

# **Pragmatic Groundwater: Texas Judges Should Pragmatically Incorporate Hydrocarbon Doctrines into Groundwater Law [*Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 825 (Tex. 2012).]**

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*“Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them.”<sup>1</sup>*

## **I. INTRODUCTION**

Although Texas groundwater law is old, it is far from being established. While *Edwards Aquifer Authority v. Day*<sup>2</sup> clearly established the rule of capture as Texas groundwater law, *Edwards* did not establish Texas hydrocarbon law as Texas groundwater law.<sup>3</sup> Groundwater and hydrocarbons are meaningfully distinct resources and the law must reflect this nuance in order to sustain Texans’ way of life.<sup>4</sup>

This Comment will argue Texas courts should pragmatically incorporate hydrocarbon doctrines into groundwater law by using a three-step inquiry: (1) would the incorporation of unaltered Texas hydrocarbon law into Texas groundwater law adequately respect the differences between hydrocarbons and groundwater; (2) what modification of Texas hydrocarbon law would achieve the desired respect for the differences between hydrocarbons and groundwater in application; and (3) should an altered version of Texas hydrocarbon law be incorporated into Texas groundwater law.

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1. United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).

2. 369 S.W.3d 814, 825 (Tex. 2012).

3. *Id.* at 82728.

4. Zachary A. Bray, *Texas Groundwater and Tragically Stable “Crossovers”*, 2014 BYU L. REV. 1283, 1312–13 (2014).

## II. BACKGROUND

Texas groundwater law follows the rule of capture (“the Rule”).<sup>5</sup> The Rule gives landowners<sup>6</sup> the right to all the groundwater beneath their land that the landowner can reduce to possession.<sup>7</sup> This Rule can be traced back to English common law.<sup>8</sup> Early jurists reasoned that a captor did not have a property right in a wild animal until he possessed it.<sup>9</sup> Possession is the starting point of ownership because the wild animal could act like a fugitive and escape the captor’s power until the wild animal was reduced to possession.<sup>10</sup>

Similarly, when jurists considered the ownership of hydrocarbons, they reasoned that the Rule should apply. Jurists came to this holding because hydrocarbons (like wild animals) are fugacious: hydrocarbons will escape your power (property lines) unless you have reduced the hydrocarbon to possession (collection).<sup>11</sup> When confronted with groundwater, early courts applied the Rule because groundwater (like hydrocarbons) is fugacious: groundwater will escape your power (property lines) unless you have reduced the groundwater to possession.<sup>12</sup>

While the Rule for groundwater has been rejected by most jurisdictions, the Rule is not in the “dustbin” of Texas history.<sup>13</sup> In *Edwards*, Chief Justice Hecht *unequivocally* established the Rule as the touchstone for Texas groundwater.<sup>14</sup> Thirteen years earlier (1999), the Texas Supreme Court *equivocally* established the Rule as the touchstone for Texas groundwater.<sup>15</sup> In 1999, Chief Justice Hecht<sup>16</sup> wrote a concurring opinion joined by Justice O’Neill.<sup>17</sup> Chief Justice Hecht was dissatisfied with the Rule for Texas groundwater law because of the tragedy of the

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

6. Assuming the landowner has not severed the groundwater estate from the surface estate. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 63 (Tex. 2016) (“An interest in groundwater can be severed from the land as a separate estate, just as an interest in minerals can be.”).

7. *Sipriano*, 1 S.W.3d at 76 (“Essentially, the rule provides that, absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in so doing they deprive their neighbors of the water’s use.”).

8. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 183–86 (1986); RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 95 (2003).

9. Posner, *supra* note 8, at 183–86.

10. *Id.*

11. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 829 (Tex. 2012); Posner, *supra* note 8, at 183–86.

12. *Day*, 369 S.W.3d at 829; Posner, *supra* note 8, at 183–86.

13. BARTON H. THOMPSON, *LEGAL CONTROL OF WATER RESOURCES CASES AND MATERIALS* 473 (6th ed. 2018).

14. *Day*, 369 S.W.3d at 823.

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

16. At the time, Justice Hecht. See *id.* at 75.

17. *Sipriano*, 1 S.W.3d at 81 (Hecht, J., concurring).

Rule—a single landowner can withdraw as much groundwater as he or she can possess.<sup>18</sup> Chief Justice Hecht knew this tragedy would magnify Texas water shortage issues, because the Rule economically incentivizes landowners to pump as much water as possible, as the alternative would result in being drained by their neighbors.<sup>19</sup> Although Chief Justice Hecht was concerned, he did not vote to replace the Rule, because he believed the 1997 Texas Water Code would make the rule of capture obsolete.<sup>20</sup>

As the Court noted, there will be similarities between hydrocarbon law and groundwater law because both resources are controlled by a common rule.<sup>21</sup> Nevertheless, there is uncertainty regarding how hydrocarbon doctrines will be applied in groundwater law.<sup>22</sup> This has spurred litigation where parties attempted to force the Court to incorporate hydrocarbon doctrines into Texas groundwater law.<sup>23</sup> These incorporation fights are in their infancy and will continue in the future.<sup>24</sup> It was only made clear in 2012 that Texas should incorporate the correlative rights doctrine of hydrocarbon law into groundwater law.<sup>25</sup> In 2016, Texas incorporated the accommodation doctrine of hydrocarbon.<sup>26</sup>

### III. ANALYSIS

Judges should use pragmatism to incorporate hydrocarbon doctrines into Texas groundwater law because hydrocarbon and groundwater resources must be treated differently to ensure they are consumed efficiently. The legal concepts attached to these resources may be similar, but they must not be the same. Specifically, the concept of fair share must be different in hydrocarbon law and groundwater law.

#### A. *Groundwater is Not Just Another Resource*

Hydrocarbons and groundwater are distinct resources. For instance, owners of hydrocarbon mineral rights and modern society operate under the business assumption that hydrocarbons are mined.<sup>27</sup> These parties retain

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18. *Id.* at 81.

19. *Id.* (identifying reoccurring droughts and dwindling water supplies as Texas water issues).

20. *Id.* at 82.

21. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 825 (Tex. 2012); *Sipriano*, 1 S.W.3d at 76.

22. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 63 (Tex. 2016); *See* Haley King, *Conflicts in Groundwater and Mineral Estates in Texas*, 48 TEX. ENVTL. L.J. 299, 311 (2018).

23. *See Coyote Lake Ranch*, 498 S.W.3d at 63.

24. *See generally id.* at 63.

25. *Day*, 369 S.W.3d at 825.

26. *Coyote Lake Ranch*, 498 S.W.3d at 63.

27. *Bray*, *supra* note 4, at 1312–13; Susana E. Canseco, *Landowners' Rights in Texas Groundwater: How and Why Texas Courts Should Determine Landowners Do Not Own Groundwater in Place*, 60 BAYLOR L. REV. 491, 522 (2008).

the greatest benefit of this mining by having the commodity shipped off tract and refined.<sup>28</sup> This way the commodity can be sold to the consumer for consumption.<sup>29</sup> Conversely, owners of groundwater rights do not operate under the assumption that groundwater is *just* a commodity.<sup>30</sup> Owners of groundwater rights must retain access to groundwater for drinking, recreation, agriculture, and other uses to sustain their way of life and communities.<sup>31</sup>

This distinction ensures the harshness of the Rule is unmitigable to owners of groundwater rights.<sup>32</sup> Although hydrocarbon owners can have their mineral rights made economically worthless by drainage, hydrocarbon owners can mitigate their economic damage by drilling themselves.<sup>33</sup> Owners of groundwater rights cannot mitigate their damages by capturing water themselves because groundwater owners can have their ways of life destroyed by having their pumps run dry.<sup>34</sup> More drilling is not the solution; it is the problem.<sup>35</sup> Groundwater is not just a commodity; it is needed to sustain life.<sup>36</sup> Texas judges must act pragmatically to ensure certain ways of Texas life are not erased in the near future.

### *B. Pragmatism is the Solution*

To prevent erasure, Texas judges should assume the role of pragmatics when determining which hydrocarbon doctrines they should incorporate into Texas groundwater law. This Comment suggests Texas courts should utilize a pragmatic, three-step inquiry: (1) would the incorporation of unaltered Texas hydrocarbon law into Texas groundwater law adequately respect the differences between hydrocarbons and groundwater; (2) what modification of Texas hydrocarbon law would achieve the desired respect for the differences between hydrocarbons and groundwater in application;

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28. Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522.

29. Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522; Elizabeth A. Reichenberger, *Another Attempt to Mix Oil, Gas, and Water: An Analysis of the Texas Supreme Court's Decision to Apply the Accommodation Doctrine to Groundwater* [Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)], 57 WASHBURN L.J. 367, 396 (2018).

30. See Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522; Reichenberger, *supra* note 29, at 396.

31. See Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522; Reichenberger, *supra* note 29, at 396.

32. See Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522.

33. See Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522; Reichenberger, *supra* note 29, at 396.

34. See generally Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522; Reichenberger, *supra* note 29, at 396.

35. See generally Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522; Reichenberger, *supra* note 29, at 396.

36. See generally Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522; Reichenberger, *supra* note 29, at 396.

and (3) should an altered version of Texas hydrocarbon law be incorporated into Texas groundwater law.

This pragmatic inquiry focuses on the most efficient use of groundwater resources.<sup>37</sup> To achieve this end, judges should consider the teachings of geologists, economists, and Texans to understand the practical consequences of incorporating unchecked hydrocarbon doctrines.<sup>38</sup>

This approach would de-escalate the tragedy of the Rule that drives owners of groundwater rights to pump as much water as possible.<sup>39</sup>

*C. Fair Share Should be Incorporated in a Modified Way to Respect the Difference Between Hydrocarbons and Groundwater*

Texas judges should incorporate the hydrocarbon doctrine of fair share into Texas groundwater law by conceptualizing a groundwater right to fair share as a right to safe yield.

Under Texas hydrocarbon law, all hydrocarbon right owners are entitled to a fair share of the hydrocarbons in their property.<sup>40</sup> This does not mean that hydrocarbon owners are entitled to a specific amount of hydrocarbons.<sup>41</sup> Instead, the hydrocarbon fair share doctrine stands for the principle that each hydrocarbon owner should have a fair chance to recover the hydrocarbons underneath their property.<sup>42</sup>

1. Incorporating an Unaltered Fair Share Doctrine into Texas Groundwater Law Would Not Adequately Respect the Differences Between Hydrocarbons and Groundwater

Texas judges should only incorporate the fair share doctrine into Texas groundwater law if it is changed. Applying this doctrine unchecked does not make sense because groundwater is not just a commodity—it has more important uses than being mined.<sup>43</sup> From an economic perspective, it does not make sense to incentivize all groundwater owners to drain as much water as possible because such a use is inconsistent with the other uses

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37. Posner, *supra* note 8, at 183–86.

38. Posner, *supra* note 8, at 183–86.

39. Posner, *supra* note 8, at 183–86.

40. R.R. Comm'n of Tex. v. Gulf Prod. Co., 134 Tex. 122, 126 (1939).

41. *Id.*

42. *Id.*

43. See Reichenberger, *supra* note 29, at 396; Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 277, at 522.

Texans have for groundwater.<sup>44</sup> These other uses would not be possible in a world where the groundwater is completely drained.<sup>45</sup>

## 2. Modifying the Concept of Fair Share to Safe Yield Would Respect the Difference between Hydrocarbons and Groundwater

Texas judges should use the concept of safe yield to modify the doctrine of fair share. The concept of safe yield is traditionally defined as: “the amount of water that can be withdrawn from an aquifer in perpetuity, where the rate of extraction just equals the rate of recharge.”<sup>46</sup> The rate of recharge can vary based off the totality of geological factors at play over a common water resource.<sup>47</sup> Although safe yield may be difficult to quantify, its use is necessary to ensure groundwater resources can be used indefinitely in Texas.<sup>48</sup> This pragmatic solution will ensure Texas owners of groundwater rights have a guaranteed right to their groundwater.

## 3. An Altered Version of Fair Share Should be Incorporated

Texas judges should incorporate the altered doctrine of fair share into Texas groundwater law. Although this would limit the quantity of water a right holder could take, qualifying Texas groundwater rights by safe yield ensures groundwater resources will be used efficiently.<sup>49</sup> This outcome is preferable to the alternative where everyone would have an equal right to non-existent groundwater resources.

### D. Counterarguments

This section of the Comment addresses the two main criticisms of legal pragmatism: (1) pragmatic judges violate the separation of powers by creating new laws, and (2) pragmatic judges operate under no constraints.<sup>50</sup>

Pragmatic judges will not violate the separation of powers by pragmatically incorporating hydrocarbon doctrines. Deciding what

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44. See *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., concurring).

45. See Reichenberger, *supra* note 29, at 396; Bray, *supra* note 4, at 1312–13; Canseco, *supra* note 27, at 522.

46. THOMPSON, *supra* note 13, at 458–59.

47. THOMPSON, *supra* note 13, at 458–59.

48. This comment’s definition of safe yield is aspirational.

49. Posner, *supra* note 8, at 183–86.

50. This Comment only seeks to briefly answer these criticisms. For more information about these criticisms or their answers, see the following pieces of scholarship. Iiya Somin, *Thoughts on Judge Richard Posner’s legal pragmatism*, WASH POST (Sept. 2, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/02/thoughts-on-judge-richard-posners-legal-pragmatism/?utm\\_term=.1c71ca74ab87](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/02/thoughts-on-judge-richard-posners-legal-pragmatism/?utm_term=.1c71ca74ab87) (tracing the history of the debate); Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683 (2004); See Posner, *supra* note 8, at 385.

hydrocarbon doctrines to incorporate in Texas groundwater law is not legislating from the bench—new laws are not being created. The decision to incorporate hydrocarbon law into groundwater law is not legislative because it is dealing with the common law.<sup>51</sup> The common law has always been interpreted to promote efficiency in the sense of wealth maximization.<sup>52</sup> The three-step inquiry outlined in this Comment suggests that this is the most efficient way to promote wealth maximization of groundwater resources under Texas common law.

Pragmatic judges are more constrained than formalist judges. Although formalists should only consider principles of law, it is impossible to render a judicial decision without political influence.<sup>53</sup> Society's values and judges' life experiences will always interfere with the judicial decision-making process, so it is just a question of how to control this interference.<sup>54</sup> Pragmatism holds judges more accountable to the law because it looks at the structural consequences of every ruling between all parties.<sup>55</sup> Pragmatic judges evaluate the structural consequences of a holding as a supplement to—not a replacement for—text or precedent.<sup>56</sup> Pragmatism commands that judges understand that legal doctrines create expectations and that there is substantial value in protecting individuals who rely upon text and precedent.<sup>57</sup>

#### IV. CONCLUSION

Although the Rule applies to groundwater, not all hydrocarbon doctrines should be incorporated unaltered into groundwater law. Hydrocarbons and groundwater are different resources.<sup>58</sup> If water pumps run dry, communities will become unsustainable.<sup>59</sup> To prevent this result, Texas judges should pragmatically incorporate hydrocarbon doctrines into groundwater law.<sup>60</sup>

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51. See Posner, *supra* note 8, at 183–86.

52. See Posner, *supra* note 8, at 183–86.

53. See Posner, *supra* note 8, at 385.

54. See Posner, *supra* note 8, at 385.

55. Posner, *supra* note 50, at 683–84; Posner, *supra* note 8, at 95.

56. Posner, *supra* note 50, at 683–84; Posner, *supra* note 8, at 95.

57. Posner, *supra* note 50, at 683–84; Posner, *supra* note 8, at 95.

58. See *supra* Part III(A).

59. See *supra* Part III(A).

60. See Posner, *supra* note 8, at 183–86.