *The Definition of a Surface Water Right and Transferability*, 24 J.L. & ECON. 273, 273 & n.1 (1981) (explaining that water rights are considered "ill defined" and compiling sources that raise this argument in the context of water transfers).

72 *See infra* notes 75–84 and accompanying text.

73 *See, e.g.*, Elk Grove Dev. Co. v. Four Corners Cnty. Water & Sewer Dist., 469 P.3d 153, 158 (Mont. 2020) (noting that in Montana, "a water right is . . . a right to make a use of waters owned by the state—a water right confers no ownership in those waters"); Water Supply & Storage Co. v. Curtis, 733 P.2d 680, 683 (Colo. 1987) (defining water rights in Colorado as "a right to use waters of the state by applying those waters to beneficial use").

74 *See* Duval v. Thomas, 114 So. 2d 791, 794–95 (Fla. 1959); Frees v. Tidd (*In re* Water Rights of Tidd), 349 P.3d 259, 264 (Colo. 2015); United States v. U.S. Bd. of Water Comm'rs, 890 F.3d 1134, 1145 (9th Cir. 2018).

75 Select Energy Servs., LLC v. K-LOW, LLC, 394 P.3d 695, 699 (Colo. 2017) ("[A] water right . . . affords its owner the right to use and enjoy a portion of the waters of the state."); State *ex rel.* Off. of the State Eng'r v. Elephant Butte Irrigation Dist., 499 P.3d 690, 712 (N.M. 2021) ("A water right is a . . . right to use the water, and not a fee interest such as one can have in real estate.").

76 *See infra* note 230.

77 *See* Stevens v. Oakdale Irrigation Dist., 90 P.2d 58, 61 (Cal. 1939) (making a similar distinction by explaining that water already diverted—and, in that specific case, imported to a different watershed—was subject to abandonment, but that this did not entail the abandonment of the right to divert water in the future).

on a particular property.[78] The second component—"future water"—is the expectation to continue diverting water in the future as long as it is available.[79] It is this second part of the right that explains why some water users decide to make certain investments—such as irrigation equipment—in situations where their ability to obtain a return depends on the continued availability of water.[80]

The right to divert surface water is far from uniform across the United States.[81] A key distinction that explains some of these differences is that between riparian and prior appropriation jurisdictions.[82] The water allocation system in some states, however, presents features of both doctrines.[83] To add to this variability, many jurisdictions have transitioned into so-called permit systems, that is, an approach that relies on a more robust legislative framework and in which government agencies assume a central role in the allocation of water resources.[84] The next Section lays out the distinctive features of water rights under prior appropriation.

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78 HEAL Utah v. Kane Cnty. Water Conservancy Dist., 378 P.3d 1246, 1250 (Utah 2016) ("[A water right] gives an individual . . . the right to use some maximum quantity of water from a specified source, at a specific point of diversion or withdrawal, for a specific use, and at a specific time."); Grand Valley Water Users Ass'n v. Busk-Ivanhoe, Inc., 386 P.3d 452, 460 (Colo. 2016) (stating that a water right—as well as the ability of its holder to make changes to it (such as transfers)—"is limited to that amount actually used beneficially pursuant to the decree at the appropriator's place of use" (citing Widefield Water & Sanitation Dist. v. Witte, 340 P.3d 1118, 1124 (Colo. 2014))); Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999).

79 *See Stevens*, 90 P.2d at 61.

80 *See* Leslie Sanchez, Eric C. Edwards & Bryan Leonard, *The Economics of Indigenous Water Claim Settlements in the American West*, 15 ENV'T RSCH. LETTERS 1, 2 (2020) (addressing, in the context of Native American tribes, how uncertainty over a water user's ability to enjoy that resource in the future inhibits investment).

81 *See* Waterwatch of Or. v. Water Res. Dep't, 501 P.3d 507, 509 (Or. 2021) ("Historically, two common-law doctrines have governed the use of surface water in Oregon and the rest of the United States: riparianism and prior appropriation."); Baker v. Ore-Ida Foods, 513 P.2d 627, 631 (Idaho 1973) ("The law of surface water has evolved along two divergent paths of riparianism and prior appropriation.").

82 *See Baker*, 513 P.2d at 631.

83 Smith, *supra* note 21, at 445 (noting that these hybrid systems "are not anomalous").

84 Robert H. Abrams, *Water Allocation by Comprehensive Permit Systems in the East: Considering a Move Away from Orthodoxy*, 9 VA. ENV'T L.J. 255, 256 (1990).

B. *Appropriative Rights*

Prior appropriation was developed as a response to the westward expansion of the United States.[85] During this process, settlers occupied large western areas that were significantly drier than the East, which created a need for a water allocation doctrine that was suited to this drier climate and the wide variety of water-intensive uses to which these lands were put, such as mining.[86] This explains why the states that have adopted prior appropriation are located to the west of the Mississippi River.[87]

1. Acquiring Appropriative Rights and the Rule of Priority

Under the common law version of this doctrine, an appropriator acquired a water right by diverting unappropriated water from a natural stream and putting it to beneficial use.[88] What "unappropriated" means in this context must be addressed in conjunction with one of the main features of this doctrine—which also explains its name—that is, time priority. Prior appropriation is governed by the principle "first in time, first in right," meaning that those who first start diverting water in compliance with all applicable requirements (senior users) will have priority over water users who start diverting water at a later time (junior users).[89]

This mechanism becomes particularly relevant when flows are insufficient to supply water to all appropriators and those administering the system need to know which users are entitled to divert water and in what order. The answer under this doctrine is that the user with the earliest priority date will be able to satisfy the full amount covered by their right.[90] After that, the appropriator with the second earliest priority date is next in line, and the process continues, allowing more junior users to

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85 ROBIN KUNDIS CRAIG, ROBERT W. ADLER & NOAH D. HALL, WATER LAW 39 (2017).

86 *See id.* at 40.

87 For a list of states where this doctrine governs, at least in part, the allocation of surface water, see *infra* note 121.

88 BARTON H. THOMPSON, JR., JOHN D. LESHY, ROBERT H. ABRAMS & SANDRA B. ZELLMER, LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 216–17 (6th ed. 2018).

89 *See* Kirk v. Bartholomew, 29 P. 40, 41 (Idaho 1892); Granite Ditch Co. v. Anderson, 662 P.2d 1312, 1317 (Mont. 1983); Westlands Water Dist. v. United States, 337 F.3d 1092, 1101–02 (9th Cir. 2003); Fox v. Skagit Cnty, 372 P.3d 784, 789 (Wash. Ct. App. 2016).

90 Whitten v. Coit, 385 P.2d 131, 136–37 (Colo. 1963) (laying out the principles of prior appropriation in the context of groundwater by explaining that "the state engineer shall . . . limit such withdrawals in the inverse order of the dates of such priorities").

divert any available water.[91] It is worth highlighting that an appropriator with an early priority date may be located downstream from someone who is their junior.[92] In these instances, the junior user will be able to divert water as long as enough is left in the stream—taking into account return flows—for the rights of downstream seniors to be fulfilled.[93]

Thus, when the focus is placed on the moment when the right is initially acquired, "unappropriated water" is often described as flows that are both physically and legally available. This requires water to be physically present so that it may actually be diverted, and also for it to not be committed to other users that have an existing right that will not be fulfilled unless that water remains in the stream.[94]

2. Scope, Transferability, and Loss of the Right

Determining the actual scope of a particular appropriative right can be challenging for a number of reasons. First, the measure of the right under the common law is determined by the amount of water that has been consistently put to beneficial use.[95] This does not mean, however, that an appropriator must beneficially use 100% of the water that is diverted. Courts have explained that, though the water use must be efficient, some loss—typically conveyance loss—is permissible and considered part of the right.[96] Conversely, water that is initially diverted

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91 *See id.*

92 THOMPSON, LESHY, ABRAMS & ZELLMER, *supra* note 88, at 179.

93 *See id.*

94 This typically occurs when these existing users are located downstream. However, water may be unavailable even if the existing users are located upstream (e.g., when users have instream flow rights, which their right prevents others from lowering the level of a stream to protect, for example, migratory fish species on which they rely). *See, e.g.*, Baley v. United States, 942 F.3d 1312, 1322 (Fed. Cir. 2019) (addressing Tribal fishing rights and describing them as "the right to prevent other appropriators from depleting the streams[']s waters below a protected level in any area where the . . . right applies" (alteration in original) (quoting United States v. Adair, 723 F.2d 1394, 1411 (9th Cir. 1983))).

95 R.D. Merrill Co. v. Pollution Control Hearings Bd., 969 P.2d 458, 464 (Wash. 1999) (citing Neubert v. Yakima-Tieton Irrigation Dist., 814 P.2d 199 (Wash. 1991)); Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co., 98 P.3d 1, 6 (Utah 2004) ("Beneficial use is 'the basis, the measure and the limit of all rights to the use of water . . . .'" (quoting UTAH CODE ANN. § 73-1-3 (West 2003))).

96 *See* United States v. Clifford Matley Fam. Tr., 354 F.3d 1154, 1163 (9th Cir. 2004) ("[T]he major conceptual tool for implementing beneficial use is the water duty, which is the amount of water an appropriator is entitled to use, including a margin for conveyance loss." (quoting United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983))); *In re* Determination of the Rts. to the Use of the Surface Waters of the Yakima River Drainage Basin, 498 P.3d 911, 936

but that is not used beneficially—for example, due to excessive conveyance loss or inefficient application—is considered "waste" and therefore not included in the appropriative right.[97]

The second consideration to be made with respect to the scope of the water right is that, in some jurisdictions, appropriative rights are constrained by the public trust doctrine. This doctrine, which can be traced back to Roman law, was later interpreted as treating lands under navigable waters to be "by the people of the State in their character as sovereign in trust for public uses."[98] While, initially, this principle only protected a limited number of public uses on the overlying waters—e.g., navigation, commerce, or fishing[99]—some states have decided to expand this list to include other uses, such as recreation and environmental protection.[100] More importantly, the subsequent expansion of the doctrine has had important implications for the scope of appropriative rights. In the landmark decision *National Audubon Society v. Superior Court*, the California Supreme Court explained that appropriative rights subject to the public trust are limited by it, so that the rights cannot be exercised in ways that are harmful to the trust.[101] It is important to point out that this expansion of the public trust doctrine has not taken place in all prior appropriation states. In fact, the legislature in Idaho has specifically provided that this doctrine does not apply to appropriative rights.[102]

Another key feature of appropriative rights is their transferability. The ability of appropriators to transfer their water rights has long been recognized by courts, and certain modifications to the right, such as changes in where the water is used, are now authorized by statute in all

(Wash. 2021) ("[C]onveyance loss is part of the water right and can be determined as part of the water duty.").

97 *See Clifford Matley Fam. Tr.*, 354 F.3d at 1163–64 (explaining that the notion of "beneficial use" does not include "waste").

98 Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 457–58 (1892).

99 *See id.* at 452. ("[People] may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein . . . .").

100 Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("[Trust uses] have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes . . . .").

101 Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983) (concluding that the public trust doctrine imposes limitations on water diversions and that, consequently, those holding rights to that resource "can assert no vested right to use those rights in a manner harmful to the trust"); Echeverria, *supra* note 26, at 953.

102 IDAHO CODE § 58-1203(2) (2022) ("[T]he public trust doctrine shall not apply to . . . [t]he appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights . . . .").

prior appropriation jurisdictions.[103] Today, however, transfers typically require prior approval by state administrative agencies.[104] While the requirements that the applicant must meet in order for the transfer to be cleared by the agency vary, one of the main challenges for the applicant is to prove that no junior appropriators will be injured by the reallocation of the right.[105] A common scenario in which such injury can occur is if an appropriator who was diverting water from a point below a junior user transfers the water right to a third party who will now be taking that same amount of water but from a point above the junior user, thereby reducing the available flow in the stream in a manner that affects that junior user.[106]

The last feature of prior appropriation that should be highlighted is the possibility of losing a right in instances of nonuse. Under the common law doctrine of abandonment, water users can lose their right if the person bringing the claim of abandonment—typically, a junior user who would like to appropriate that water—can show that the water user is not exercising their right and intends to relinquish it.[107] Some courts, however, have lightened the claimant's burden by adopting a system where proof of a certain number of years of nonuse—the precise number varying across jurisdictions—raises a presumption of abandonment.[108] Most states have also passed forfeiture statutes providing that appropriators will lose their right if they fail to exercise it within a certain number of years.[109] While it may seem as though the application of this standard should be straightforward and simple, states have provided a number of exceptions to forfeiture or extensions to the maximum period

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103 Taiawagi Helton & Rhett Larson, *Reallocations, Transfers, and Changes*, *in* 1 WATERS AND WATER RIGHTS § 14.04(a) (2022).

104 *See id.* § 14.04(c)(1.01).

105 *See id.*

106 *See id.*

107 Delta Canal Co. v. Frank Vincent Fam. Ranch, LC, 420 P.3d 1052, 1056 (Utah 2013) ("[A]bandonment is a common-law cause of action that requires a showing of intent to relinquish."); Beaver Park Water, Inc. v. Victor, 649 P.2d 300, 302 (Colo. 1982) ("Under Colorado water law, abandonment of a water right requires a concurrence of nonuse and intent to abandon."); CRAIG, ADLER & HALL, *supra* note 85, at 46.

108 *See, e.g.*, 79 Ranch, Inc. v. Pitsch, 666 P.2d 215, 217 (Mont. 1983) ("Forty years of nonuse is strong evidence of an intent to abandon a water right . . . ."); Wolfe v. Jim Hutton Educ. Found. (*In re* Protest of Jim Hutton Educ. Found.), 344 P.3d 855, 857 (Colo. 2015) ("[I]f a water right holder fails to apply a water right to beneficial use for a period of ten years or more, the period of nonuse creates a rebuttable presumption that the water right holder has abandoned the right.").

109 *See, e.g.*, Mt. Falls Acquisition Corp. v. State, No. 74130, 2019 WL 2305720, at *2 (Nev. May 29, 2019) ("The failure to put the water to beneficial use for five successive years 'works a forfeiture' of any right to appropriate water." (quoting NEV. REV. STAT. § 534.090(1) (2017))); Sagewillow, Inc. v. Idaho Dep't of Water Res., 70 P.3d 669, 674 (Idaho 2003) (noting that appropriative rights "shall be lost and forfeited by a failure for the term of five (5) years" (quoting IDAHO CODE § 42-222(2) (1990))).

of nonuse, for example, in situations in which the failure to put the water to use is the result of factors beyond the control of the appropriator.[110] It is also worth noting that some states allow for water rights to be lost by prescription, that is, the close relative of the doctrine of adverse possession.[111]

III. ARE WATER RIGHTS *TAKINGS PROPERTY*?

This part of the Article aims to determine the extent to which water rights should be considered *takings property*. This question, particularly in the context of appropriative rights, has generated ample controversy. Two water law scholars have noted that the law in this regard is "surprisingly unsettled."[112] Another scholar has explained—in part due to the uncertain status of water rights as *takings property*—that "the muddle that currently exists in takings jurisprudence is further exacerbated when applied to water right takings claims."[113] Yet another commentator has remarked that this question is one "with no consistent answers."[114]

As noted earlier, however, there are two main possible approaches to determining whether a particular state-created right qualifies as *takings property*.[115] First, a federal court may attempt to find an answer to this question in decisions originating in the relevant state court system.[116] Second, a federal court may initially look to state law to identify the main features of the right and then make a separate assessment of whether the right in question meets the necessary requirements to be considered *takings property*.[117]

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110 *See, e.g.*, *Mt. Falls Acquisition Corp.*, 2019 WL 2305720, at *2 ("[The] State Engineer may grant a one-year extension if the water rights holder demonstrates good cause." (footnote omitted)); *Sagewillow, Inc.*, 70 P.3d at 684 (Kidwell, J., concurring) ("The statute states a water right holder may avoid forfeiture upon a: 'proper showing of good and sufficient reason for nonapplication to beneficial use of such water for five (5) years.'" (quoting IDAHO CODE § 42-222(3) (2002))).

111 This doctrine, as with adverse possession, allows one party to acquire the right that the previous holder will at the same time lose. Many states have significantly limited or completely eliminated the possibility of losing and acquiring water rights through prescription. Taiawagi Helton & Rhett Larson, *Administration, Protection, and Termination of the Water Right*, *in* 1 WATERS AND WATER RIGHTS § 17.03(d) (2022).

112 Zellmer & Harder, *supra* note 21, at 681.

113 Huffman, Lund & Scoones, *supra* note 21, at 27.

114 Saxer, *supra* note 23, at 49.

115 *See supra* Section I.A.

116 *See supra* notes 46–47 and accompanying text. Examples of this approach can be found in the water context. *See, e.g.*, Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 453–55 (2011).

117 *See supra* Section I.A.

The following discussion will explore both of these avenues.[118] Each of these two paths, however, require a very different methodological approach. The first focuses on whether appropriative rights are considered property at the state level, which is essentially an empirical question to be answered by examining the appropriate case law.[119] The second operates under the assumption that there is a federal test—several have been proposed—for *takings property* and, therefore, the key inquiry is whether appropriative rights meet the requirements of the test in question.[120]

A. *Are Appropriative Rights Property Under State Law?*

As explained above, the question of whether states are consistently treating appropriative rights as property under state law is primarily an empirical one that is best answered by surveying state court opinions. This analysis will include case law of the states where the allocation of surface water is governed solely by prior appropriation.[121] Thus, states that have been characterized as following a hybrid model—including features of both riparianism or prior appropriation—will be excluded in

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118 Theoretically, this analysis could yield the following four different scenarios in which water (1) is *takings property* under state law but not federal law; (2) is *takings property* under both state and federal law; (3) is *takings property* under federal law but not under state law; or (4) is not *takings property* under either federal or state law. Of course, and also in theory, the courts in different states could potentially reach different conclusions as to whether water rights are property under their respective laws.

119 *See infra* Section III.A.

120 *See infra* Section III.B.

121 The literature frequently regards the following states as having adopted either prior appropriation or a system that incorporates that doctrine in part: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. *See* Taiawagi Helton & Rhett Larson, *Elements of Prior Appropriation*, *in* 1 WATERS AND WATER RIGHTS § 12.02(d), 54–60 (Amy K. Kelly ed., 3d ed. 2022); Robert P. Brooks, *Geography of Water Resources: Water Law, Regulation, and Policy*, PENN STATE COLL. OF EARTH & MIN. SCIS. fig.9.1, https://www.e-education.psu.edu/geog431/node/703 [https://perma.cc/X28H-RD56]; Todd A. Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077, 1077 n.2 (1984); Gary D. Weatherford & Helen M. Ingram, *Legal-Institutional Limitations on Water Use*, *in* WATER SCARCITY: IMPACTS ON WESTERN AGRICULTURE 55–56 (Ernest A. Engelbert & Ann Foley Scheuring eds., 1984); Andrew P. Morriss, *Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning*, 80 OR. L. REV. 861, 865, 868 (2001) (listing the seventeen continental prior appropriation states); Chennat Gopalakrishnan, *The Doctrine of Prior Appropriation and Its Impact on Water Development: A Critical Survey*, 32 AM. J. ECON. & SOCIO. 61, 61 (1973) (same).

order to minimize confusion.[122] The resulting list of states is as follows: Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

The survey and analysis of the relevant case law confirms that the overwhelming majority of states that traditionally used prior appropriation as their surface water allocation method consider water rights to be property. Courts in most of these states—for example, Alaska, Colorado, Montana, New Mexico, and Wyoming—have specifically stated that a water right is or provides its holder with a "property right."[123] Other state courts, however, describe water rights as "vested rights," implying that they should be viewed as property.[124] Another subset of states—which partially overlap with the first category noted above—highlight both that water rights are vested and that they are property.[125]

The Nevada Supreme Court has reached the same conclusion by pointing out that, while water rights acquired both under the common law and by statute are appurtenant to land, they constitute a separate stick in the bundle.[126] Courts in Idaho and Nevada have adopted an even clearer formulation of the notion that appropriative rights are property

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122 There is not a single list of states that follow a hybrid system. For the purposes of this analysis, however, these states will not be considered: California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. *See* COLIN CHARTRES & SAMYUKTHA VARMA, OUT OF WATER: FROM ABUNDANCE TO SCARCITY AND HOW TO SOLVE THE WORLD'S WATER PROBLEMS 166 (2011).

123 Tulkisarmute Native Cmty. Council v. Heinze, 898 P.2d 935, 942 (Alaska 1995) ("This provides the holder with a full and permanent property right in that quantity of water."); Kobobel v. State Dep't of Nat. Res., 249 P.3d 1127, 1134 (Colo. 2011) ("A validly adjudicated water right gives its holder a special type of property right."); Osnes Livestock Co. v. Warren, 62 P.2d 206, 210 (Mont. 1936) ("When the right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner."); Walker v. United States, 162 P.3d 882, 890 (N.M. 2007) ("Thus, under prior appropriation, as a separate protected property right, a . . . water right can be 'sold, leased, or transferred.'" (quoting KRM, Inc. v. Caviness, 925 P.2d 9, 10 (N.M. 1996))); Farm Inv. Co. v. Carpenter, 61 P. 258, 265 (Wyo. 1900) ("[A]n appropriator secures a right, which has been held with good reason to amount to a property right . . . .").

124 *See, e.g.*, Crafts v. Hansen, 667 P.2d 1068, 1070 (Utah 1983) ("The owner of a water right has a vested right to the quality as well as the quantity which he has beneficially used." (quoting Salt Lake City v. Boundary Springs Water Users Ass'n, 270 P.2d 453, 455 (Utah 1954))).

125 Budd v. Bishop, 543 P.2d 368, 372 (Wyo. 1975) (explaining that appropriative rights "are real property rights which become vested" (citing Whalon v. North Platte Canal & Colonization Co., 71 P. 995 (Wyo. 1903))); *Walker*, 162 P.3d at 890 ("[U]nder prior appropriation, as a separate protected property right, a vested water right can be 'sold, leased, or transferred.'" (quoting *KRM, Inc.*, 925 P.2d at 10)).

126 Dermody v. City of Reno, 931 P.2d 1354, 1358 (Nev. 1997) ("Nevada law is clear that appurtenant water rights are a separate stick in the bundle of rights attendant to real property.").

by stating that these water rights receive constitutional protections against uncompensated takings.[127]

Lastly, it is worth noting how courts in these states have characterized the nature of the property right that appropriators hold. Courts in a majority of these states have explicitly clarified that the property right that appropriators hold does not amount to ownership, but rather to a right to use water from a particular stream or other body of water.[128]

B. *Do Appropriative Rights Meet the Definitions of* Takings Property *Advanced by Scholars and Courts?*

Although most states have considered appropriative rights to be property, it is critical to subject these rights to further examination. As indicated earlier, some scholars would argue that these rights must satisfy certain tests before they can be deemed *takings property* under the United States Constitution.[129]

This raises the question: what is the appropriate test to apply in these cases? Given that several scholars have proposed different tests, the analysis will be organized based on the most basic formulation of the test, which is also the version that can be most easily traced back to Supreme Court precedent. This discussion, however, will also draw on the literature offering additional factors that should be considered when determining whether a right qualifies as property under the Takings Clause.

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127 Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 78 (Idaho 2011) ("When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor." (quoting Bennett v. Twin Falls N. Side Land & Water Co., 150 P. 336, 339 (Idaho 1915))); *Dermody*, 931 P.2d at 1358 ("[T]his court held that water rights can be subject to eminent domain as a separate interest in real property.").

128 *Farm Inv. Co.*, 61 P. at 265 ("Although an appropriator secures a right, which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves . . . ."); Sigurd City v. State, 142 P.2d 154, 157 (Utah 1943) (noting that appropriators are "not the owners of the body of water . . . , they [are] merely the owner of the right to use such waters as reache[s] their lands and ha[s] been put to a beneficial use"); *Walker*, 162 P.3d at 890 ("As such, water rights are not considered ownership in any particular water source, but rather a right to use a certain amount of water to which one has a claim via beneficial use."); Elk Grove Dev. Co. v. Four Corners Cnty. Water & Sewer Dist., 469 P.3d 153, 157 (Mont. 2020) ("[A] water right is . . . a right to make use of the water, rather than a physical ownership right." (quoting Nelson v. Brooks, 329 P.3d 558, 567 (Mont. 2014))); Joyce Livestock Co. v. United States, 156 P.3d 502, 516 (Idaho 2007) ("A water right simply gives the appropriator the right to the use of the water from that source . . . .").

129 *See supra* Section I.B.

Professor John Echeverria's observations on this question provide a very useful starting point for this analysis.[130] This scholar explains that the Supreme Court has suggested that the Takings Clause should be interpreted as imposing certain limitations on the types of state interests that may be treated as property in this context.[131] The main two requirements that an interest must meet to receive this protection are: (1) it "must include the authority to exclude others from accessing or using" it, and (2) it must be "specific and identifiable."[132] The following discussion will first examine whether appropriative rights would satisfy these two factors and will then explore additional prongs that the *takings property* test should incorporate.

1. The Right to Exclude

The phrase "right to exclude" is largely self-explanatory. However, it is worth noting that it captures the idea that those who have that right will be able to control access to—or "exclude others and prevent others from doing acts" with respect to—a thing, resource, etc.[133] There is no question that the Supreme Court views the right to exclude as a key feature of property. In *Kaiser Aetna v. United States*, the court concluded that "the right to exclude" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[134] The Court has quoted this language on numerous occasions from the 1980s to the present day, as evidenced in *Cedar Point Nursery v. Hassid*, a case decided in 2021.[135]

While no opinion of the Court has explicitly stated that the right to exclude is an essential factor to consider for takings purposes, it is reasonable to make this inference in light of the importance that this right has been given in cases involving constitutional property.[136] Another way

130 Echeverria, *supra* note 14, at 663.

131 *See id.*

132 *See id.*

133 Merrill & Smith, *supra* note 8, at 788–89; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 740 (1998) (explaining that one with the right to exclude has "the power to determine who has access to Blackacre and on what terms").

134 Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

135 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Dolan v. City of Tigard, 512 U.S. 374, 384, 393 (1994).

136 *See* Echeverria, *supra* note 14, at 663 & n.105 (relying on *Kaiser Aetna* to conclude that "authority to exclude others" is one of the elements of *takings property*, while acknowledging that the Court "has never gone so far as to say that the right to exclude is an essential element of an interest in order for it to be recognized as 'property' within the meaning of the Takings Clause").

of justifying the notion that the right to exclude is a key component of *takings property* is that the Supreme Court has portrayed this right as "[t]he hallmark of a protected property interest" for the purposes of the Fifth Amendment when considering what qualifies as property under the Due Process Clause.[137]

As the analysis of state case law in Section III.A of this Article shows, state courts generally view the right to exclude as an inherent feature of appropriative rights. This should not be surprising given the critical role that priority of use plays in the administration of water systems governed by prior appropriation.[138]

Unlike with common law riparianism, which had the goal of allowing multiple water users share the resource equitably,[139] one of the main principles of prior appropriation is that water users with an earlier priority date—i.e., senior users—will be able to divert all the available water recognized in the water right even if that means that there will be no water left for junior users.[140] This is the essence of the right to exclude; senior appropriators can take the water to which they are entitled and exclude others by preventing them from using it.[141] It is worth highlighting that this reasoning, while generally true for appropriative rights, does not necessarily hold for other types of water rights, such as riparian rights or certain types of groundwater rights.[142]

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137 Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999); *see* Merrill, *supra* note 13, at 970.

138 *See, e.g.*, *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 673–74 (Cal. 1979) (Manuel, J., concurring in part and dissenting in part) (noting that significantly lowering the priority of a right in a mixed-system jurisdiction would be tantamount to extinguishing it); Smith, *supra* note 21, at 449 (highlighting that prior appropriation has an "exclusion-like priority scheme").

139 This is no longer necessarily the case in states that have transitioned into a regulated riparianism model where water allocation decisions are also based on a variety of public policy considerations.

140 *See supra* Section II.B.1.

141 This does not mean, of course, that others will not be able to divert that same water in the future when the original appropriator's use has ended, and part of that water returns to the system in the form of return flows.

142 This problem has been reported specifically in California. *See* Saxer, *supra* note 23, at 81–82 ("[G]roundwater rights are 'fragile and limited, because you cannot stop others from pumping groundwater out from underneath your land, so long as they withdraw it from wells on their own land and use it on that land.'" (quoting John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985, 1988 (2005))); Leshy, *supra* note 142, at 1989 ("Under California water law, . . . [y]ou could lose the use of your surface water right, without compensation, if Friends were to limit that flow by pumping percolating groundwater . . . .").

Professor Stern claims that, for a property right to be protected by the Takings Clause,[143] it must be "good against the world."[144] This means that the right holder has the authority to decide how a thing or resource will be used.[145] Logically, this includes the very right this Section is examining—that is, the right to exclude—as those who can determine how a thing or resource will be used can also decide who will not have access to it.[146] Returning to the water context, holders of appropriative rights are able to determine how the water to which they are entitled under the priority system will be used, and they have the ability to exclude others from that water.[147]

It is important to note that this does not mean that, unless the authority to decide how a thing or resource will be used is unfettered, we should regard an appropriator as not having a right to exclude others.[148] The right to use or control many other types of assets or resources—such as land—is not unlimited, and these limitations have not led courts to conclude that these other rights or interests do not qualify as property. For example, it is unquestionable that the owners of a piece of land in an urban residential area have the right to control it, even though they will very likely be subject to a number of restrictions, such as strict limitations with respect to the type of building they are able to erect. It is also highly unlikely that these landowners will be able to use the land to keep dangerous wild animals, to generate nuclear energy, or to store substantial amounts of hazardous substances.

2. Specific and Identifiable

While there is ample Supreme Court case law emphasizing that the right to exclude is a critical component of property rights, the Court's support for the notion that a right must be "specific and identifiable" in order to qualify as a property right under the Takings Clause is weaker. Scholars who make this claim do not rely on a majority opinion of the Court, but rather on Justice Breyer's dissent in *Eastern Enterprises v. Apfel*, in which three other Justices joined, as well as on Justice Kennedy's

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143 This scholar argues that the same definition of property should be used to determine the types of rights that receive protection under both the Takings and Due Process Clauses. *See* Stern, *supra* note 7, at 325–26.

144 *See id.* at 298.

145 *See id.*

146 *See id.* at 302 (explaining that the right to exclude is part of the right to control).

147 *See supra* Sections II.B.1–II.B.2.

148 *See* Zellmer & Harder, *supra* note 21, at 735.

concurrence in that same case.[149] This view, however, has gained momentum more recently due to the Court's analysis in *Koontz v. St. John's River Water Management District*.[150]

The so-called "Breyer/Kennedy position"[151] on this question was actually formulated in very general terms and set a rather low standard for what constitutes constitutional property. Justice Kennedy started by noting that "all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."[152] According to Justice Kennedy, there are numerous types of interests that meet this requirement,[153] including "estate[s] in land," "valuable interest[s] in an intangible (e.g., intellectual property)," and even "the right to extract mineral deposits."[154] Justice Breyer's formulation of this requirement is also based on the general idea that "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property."[155] What, then, would fail to meet this definition? Both Justices agreed that a government action that merely imposes a financial burden on a person or corporation without tying it to a particular asset or resource does not trigger the protections afforded by the Takings Clause.[156]

Under this interpretation, appropriative rights would meet this standard with ease. As explained at length earlier, water rights give their holder the right to use water.[157] Acts interfering with this right would

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149 *See* DANA & MERRILL, *supra* note 43, at 70 (noting that, in total, five Justices supported this idea); Echeverria, *supra* note 14, at 663 n.103; Merrill, *supra* note 13, at 903–04, 974.

150 Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613 (2013) (lending legitimacy to this approach by distinguishing *Eastern Enterprises* in what can be viewed as an implicit acceptance by the Court of the validity of the Breyer/Kennedy position).

151 *See* Merrill, *supra* note 13, at 974.

152 E. Enters. v. Apfel, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

153 Justice Kennedy also provided a long list of interests that, in his opinion, the Court already analyzed and that qualify as specific property interests: "air rights for high-rise buildings," "zoning on parcels of real property," "trade secrets," "right of access to property," "right to affix on structures," "right to transfer property by devise or intestacy," "creation of an easement," "right to build or improve," "liens on real property," "right to mine coal," "right to sell personal property," and the "right to extract mineral deposits." *Id.* (citations omitted).

154 *See id.* at 540, 541.

155 *See id.* at 554 (Breyer, J., dissenting).

156 *See id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part) ("The Coal Act imposes a staggering financial burden on the petitioner, . . . but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest."); *id.* at 554 (Breyer, J., dissenting) (noting that constitutional property was not implicated in that case because it "involve[d], not an interest in physical or intellectual property, but an ordinary liability to pay money").

157 *See supra* Section II.A.

necessarily be tied to a physical resource—i.e., the water itself—rather than merely imposing a general financial burden on the water right holder.[158] Therefore, water rights would satisfy the "specific and identifiable" requirement for constitutionally protected property under the broad and lenient view that Justices Breyer and Kennedy adopted.

Professor Thomas Merrill, however, offers a considerably narrower interpretation of this factor. While this alternative approach is not directly supported by Supreme Court precedent, it has the advantage of providing a clearer and richer framework to determine whether the "specific and identifiable" requirement is met. According to Merrill, this requirement is met if the interest in question is a "discrete asset" and not a mere "incident of property."[159] In other words, only when a discrete asset is present should an interest be viewed as "specific and identifiable."[160]

The immediate question becomes: how does one know if a right is tied to a discrete asset? Merrill has explained that a discrete asset is (1) "a valued resource" that (2) "is held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth)," and (3) "is created, exchanged or enforced by economic actors with enough frequency."[161] This scholar provides the right to inherit as a useful example of a right that fails this test. Although the Supreme Court reached a different conclusion when it examined this type of interest in *Hodel v. Irving*,[162] Merrill argues that the right to inherit does not meet the third prong of his test because it "is not a legally recognized form of property, nor is it created, exchanged, or enforced as a separate asset," making it an incident of property rather than a discrete asset.[163]

Even if this stricter test is applied to appropriative water rights, the conclusion that the "specific and identifiable" requirement is met remains unchanged. First, water has been a valuable resource for a long time and its value has continued to increase in recent years.[164] Second, as the

158 It is worth noting that the conclusion that water rights are connected to a physical resource does not suggest that a particular takings approach—e.g., physical taking—should be used to determine whether the interference in question, if undertaken by the government, should trigger compensation. Government restrictions of rights over land are tied to a specific physical thing, but are often, depending on the circumstances, examined under a regulatory takings framework. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

159 *See* Merrill, *supra* note 13, at 974.

160 *See id.*

161 *See id.*

162 Hodel v. Irving, 481 U.S. 704, 718 (1987).

163 *See* Merrill, *supra* note 13, at 974–75.

164 *See* Marguerite Ronin, *Sharing Water in the Roman Countryside: Environmental Issues, Economic Interests, and Legal Solutions*, *in* WATER MANAGEMENT IN ANCIENT CIVILIZATIONS 112–

examination of state court case law in Section III.A reveals, most states consider water rights to be a recognized form of property. Some may argue that they are a limited form of property,[165] and while this is true, the consensus from a state common law standpoint is that appropriative rights are property.[166]

The third prong of the test includes three different options. A particular right may be either created, exchanged, or enforced frequently. While one of these elements would be sufficient to conclude that this condition is satisfied, water rights meet, at the very least, two of these requirements. Water rights are exchanged and enforced regularly. As noted earlier, most states allow sales and leases of appropriative rights, and these types of transfers occur regularly, even if these transactions may be subject to certain conditions to ensure the rational utilization of water resources and to prevent harm to existing appropriators.[167]

The preceding shows that appropriative rights meet the "specific and identifiable" requirement, including how Justices Breyer and Kennedy articulated it and Professor Merrill's more refined version of that factor. This analysis would be incomplete, however, without addressing the extent to which water rights under prior appropriation also constitute what Professor James Stern refers to as a "discrete thing."[168] According to this scholar, this is one of the two distinguishing characteristics of in rem rights, which is relevant because Stern claims that in rem rights are property rights entitled to protection under both the Takings and Due Process Clauses.[169]

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13 (Jonas Berking ed., 2018); Elise L. Larson, Note, *In Deep Water: A Common Law Solution to the Bulk Water Export Problem*, 96 MINN. L. REV. 739, 740 (2011). *See generally* Daniela Vandone, Massimo Peri, Lucia Baldi & Alessandra Tanda, *The Impact of Energy and Agriculture Prices on the Stock Performance of the Water Industry*, 23 WATER RES. & ECON. 14 (2018) (explaining that the value of water and the stock of the water industry have increased as a result of the growing demand from the agricultural and energy sectors).

165 *See* Owen, *supra* note 25, at 274–75 (explaining that many scholars "argue that water rights are inherently more limited and contingent than ownership interests in land or personal property"); Saxer, *supra* note 23, at 55–56.

166 *See supra* Section III.A.

167 Helton & Larson, *supra* note 103 ("Since the mid-1800s, the right to transfer a[n appropriative] water right . . . has been permitted without loss of priority."); ELLEN HANAK, GOKCE SENCAN & ANDREW AYRES, CALIFORNIA'S WATER MARKET, PUB. POL'Y INST. OF CAL. (2021), https://www.ppic.org/wp-content/uploads/jtf-water-market.pdf [https://perma.cc/Q3QS-A47K] (showing a marked increase in sales and leases of water in California between 1982 and 2019); *see supra* Section II.B.2 (explaining the no injury rule).

168 *See* Stern, *supra* note 7, at 297–98.

169 *See id.* at 296–97, 325–26 (explaining first that "rights in rem are property rights" and later arguing that in rem rights offer a definition of property that is consistent with that in the Takings and Due Process Clauses).

The "discrete thing" requirement is met when the right that is being analyzed gives authority over "a particular, identifiable item, resource, or asset."[170] This author provides a useful set of examples to clarify when this factor is or is not fulfilled. A right over a particular building is valuable and includes the ability to control it, whereas the right over an unspecified building lacks that quality and, consequently, does not confer a property right.[171]

As addressed in Part IV, applying these principles, which are primarily land- and chattel-centered, to other types of rights, such as those over water, creates numerous practical problems.[172] The water to which an appropriator is entitled is not fully identified until it is diverted.[173] This future access to water that the right protects, however, while uncertain, is nevertheless identifiable—the amount is fixed and so is the preference with which different appropriators will be able to divert the water, as well as their physical location in a water course or lake.[174]

Does this suffice to conclude that a water right meets Stern's definition of a "discrete asset"? Unfortunately, this formulation of the "specific and identifiable" requirement does not provide a workable framework to answer this question.[175] Part IV of this Article examines in detail why this occurs.[176]

The Supreme Court, however, has addressed a closely related question, that is, the extent to which a right to receive benefits in the future should be considered constitutional property for the purposes of the Due Process Clause.[177] In *Board of Regents of State Colleges v. Roth*, the Court explained that:

> The Fourteenth Amendment's procedural protection of *property* is a safeguard of the security of interests that a person has already acquired in specific benefits. . . .
>
> Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in *continued receipt* of those benefits that is safeguarded . . . .[178]

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170 *See id.* at 283.

171 *See id.* at 297.

172 *See infra* Part IV.

173 *See supra* Section II.B.1.

174 *See supra* Section II.B.1.

175 What seems clear, however, is that an obligation "framed only in terms of quantities," would not implicate a discrete asset. *See* Stern, *supra* note 7, at 297.

176 *See infra* Section IV.B.

177 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972).

178 *See id.* (emphasis added) (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

Applying this reasoning analogically to the Takings Clause—which would be consistent with Stern's view that the same definition of property should be used in both contexts—it is reasonable to conclude that an appropriative water right constitutes *takings property*. Stated differently, under this interpretation, the fact that appropriators do not presently have the ability to physically control the water that they are entitled to divert in the future does not prevent their right from being "concerned with some particular, singular, discrete thing."

3. An Important Additional Factor: A Property Right Should Be Reasonably Irrevocable

Most of the formulations of the *takings property* test can be reduced to the two factors discussed above, that is, whether the right that is being examined (1) includes the right to exclude and (2) is "specific and identifiable."[179] According to Professor Merrill, even if a right meets the preceding requirements, an additional factor must be examined, that is, the interest must also be irrevocable to qualify as *takings property*.[180]

The "irrevocability" requirement sets a rather low bar that can be cleared by many types of rights. Professor Merrill posits that this factor is met when the right has a "certain degree of security expectation."[181] This author then clarifies that this simply means that "the right is not subject to discretionary revocation for some predetermined period of time."[182] It is critical to note the importance of the word "discretionary" in this context.[183] Many rights can be revoked for a variety of reasons but far fewer can be taken away discretionarily. A term of years may be subject to certain conditions but is considered irrevocable under this factor.[184] A common law license, on the other hand, can typically be revoked at any time and for any reason, and would therefore not satisfy this factor.[185]

Common law appropriative rights meet this standard, as they are typically not subject to discretionary revocation.[186] Moreover, as

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179 *See supra* text accompanying notes 65–67.

180 *See* Merrill, *supra* note 13, at 978.

181 *See id.*

182 *See id.* at 979.

183 Black's Law Dictionary defines discretionary as "involving an exercise of judgment and choice, not an implementation of a hard-and-fast rule." *Discretionary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

184 *See* Merrill, *supra* note 13, at 979.

185 *See id.* at 978.

186 Although this analysis focuses on common law appropriative rights, some statutory provisions in jurisdictions currently governed by a permit system contemplate discretionary

discussed above, most courts consider appropriative rights to be vested once the water has been put to use.[187] Some scholars have claimed that this factor is compromised, among other things, because this type of water right is subject to certain conditions that can lead to its reduction or even termination—e.g., by operation of the doctrines of forfeiture or abandonment.[188] These two doctrines, however, will only lead to the cancelation of the right if certain conditions are met. In the case of forfeiture, the period of nonuse needs to extend beyond a certain number of years—e.g., three years in many jurisdictions.[189] Even when that is the case, states frequently excuse the failure to use the water under a variety of circumstances.[190] As for abandonment, courts typically require objective evidence supporting the conclusion that appropriators intended to permanently cease their diversion and beneficial use of water.[191] Therefore, the termination of these rights under these two doctrines will have to be based on whether the aforementioned legal requirements are met, not on an agency's or court's discretionary judgment.

It is also worth noting that structural limitations of the right, such as restrictions stemming from the beneficial use requirement or the public trust doctrine, do not lead to the conclusion that the right is revocable. The fact that they may appear to constrain the exercise of an existing water right should be viewed, not as a curtailment of that right, but as an enforcement of limitations that, as the Supreme Court described in *Lucas v. South Carolina Coastal Council*, "inhere in the [right] itself."[192]

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revocation for water permits granted under California law. *See* CAL. WATER CODE §§ 1392, 1629 (West 2022); Joseph L. Sax, *Reserved Public Rights in Water*, 36 VT. L. REV. 535, 541 (2012) ("Without doubt, the most powerful, and least explicated, statutes authorizing California to recall water for public use are the twin Water Code provisions sections 1392 and 1629 . . . ."); *see also* ARIZ. REV. STAT. ANN. § 45-159 (2022); OR. REV. STAT. § 537.390 (2022).

187 *See supra* notes 124–25 and accompanying text. It is worth highlighting that a number of scholars and courts have noted that, while a debated issue, even inchoate rights in land—such as contingent remainders—are still protected property for takings purposes. *See* Hemphill v. Miss. State Highway Comm'n, 145 So. 2d 455, 462–63 (Miss. 1962) (addressing the literature on this question and concluding that inchoate—that is, nonvested—interests are constitutionally protected and, therefore, the government must pay compensation when these rights are taken).

188 *See* Zellmer & Harder, *supra* note 21, at 735 ("The third element—an irrevocable interest—is also compromised because appropriative rights can be forfeited or canceled for non-use or waste."); Saxer, *supra* note 23, at 78 ("Like a grazing right, or the right to cut timber on federal public land, the right to use water should be treated as a revocable license.").

189 *See supra* Section II.B.2.

190 *See supra* Section II.B.2.

191 *See supra* Section II.B.2. Certain states have instituted a presumption of abandonment. However, this presumption arises after a certain number of years of non-use and, moreover, it is a rebuttable one. *See supra* Section II.B.2.

192 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

If certain appropriators are wasting water by allowing excessive conveyance losses and an agency responds by ordering them to decrease their diversion, the effect of that mandate is not to partially revoke their right, but rather to prevent water users from removing more water than is covered by their right from a stream, river, or lake.[193] Likewise, a court decision concluding that the public trust doctrine requires specific appropriators to reduce their water consumption is not modifying their existing rights but instead clarifying that, at that particular point in time, their water use is excessive.[194] Therefore, by delineating the scope of the right, the enforcement of these restrictions helps answer the question: "how much water may an appropriator use?" This Article, however, is concerned with the threshold question of "does the appropriator have a property right in the use of water (regardless of its scope) to begin with?"

To be sure, in extreme cases, these two questions merge into one. For example, if when applying the public trust doctrine, an agency or court concludes that an appropriator may no longer divert any amount of water at any time, this would indeed amount to a revocation of the right. However, the mere existence of this possibility—in the small number of states that recognize the public trust doctrine as a limitation on water withdrawals[195]—does not invalidate the conclusion that appropriative rights have a "certain degree of security expectation" and should therefore be considered irrevocable for *takings property* purposes.

4. Conclusion: Are Appropriative Rights *Takings Property*?

Based on the above analysis, it is reasonable to conclude that common law appropriative rights meet all the necessary requirements to be considered constitutional property for takings purposes.[196] To be sure,

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193 State Dep't of Ecology v. Grimes, 852 P.2d 1044, 1051 (1993) ("[T]he appropriator who diverted more than was needed for the appropriator's actual requirements and allowed the excess to go to waste acquired no right to the excess."); *id.* at 1055 ("[T]he concept of 'beneficial use,' as developed in the common law . . . operates as a permissible limitation on water rights.").

194 Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 727 (1983) (explaining that no party may acquire "a vested right to appropriate water in a manner harmful to the interests protected by the public trust").

195 *See* THOMPSON, LESHY, ABRAMS & ZELLMER, *supra* note 88, at 679; DAVID H. GETCHES, SANDRA B. ZELLMER & ADELL L. AMOS, WATER LAW IN A NUTSHELL 121 (5th ed. 2015).

196 The only caveat to consider would be that, under Professor Stern's approach, it remains unclear whether water rights would allow control over what he refers to as a "discrete asset." *See supra* Section IV.B. Moreover, it is worth noting that the conclusion that appropriative rights are *takings property* may not necessarily hold true for other types of water rights. For example, the right to exclude is missing for certain groundwater rights—i.e., those governed by the rule of capture. This could be used as an argument to question whether this type of water right should be viewed as

this does not mean that appropriative rights confer on their holder unlimited rights to the resource. On the contrary, and as explained in depth in Part II of this Article, their scope is limited in a variety of ways. For example, appropriators may only divert water that will be used for a useful or beneficial purpose.[197]

The conclusion that appropriative rights are *takings property*, despite having been challenged in the literature,[198] is in line with the reasoning in multiple federal court opinions or, at the very least, consistent with their outcomes. In *Casitas Municipal Water District v. United States*, the Court of Federal Claims concluded that a water user's right acquired under California law to divert water and put it to beneficial use was protected property for takings purposes.[199] In a decision that has been criticized by a number of scholars,[200] *Tulare Lake Basin Water Storage District v. United States*, the Court of Federal Claims noted that "the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled . . . effected a . . . taking."[201] Given that a finding that a particular right is protected property is necessary in order to be able to conclude that a taking has occurred (i.e., a taking of *that* protected right), the court's ultimate conclusion implies that the water right implicated in *Tulare* was *takings property*.

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takings property. *See* THOMPSON, LESHY, ABRAMS & ZELLMER, *supra* note 88, at 508; Zellmer & Harder, *supra* note 21, at 694–95.

197 *See supra* Section II.B.1; Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 454 (2011) ("California case law . . . recognizes the beneficial use doctrine as defining the limits of an appropriative water right." (citing People v. Murrison, 124 Cal. Rptr. 2d 68 (Ct. App. 2002))).

198 *See supra* text accompanying notes 112–14.

199 *Casitas Mun. Water Dist.*, 102 Fed. Cl. at 455, 478 (referring to a right to divert and put water to beneficial use as "compensable" under the Fifth Amendment and ultimately dismissing the takings claim as not ripe for adjudication).

200 *See* David B. Anderson, *Water Rights as Property in* Tulare v. United States, 38 MCGEORGE L. REV. 461, 494–95 (2007) (criticizing the court's decision to analyze the taking under the "physical" takings framework instead of applying a regulatory takings test); Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENV'T L. & POL'Y 1, 10 (2002) (claiming that the court did not adequately assess the role that certain doctrines that affect the scope of the water right—e.g., the public trust—should have played in the takings analysis). A later decision from the Court of Federal Claims hinted at the idea that failure to consider the role that the public trust doctrine played in the *Tulare* case may have led the court to "just compensation for the taking of interests that may well not exist under state law." Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 538 (2005). However, some praise of this decision can also be found in the literature. *See, e.g.*, Jesse W. Barton, Note, Tulare Lake Basin Water Storage District v. United States*: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS ENV'T L. & POL'Y J. 109 (2002).

201 Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001).

Viewing water rights as constitutionally protected property is also consistent with a series of Supreme Court cases decided in the early- to mid-nineteenth century. This is not to say that these decisions settled the issue. All these cases involved one particular type of water right—i.e., riparian rights.[202] On the other hand, it is also important to note that the Court did not seem to rely on any feature that is distinctive to riparian rights when deciding these cases. In other words, there does not appear to be a good reason to suggest that the Court's reasoning in these decisions would not equally apply to appropriative rights.

In *International Paper Company v. United States*, the Supreme Court found that the deprivation of water rights by the government constituted a taking.[203] In that case, a power company had leased part of its water rights to International Paper and, as a result, the latter company's ability to use water came to an end when the federal government required the power company to use all the water that could be diverted through its intake canal to generate power during World War I.[204] The Court ultimately found that International Paper was entitled to compensation for the taking of its right to part of that water.[205] This implies that the Court viewed a right to use water—which, in this case, had its origin in a contract—as protected under the Takings Clause.

In *United States v. Gerlach Live Stock Company*, the construction of a dam that was part of the California Central Valley Project interfered with downstream landowners' right to have their grasslands watered through the seasonal overflow from the water body adjoining their land.[206] The Court noted that the federal government had consistently recognized that water rights acquired under state law were in fact property rights and proceeded to uphold the lower court's decision to award compensation to the landowner plaintiffs.[207] It is also noteworthy that the majority, by recognizing the landowners' right to compensation, rejected the argument advanced by Justice Douglas that "there are no private property rights in the waters of a navigable river."[208]

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202 Int'l Paper Co. v. United States, 282 U.S. 399, 404 (1931) (analyzing a water dispute that took place in New York, a state where riparianism governs water allocation); United States v. Gerlach Live Stock Co., 339 U.S. 725, 727–28 (1950); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291 (1958); Dugan v. Rank, 372 U.S. 609, 625 (1963).

203 *Int'l Paper Co.*, 282 U.S. at 407.

204 *See id.* at 405.

205 *See id.* at 407.

206 *Gerlach Live Stock Co.*, 339 U.S. at 727–28, 730.

207 *See id.* at 754–56.

208 *See id.* at 756 (Douglas, J., concurring in part and dissenting in part).

Two subsequent opinions also relating to the impacts of the Central Valley Project on the use of water by riparian landowners further clarified that the water rights involved in these litigations constituted *takings property*. In *Ivanhoe Irrigation District v. McCracken*, the Court made it clear that the federal government's acquisition of water rights from private parties required the payment of compensation, whether through the exercise of eminent domain or in the context of a takings claim brought by the water right holders.[209] Five years later, in *Dugan v. Rank*, the Court explained that the government's interference with the plaintiffs' water rights deprived the owners of their use of the water and created a servitude that had the effect of taking their property for which compensation was due.[210]

These Supreme Court opinions have been used to support the claim that interferences with water rights constitute physical takings requiring the payment of compensation.[211] It is important to highlight, however, that this is not the claim that is being made here. On the contrary, these decisions serve to illustrate the fact that viewing water rights as *takings property* is consistent with Supreme Court precedent. This Article does not express an opinion as to whether a physical or regulatory takings framework should be used to analyze if a reduction or destruction of such right requires the payment of compensation, a question which others have explored at length.[212]

A final point to consider is that the conclusion that water rights are *takings property* is also consistent with how these types of rights are viewed in other jurisdictions. For example, Article 19.24 of the Chilean Constitution provides that citizens may not be deprived of their property without the payment of compensation.[213] Interestingly, this same constitutional provision contains a specific reference to water rights and notes that water rights are "property."[214] Another civil law jurisdiction provides an additional example of how rights to use water can be viewed as *takings property*. The Constitutional Court of Spain concluded that

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209 Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291 (1958) ("If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the project, paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts." (citation omitted)).

210 Dugan v. Rank, 372 U.S. 609, 625 (1963).

211 Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001).

212 *See, e.g.*, John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 VT. J. ENV'T L. 579, 592 (2010); Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 SANTA CLARA L. REV. 365, 381–416 (2011); Huffman, Lund & Scoones, *supra* note 21, at 49, 53.

213 Constitución Política de la República de Chile [C.P.] art. 19.24. ("The expropriated . . . shall always have the right to be compensated for the [economic harm] actually caused . . . .").

214 *See id.*

constitutional protections against takings extend to any economic right, including a right to use property or resources that belong to the public, such as water.[215]

C. *A Brief Note on Riparian Rights as* Takings Property

Although this Article aims to assess the soundness and usefulness of *takings property* definitions by applying them to appropriative water rights, it seems appropriate to briefly address some of the issues that arise when testing these same frameworks against the other main type of surface water rights in the United States, that is, riparian rights.[216] While under the common law, the owners of riparian lands held a wide variety of rights—including the right to use water, to access water, to build wharves, etc.[217]—the following analysis will focus, to maintain consistency throughout Part III of this Article, on the right to use water.

Two factors of the *takings property* framework provided by Professor Merrill could be viewed as compromised in the case of riparian rights, namely, the right to exclude and the "specific and identifiable" requirement.[218] With regard to the first, one could argue that riparians' right to exclude is significantly weaker than that enjoyed by appropriators. This is due to the fact that, unlike with prior appropriation, where seniority comes with the right to exclude junior users from the resource in times of scarcity, riparians do not have that same prerogative.[219]

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215 *See* Luis Inaraja Vera, *Instream Flows in California and Spain: The Thorny Issue of Compensation*, 27 GEO. INT'L ENV'T L. REV. 199, 212 (2015) (citing S.T.C., Nov. 29, 1988 (B.O.E., No. 307) (Spain)). Despite recognizing these constitutional protections for water rights, the Spanish Constitutional Court applies a standard that only requires the payment of compensation in situations approaching the total deprivation of the right. *See id.* at 218–19.

216 *See supra* text accompanying notes 81–83.

217 627 Smith St. Corp. v. Bureau of Waste Disposal of the Dep't of Sanitation of N.Y., 735 N.Y.S.2d 555, 557 (App. Div. 2001) (citing Hinkley v. State, 137 N.E. 599 (N.Y. 1922); Saunders v. N.Y. Cent. & Hudson River R.R., 38 N.E. 992 (N.Y. 1894); Town of Hempstead v. Oceanside Yacht Harbor, 328 N.Y.S.2d 894 (App. Div. 1972), *aff'd*, 299 N.E.2d 895 (N.Y. 1973)).

218 Riparian rights are often viewed as insecure, which would be relevant for the purposes of Professor Merrill's third factor, that is, irrevocability. However, this insecurity relates not to the existence of the right, but rather to the fact that, particularly under the common law but also to a lesser extent under some permit systems, the amount of water that a particular riparian owner was able to enjoy could be reduced to accommodate new users. Peter N. Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri*, 47 MO. L. REV. 429, 456 (1982).

219 Wells A. Hutchins, *A Regional View: Riparian-Appropriation Conflicts in the Upper Midwest*, 38 N.D. L. REV. 278, 284 (1962).

However, the differences between the two systems with respect to the right to exclude should not be overstated. Even under the common law, riparian owners were entitled to prevent the vast majority of the population from using water from the river or lake abutting their property—they were able to exclude everyone except other riparians.[220] Moreover, under modern versions of this doctrine—i.e., regulated riparianism—the administering agency will often abstain from granting new permits when all the water in the system has been allocated to existing users.[221] This effectively allows a permit holder to exclude potential new water users with the assistance of an agency or court.

The second issue is that one could question that a riparian's right to use water is "held by the claimant in legally a recognized property form" by arguing that this right is not *property* but merely an *incident of property* attached to the ownership of land.[222] The basis for this argument would be that, especially under the early common law, water could only be used on riparian land.[223] The fact that the right could not be separated from the land to which it was attached—e.g., by transferring it to a nonriparian user—would lend some support to the claim that a riparian's prerogative to use water was just a stick in the landowner's bundle.[224]

Some state courts, however, explicitly rejected this reasoning and treated a riparian landowner's right to use water as a separate property right.[225] Moreover, it is also worth noting that even if a riparian right is considered an incident of property, a takings claim brought by a landowner whose water rights have been abrogated is not necessarily

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220 O. Paul Matthews, *Water Is Not "Real" Property*, 85 J. CONTEMP. WATER RSCH. & EDUC. 19, 19 (1991).

221 Joseph W. Dellapenna, *Regulated Riparianism*, *in* 1 WATERS AND WATER RIGHTS § 9.03(d) (2022); *id.* § 9.03(b)(3) ("One might suspect, however, that agencies defer to temporal priorities in exercising their discretion far more than the statutes require, and perhaps even more than the statutes authorize.").

222 *See* Merrill, *supra* note 13, at 974; *supra* text accompanying notes 158–62. As with appropriative rights, the other two elements of the "specific and identifiable/discrete asset" test—whether the right attaches to a valuable resource or whether it is created, exchanged, or enforced frequently—are not particularly problematic.

223 Ludwik A. Teclaff, *Fiat or Custom: The Checkered Development of International Water Law*, 31 NAT. RES. J. 45, 63 (1991).

224 Joseph W. Dellapenna, *The Right to Consume Water Under "Pure" Riparian Rights*, *in* 1 WATERS AND WATER RIGHTS § 7.04(a.01) (2022); Thompson v. Enz, 154 N.W.2d 473, 482 (Mich. 1967).

225 *See, e.g.*, Franco-American Charolaise, Ltd. v. Water Res. Bd., 855 P.2d 568, 576–77 (Okla. 1990); Portage Cnty. Bd. of Comm'rs v. City of Akron, 846 N.E.2d 478, 490 (Ohio 2006). As Professor Dellapenna explains, however, in a series of opinions that contain important contradictions with respect to the reach of the state legislation that was challenged, the Supreme Court of Wisconsin concluded that the abrogation of existing riparian rights did not trigger the obligation to compensate a riparian landowner. Dellapenna, supra note 221, § 9.04(a).

destined to fail. Even in these instances, riparians may be able to prevail—the likelihood of that success would depend to a significant extent on the takings test employed—by arguing that the governmental interference with their water rights substantially diminishes the value of their land.[226]

IV. BROADER LESSONS ON *TAKINGS PROPERTY*

The analysis in Part III achieved two main goals. The first was to answer the question of whether appropriative rights, despite being treated by courts as common law property, should be viewed as *takings property* as well. The second was to test existing *takings property* definitions against a right—again, an appropriative water right—that presents a variety of unusual characteristics that set them apart from more traditional interests in land or personal property.[227]

This Part of the Article provides and contextualizes a number of insights that can be extracted from the analysis in Part III and that are particularly relevant to the constitutional property literature. These broader lessons have a common theme, namely, that scholars have looked at the notion of constitutional property from an unnecessarily narrow lens: one that focuses on land, chattel, and other very specific rights that the Supreme Court has examined in the past. The following discussion addresses some of the flaws in *takings property* frameworks.

A. *Existing Scholarship Shows an Excessive Reluctance to Consider "Non-Land" as* Takings Property

One of the main arguments that scholars have made to support the claim that water rights should not be viewed as *takings property* is that they are "too unlike land."[228] This view reflects the idea that one should be hesitant to view rights that do not relate to land—or, possibly, certain objects—as property. The question this raises is: is it justified to exclude other types of rights from this category of property *ab initio*?

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226 *See, e.g.*, 627 Smith St. Corp. v. Bureau of Waste Disposal of the Dep't of Sanitation of N.Y., 735 N.Y.S.2d 555, 557–58 (App. Div. 2001).

227 *See supra* Section III.B.

228 *See* Saxer, *supra* note 23, at 112 ("Water is fluid and too unlike land to be treated as a property interest and held by private individuals."); Zellmer & Harder, *supra* note 21, at 691 (suggesting that water needs to meet a particularly high standard by framing the question as "whether interests in water are indeed Property, with a Capital P, in all of its glorious wonder").

1. The Claim that Usufructuary Rights Cannot Be Considered *Takings Property*

Court opinions and scholarship on water rights contain a number of arguments that are frequently deployed to question the status of water as a property right. Chief among them is the notion that can be summarized with the phrase "[n]o one has any property in the water itself but a simple usufruct."[229] Stated differently, the argument is that rights that are usufructuary in nature cannot be deemed *takings property*.[230]

It is critical to distinguish this claim from the position that other courts have adopted on this question, that is, that a usufruct, while a property right, does not constitute full ownership.[231] While these two views may seem similar at first blush, they are markedly different. In one case, the argument is that a right to use is not a constitutionally protected property right while, in the other, courts are merely providing a reminder that, as explained in more detail below, a right to use is one of the property rights in the bundle, rather than the full bundle.[232]

Focusing on the former position, the main problem with it is its untenable premise that a usufructuary right cannot be a property right. A usufruct, a familiar type of right in civil law jurisdictions,[233] is "[a] right for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it."[234] This so-called "real right" confers

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229 *In re* Hood River, 227 P. 1065, 1087 (Or. 1924).

230 Zellmer & Harder, *supra* note 21, at 735 (arguing that "[g]iven the usufructuary and public nature of water rights, however, any expectation of exclusive, unfettered use . . . is patently unrealistic" to conclude that some of the necessary elements of the *takings property* test are missing in the case of appropriative rights); Saxer, *supra* note 23, at 53 ("[W]ater rights are generally viewed not as actual property rights subject to a taking under the Fifth Amendment, but as usufructuary rights . . . .").

231 *See* Mineral Cnty. v. Lyon Cnty., 473 P.3d 418, 430 (Nev. 2020) (noting that water rights are an "inchoate usufructuary right" and right holders "do not own or acquire title to water" (citing Desert Irrigation, Ltd. v. State, 944 P.2d 835, 842 (Nev. 1997))); Kobobel v. State Dep't of Nat. Res., 249 P.3d 1127, 1134 (Colo. 2011) (explaining that while "one does not 'own' water," one can "own[] the right to use water," and clarifying that "[a] water right is a usufructuary right, giving 'its holder the right to use and enjoy the property of another without impairing its substance'" (quoting Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1377 (Colo. 1982))).

232 *See infra* notes 233–38.

233 *Usufruct*, THE LAW DICTIONARY, https://thelawdictionary.org/usufruct [https://perma.cc/63X5-MY72].

234 *Usufruct*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Usufruct*, supra note 233. Webster's dictionary defines it as "the right to utilize and enjoy the profits and advantages of something belonging to another so long as the property is not damaged or altered." Phelps Dodge Corp. v. Ariz. Dep't of Water Res., 118 P.3d 1110, 1113 n.2 (Ariz. Ct. App. 2005) (quoting WEBSTER'S II: NEW RIVERSIDE UNIVERSITY DICTIONARY 1272 (1994)).

direct control over a thing owned by another person[235] or, in other words, a possessory right of use.[236] Thus, a usufruct and a life estate are functional equivalents, particularly in cases in which the usufruct's duration is measured by the life of the person holding the right.[237]

For this reason, putting the label "usufructuary" on a particular right should have the effect of reinforcing, rather than diminishing, its consideration as a property right. In the land context, for example, it would be shocking to argue that a life estate is not *takings property*. Since the 1960s, this has been treated as a truism in the literature, which focused on a subsequent step of the takings analysis, namely, how compensation should be split between the life tenant and the holder of the future interest, often a remainder.[238] Even easements—the nonpossessory version of the right to use and, therefore, a more limited right—are overwhelmingly viewed as *takings property*.[239]

Consequently, the argument that, in the nonland context, a more robust version of a right to use should not be regarded as *takings property* is hard to justify, unless the reason for this inconsistent treatment is simply that land is different and therefore subject to a different set of rules when it comes to determining which rights in it will be deemed property.

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235 *See* LA. CIV. CODE ANN. art. 535 (2021); A. N. Yiannopoulos, *Usufruct: General Principles—Louisiana and Comparative Law*, 27 LA. L. REV. 369, 369–70 (1967).

236 *See* A. J. McClean, *The Common Law Life Estate and the Civil Law Usufruct: A Comparative Study*, 12 INT'L & COMPAR. L.Q. 649, 651 (1963) (explaining that the holder of the usufruct or usufructuary "has the right to the fruits of the property and to *possession*" (emphasis added)).

237 *See* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 983 (1985) (noting that a usufruct is a "rough analog to the life estate"); Robert S. Parker Jr., *Life Estates and QTIP: A Problem*, 6 PROB. & PROP. 62, 62 (1992) ("The *right to use* property for life as commonly found in a life estate satisfies Requirement I, either because the right to use is the functional equivalent of the right to all of the income or because it is the functional equivalent of a usufruct."); McClean, *supra* note 236, at 665 ("The striking aspect of this comparison has been the almost uniform similarity between the life estate and the usufruct. They are in substance and to a very large extent in detail the same . . . .").

238 *See, e.g.*, Olin L. Browder, Jr., *The Condemnation of Future Interests*, 48 VA. L. REV. 461, 461–62 (1962) ("[T]he award could be immediately divided so as to pay off the life tenant . . . and the balance could be set aside for those who ultimately become entitled to it."); Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 BYU L. REV. 789, 801 (1989) (discussing the two methods to allocate compensation between the holder of a life estate and that of the remainder).

239 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021) ("[T]he Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement."); *see* Stern, *supra* note 7, at 289 (noting that the Supreme Court has recognized easements as property rights in the takings context); Merrill, *supra* note 13, at 957 ("Virtually all takings cases involve common-law property interests, such as a fee simple or an easement."); United States v. Va. Elec. & Power Co., 365 U.S. 624, 629 (1961) ("If [an] easement [has] value, then the Government must compensate for the easement's destruction . . . .").

2. Applying the Transferability Requirement for *Takings Property* to Water Rights

As explained earlier, Professor Merrill's test for *takings property* is narrower than that adopted by courts and other scholars.[240] One of the elements relevant to his proposed framework is whether a particular right is transferable, which is part of the inquiry on whether an asset is "discrete."[241]

Under Merrill's test, a discrete asset is present when "a valued resource . . . held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth), . . . is created, exchanged or enforced by economic actors with enough frequency."[242] Therefore, whether a valued resource can be exchanged—i.e., is transferable—may play an important role in deciding if the discrete asset requirement is met. It is worth noting, however, that based on the wording of the test, a right would not necessarily need to be transferable to meet this requirement, as rights created or enforced with enough frequency would qualify as well.

While, even under Merrill's framework, a nontransferable right could be deemed *takings property*, some water law scholars have argued that water rights do not satisfy the "discrete asset" requirement because they cannot "be routinely conveyed or disposed of however the appropriator wishes."[243] This approach, however, constitutes a significant departure from Merrill's test. As noted above, transferability is not a necessary prerequisite of the "discrete asset" requirement. More importantly, Merrill refers to transferability "by economic actors with enough frequency," not an unlimited ability to transfer and dispose of the right.

The effect of adopting this new and considerably stricter standard specifically for water rights is that it creates an inconsistency with how more traditional property rights are analyzed. As explained earlier, the limitations on the transferability of water rights are far from absolute.[244] While most prior appropriation jurisdictions require administrative approval of transfers, most of these requests will be approved as long as the modification of the right does not injure other appropriators.[245]

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240 *See supra* Section III.B.2.

241 *See supra* Section III.B.2.

242 *See* Merrill, *supra* note 13, at 974.

243 Zellmer & Harder, *supra* note 21, at 741.

244 *See supra* Section II.B.2.

245 *See supra* Section II.B.2.

If this type of restriction on alienability were sufficient to conclude that appropriative rights are not transferable and, therefore, not *takings property*, this same standard would lead to the very questionable conclusion that a fee simple absolute is not *takings property* either. It is not uncommon to see instances in which land transfers are subject to conditions or administrative approval. For example, a New Jersey statute requires owners of industrial sites to either submit a cleanup plan or a declaration certifying that there are no hazardous substances on the property as a condition precedent to their transfer.[246] More generally, restraints on alienation are frequently upheld by courts as long as they are deemed reasonable.[247]

Sections IV.A.1 and IV.A.2 show that arguments that scholars have made to claim that water rights should not be considered *takings property* would not be persuasive in the land context. This ultimately reveals that these arguments are predicated on the idea that land is different and, therefore, property interests that do not pertain to land should enjoy a lower status in our legal system.

B. *The "Specific and Identifiable" Requirement for* Takings Property *and the in Rem/in Personam Rights Distinction*

All the *takings property* tests discussed in this Article incorporate the requirement that a right be "specific and identifiable"—or a "discrete thing" or "discrete asset"—in order to qualify as *takings property*.[248] To apply these tests in specific cases, however, one has to deal with an extremely complex question, that is, how should the determination of whether a right is sufficiently "specific and identifiable" be made? Even more important, however, is the question of which of these different answers provides better outcomes, an issue on which the analysis of appropriative rights can shed some light.

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246 N.J. STAT. ANN. §§ 13:1K-6–13 (West 2022); *In re* Adoption of N.J.A.C., 608 A.2d 288, 290 (N.J. 1992) ("[The statute] requires the owners and operators of industrial sites either to develop a cleanup plan for real property contaminated by hazardous waste or to certify in a 'negative declaration,' as a condition precedent to the closing, sale, or transfer of a business or real property, that cleanup is unnecessary." (citation omitted)).

247 *See, e.g.*, City of Oceanside v. McKenna, 264 Cal. Rptr. 275, 282–83 (Ct. App. 1989) (finding that restrictions in covenants, conditions, and restrictions were reasonable in that particular case and therefore enforceable under California law); Alfaro v. Cmty. Hous. Improvement Sys. & Planning Ass'n, 124 Cal. Rptr. 3d 271, 291, 292 (Ct. App. 2009) (explaining that "the enforceability of the restriction depends on whether the restriction is reasonable" and then concluding that the deed restriction at issue in that case was reasonable (quoting *McKenna*, 264 Cal. Rptr. at 281)).

248 *See supra* Section I.B.

1. Two Possible Answers: "Discrete Asset" and "Identified with Enough Specificity"

As explained earlier, scholars have proposed different approaches to answer this question.[249] As addressed at length in Part III, Professor Merrill has concluded that this requirement—to which he refers as a "discrete asset"—is met when the right relates to (1) "a valued resource" that (2) "is held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth)," and (3) "is created, exchanged or enforced by economic actors with enough frequency."[250]

An alternative to this framework is one that, relying on the distinction between in personam and in rem rights, essentially argues for a different interpretation of the "specific and identifiable" requirement.[251] Professor Stern, the main proponent of this in rem theory of constitutional property, posits that the notion of *takings property*—as well as other types of constitutional property—overlaps with that of in rem rights.[252] Because, according to this scholar, one of the key features of in rem rights is that the thing must be "identified with enough specificity," this effectively provides a way to interpret the "specific and identifiable" requirement that is different from Merrill's.[253]

Of course, the next logical step is to define the precise meaning of the phrase "identified with enough specificity." The basic idea is that the interest in question must be described in such a way that does more than merely identify quantities or substitutes of the thing.[254]

This approach leads to coherent outcomes when one applies it to rights over land or personal property. For instance, it is reasonable to view the obligation of a widget manufacturer to provide a certain number of widgets of a particular quality to a customer as an in personam—or contract—right.[255] The things are described in terms of quantities and, therefore, they would not be considered "identified with enough specificity." The same is true when a developer agrees to build a house that will meet certain specifications. Under this view, property rights would basically attach only when the thing comes into existence and is

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249 *See supra* Section I.B.

250 *See* Merrill, *supra* note 13, at 974; *supra* text accompanying notes 160–61.

251 *See supra* notes 168–69 and accompanying text.

252 *See* Stern, *supra* note 7, at 296 ("As used here, rights in rem are property rights, while rights in personam are rights that are not property rights.").

253 *See id.* at 297.

254 *See id.*

255 Of course, as long as the other requisites for the valid formation of a contract are present.

delivered, that is, when the widgets are made and identified as the customer's or when the house is built and title passes to the buyer.

2. Why the "Identified with Enough Specificity" Approach Leads to Suboptimal Outcomes

As noted above, applying Merrill's test to appropriative rights shows that this approach leads to predictable and consistent conclusions.[256] Relying on the in rem/in personam distinction to argue that things must be "identified with enough specificity" to qualify as *takings property*, however, yields intuitively sound outcomes when applied to land and personal property but raises some concerning issues in the water context. Section II.A explains that water rights have two different components.[257] The first allows the holder to use the water once it has been diverted and the second protects the right to divert and use water in the future.[258]

If we apply the "in rem theory of constitutional property" to appropriative rights, which adds the constraint that a right may only be considered "specific and identifiable" once it can actually be identified, as well as the limitation that quantities are not sufficient, we would reach a surprising conclusion. The part of an appropriative right that focuses on the use of water that has already been diverted—what I have referred to earlier as "present water"[259]—would constitute *takings property*. At that point in time, it would be theoretically possible to identify the specific molecules that the appropriator is entitled to use. On the other hand, the second part of the right—i.e., the forward-looking component that I described as "future water"[260]—might not qualify as *takings property* as the water molecules that may be diverted and used in the future, while in existence, have not been, and cannot at this point be, identified.[261]

This conclusion, of course, is not objectionable per se. It does, however, raise an important issue. Given that "[a]ll rights are . . . either *in rem* or *in personam*," if the right to divert and use water in the future is not an in rem right, we should expect it to instead be in personam or

256 *See supra* text accompanying notes 164–66.

257 *See supra* notes 78–80 and accompanying text.

258 *See supra* notes 78–80 and accompanying text.

259 *See supra* text accompanying note 77.

260 *See supra* text accompanying note 79.

261 With appropriative rights, however, the right is not only defined by its quantity or flow, but also by reference to priority, which would provide an additional argument to treat the right to divert water in the future as specific enough to meet this requirement, even as interpreted by Professor Stern.

contractual.[262] How plausible is it, however, that water rights could be viewed as in personam?

To determine whether water rights could potentially be considered in personam, a more detailed analysis of what this conclusion would entail is in order. First of all, it is important to note that, while in personam rights are typically contractual in nature, they are a broader category that includes, in addition to contracts, for example, rights that arise out of a judicial judgment.[263] In personam rights are more generally defined as those requiring a specific person to behave in a certain way.[264] For this reason, they bind particular individuals only.[265] Wesley Hohfeld famously defined rights in personam as "unique right[s] residing in a person (or group of persons) and availing against a single person (or single group of persons)."[266] Given that contracts are the epitome of in personam rights, it is not surprising that, consistently with this, one scholar highlighted that in personam rights tend to impose positive—rather than negative—duties.[267]

Given how in personam rights are characterized in the literature, it would be complicated to conclude that common law appropriative rights fit within this category. The holder of the right is not entitled to require a particular person to act a certain way. In other words, no one has the obligation to provide water to the appropriator—not nature, not the government, and not any other person.[268] Moreover, the time priority feature of prior appropriation makes the argument that appropriative rights are in personam even less plausible. The obligation to not interfere with senior users is a negative one, a trait commonly associated with rights in rem as noted above.[269] Further, this duty applies not to a single person or group thereof but to a "large and indefinite class of persons"—i.e., anyone who could be in a position to interfere with that right.[270] This, again, is another distinctive feature of rights in rem.[271]

This analysis shows the contradiction that water rights uncover. Water itself cannot be identified before it is diverted, which suggests that

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262 *See* Stern, *supra* note 7, at 296–97.

263 *See* Merrill & Smith, *supra* note 8, at 778.

264 J.E. PENNER, THE IDEA OF PROPERTY IN LAW 23 (1997).

265 *See id.*

266 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718 (1917).

267 Albert Kocourek, *Rights in Rem*, 68 U. PA. L. REV. 322, 334 (1920).

268 To be sure, there are cases in which the appropriator is the one who has such an obligation, for example, when she agrees to provide water to a third party under a contract.

269 *See supra* text accompanying note 267; Kocourek, *supra* note 267, at 334 ("Rights *in rem* correspond, in modern law, to negative duties . . . .").

270 *See* Hohfeld, *supra* note 266, at 740.

271 *See id.*; *supra* text accompanying note 266.

these rights are not "identified with enough specificity" and therefore not in rem or *takings property*. However, the preceding analysis focusing on the features of each type of right shows that appropriative rights are more properly classified as in rem rather than in personam.

3. Addressing the Contradiction and a Path Forward: In Rem vs. *In Re* Rights

The "in rem theory of constitutional property" would be creating a new category of rights, thereby undermining the idea that rights must be either in personam or in rem. This third category of rights would have to include rights that, as appropriative rights, exhibit the features of a right in rem—and are therefore not in personam rights—but that are not "identified with enough specificity" and, therefore, would not be considered *takings property* under the "in rem theory of constitutional property." This is problematic in that this situation is ultimately negating the main premise on which this particular approach to identifying *takings property* is based, namely that in rem rights are synonymous with constitutional property. The reason for this contradiction can ultimately be traced back to the premise that in rem rights must be "identified with enough specificity," excluding a reference to quantities. This requirement is making the in rem rights category exceedingly narrow.

A way to address this analytical obstacle is to focus on Hohfeld's distinction between two similar but different categories of rights—rights *in re* and rights in rem. According to this scholar, the notion of *in re* rights is narrower—and included within the broader category of in rem rights—and typically relates to tangible objects, such as land or personal property.[272] Rights in rem, on the other hand, include but do not necessarily always concern a thing or tangible object.[273] Therefore, interpreting the requirement that a thing be identified "with enough specificity" to mean that quantities or substitutes should be excluded would be to effectively use the category of *in re* rights, rather than that of in rem rights, as the standard for constitutional property.

This should clarify why a third category of rights is not in fact being created. Returning to the water example, as explained above, appropriative rights are rights in rem and, therefore, not in personam.

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272 *See* Hohfeld, *supra* note 266, at 733 (noting that a right in rem "is not always one relating to a thing, i.e., a tangible object" (emphasis omitted)); *id.* at 734 ("It is, however, important to observe that there is a more specific Latin term, *jus in re*, which has been frequently used by able judges to indicate jural relations *in rem* (i.e., multital rights, privileges, powers, and immunities) directly concerning a tangible object, such as a piece of land, a vessel, etc.").

273 *See id.* at 734.

Given their peculiar characteristics—i.e., they are not land or personal property—they cannot be included in the subcategory of in rem rights that Hohfeld and others refer to as *in re*.

Returning to the problem with how the "in rem theory of constitutional property" defines rights in rem, a solution would be to use the traditional definition of rights in rem to determine which rights qualify as *takings property*. In other words, by recognizing that rights in rem do not require the existence of a discrete, tangible thing that is described "with enough specificity," the contradiction would be eliminated, and the focus would be on rights that have traditionally been considered in rem rather than *in re*. This is also consistent with the view, endorsed by the Supreme Court and discussed in more detail earlier, that a right to continue receiving something valuable in the future—as occurs with water rights—can be a property right entitled to constitutional protection under the Fifth Amendment.[274]

This does not mean, however, that the notion of a "discrete and identifiable" asset should be eliminated from *takings property* tests. What would change is how courts determine whether that requirement is met or not. Instead of relying on the idea that identifying quantities or substitutes of the thing is inconsistent with property rights for takings purposes, the focus would be placed exclusively on other considerations already present in other *takings property* frameworks—for example, the approach proposed by Professor Thomas Merrill.

As the water right example shows, basing such a definition on considerations such as frequent creation, enforceability, and transferability of the right is a far superior approach.[275] In addition to avoiding the tensions that equating *in re* and *takings property* creates, Merrill's interpretation leads to more consistency between how interests in land and other less traditional rights are treated for takings protection purposes.

CONCLUSION

Determining what "private property" means in the context of the Takings Clause is critical, especially when courts are dealing with rights or interests whose status as *takings property* has been questioned. This is particularly relevant, for example, when plaintiffs in a takings case are arguing that they should be compensated for the modification of a water right or claim that business losses associated with a shutdown order issued during a pandemic constitutes a taking.

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274 *See supra* notes 177–78 and accompanying text.

275 *See supra* Section I.B.

Scholars who support the idea that there is a specific definition of property for takings or, more broadly, constitutional purposes, have been grappling with the challenges of providing a test to make these determinations. As this Article has explained, the tests that have been proposed in the literature are consistent and predictable when dealing with traditional rights, especially those in land. However, when tested against more idiosyncratic rights such as water rights, their differences and shortcomings become apparent.

This Article has shown that frameworks that interpret the Supreme Court's "specific and identifiable" language by focusing on features of a right such as transferability and whether they are an accepted form of property under the common law lead to sounder outcomes than those adopting a very narrow view of the requirement that is only satisfied if the resource is identified with the utmost precision. It is also crucial for these tests to be applied consistently so that the bar for what is required for a particular right to be deemed *takings property* is not lower for some rights—for example, those in land—than it is for other less traditional rights, such as a water right in prior appropriation jurisdictions.