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Anti-Monopoly and the Radical Lockean Origins of Western Water Law

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A review of DAVID B. SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER (Yale U. Press 2012**)**

The received view of Western settlement under the prior appropriation system that the gold and silver rushes of the mid-nineteenth century ushered in is that its distribution to private takers on the basis of temporal priority reflected an ideological aversion to the inefficiencies associated with common property, a preference for the perceived efficiency of privatization, and a devotion to market preferences that would release what Willard Hurst called the "creative energy" of individual Americans.[1] According to this perspective, the result fostered Western "individualism, initiative, and exploition (p. 5),"[2] thereby avoiding a "tragedy of the commons"[3] and reflected a natural progression of property privatization in pursuit of maximization of social welfare.[4] This story has become a celebrated part of the history of American natural resources law,[5] which the libertarian-minded now see as a model for substituting markets for regulation in the future.[6]

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[1] *See* DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER 3 (Yale U. Press, 2012) [most ensuing references are to page numbers in textual parentheticals] (citing JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 6 (1956)).

[2] Citing Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialogue of Accommodation*, 71 Or. L. Rev. 381, 382 (1992); and Charles F. Wilkinson, *In Memoriam: Prior Appropriation,* 21 Envtl. L. pt. 3, v, viii (1991)).

[3] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

[4] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

[5] *See, e.g.,* Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & Econ. 163 (1975); Gary D. Libecap, *Economic Variables and the Development of the Law: The Case of Western Mineral Rights*, 18 J. Econ. Hist. 338 (1978).

[6] *See* TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (rev. ed. 2001). For a critical review, see Michael C. Blumm, *The Fallacies of Free Market Environmentalism,* 15 Harv. J.L. & Pub. Poly. 371 (1992).

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David Schorr's concise examination of the origins of prior appropriation challenges this received wisdom in a careful analysis of archival material, legislative records, and court cases.[7] Schorr maintains that this history reveals that the prior appropriation doctrine so central to Western mining and water law was founded not on an attachment to privatization for its allocative efficiency but instead on principles of equity and justice.[8] Schorr's account shows that distributional concerns dominated the thinking of the appropriation doctrine's architects, whose principal concern was that water law foster widespread use of the resource. Consequently, riparian land ownership, the basis of common law water rights in the East and in England, was explicitly rejected in the Colorado Supreme Court's landmark decision of *Coffin v. Left Hand Ditch* in 1882.[9] Riparianism threatened landowner monopoly of the scarce water resource and would have allowed speculation,[10] both of which were inconsistent with the ideology of the Radical Lockeanism that was dominant at Colorado's founding and which promoted equitable distribution of rights among small irrigators.[11] In addition to its rejection of

[7] Schorr employs four types of historical evidence in support of his claim that the essence of prior appropriation was distributive justice and widespread use of water: 1) mining district codes (he examined some 78 of them (p. 9); 2) water law statutes of the Colorado legislature and the 1876 Colorado Constitution; 3) Colorado court decisions; and 4) contemporary primary sources and published works (p. 7).

[8] Schorr quotes the Colorado Court of Appeals in the book's epigram to the effect that the prior appropriation doctrine was designed in light of the region's aridity on "principles of equity and justice" that would "control[] and limit[]" water use. Schorr, *supra* note 1, at vi (quoting Armstrong v. Larrimer County Ditch Co. 27 P. 235, 237 (Colo. Ct. App. 1891)).

[9] Coffin v. Left Hand Ditch, 6 Colo. 443, 447 (1882), quoted by Schorr, *supra* note 1, at 1.

[10] Although Schorr does not mention it, recognition of riparian rights also would have put the federal government, as the dominant landowner in the West, in control economic development. However, the federal government renounced claims to riparian rights to its grantees in the Mining Act of 1866 [cite] and the Desert Land Act of 1877, 43 U.S.C ss. 321-39. However, a kind of federal riparianism persisted in the form of federal reserved water rights, primarily for Indian reservations, but those rights are not enforced until quantified, which has happened only at glacial speed. On federal reserved rights, see Brett Birdsong, *Reserved Rights,* 2 WATERS AND WATER RIGHTS, chap. 37 (3rd ed., Amy K. Kelley, 2013).

[11] On Radical Lockeanism, see *infra §* I.

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riparianism, the other cardinal tenets of the Radical Lockean policy of widespread use, according to Schorr, were a "sufficiency principle" in which appropriators secured enough water to carry out their immediate primary purpose of mining or farming, public ownership of water, and the doctrine of beneficial use as both the basis and measure of a water right (pp. 20, 106). Temporal priority was a mere incident to these foundation principles.

This review essay examines Schorr's arresting claim that the origins and significance of prior appropriation water law have been misunderstood, by both its proponents[12] and opponents.[13] Section I focuses on the founding of the doctrine and its anchor in Radical Lockean thought. Section II turns to the fundamental of ethic of widespread use underlying prior appropriation law, which required rejecting riparianism. Section III examines the sufficiency principle that ensured that appropriators had enough water to effectively mine or farm, but not more than that, and which relegated priority to a tie-breaking function. Section IV explores the significance of the state of Colorado's longstanding declaration that the public owns all the water in the state. Section V evaluates the effect of Colorado courts' interpretation of requirement of beneficial use and its attendant limits on alienability of water rights. Section VI considers Schorr's linkage of the state's bias against corporations to the formulation of the state's water law. The essay concludes that Schorr's perspective should appear in any Anglo-American interpretation of property law as a credible alternative to the Demsetzian vision which claims that the natural progression of property is a progression toward unfettered

[12] *See, e.g.,* Anderson & Leal, *supra* note 6; WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY, AND THE ENVIRONMENT (Terry L. Anderson, ed. 1983) and other sources cited by Schorr in nn, 24-26, p. 168.
[13] *See, e.g.,* SARAH F. BATES, ET AL., SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY 136-137 (1993); MARK FIEGE, IRRIGATED EDEN: THE MAKING OF AN AGRICULTURAL LANDSCAPE IN THE AMERICAN WEST (1999) and other sources cited by Shorr in nn. 27-29, pp. 168-69.

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privatization.[14] But Schorr's vision may also be disturbing to advocates of public property, for he seems to suggest that small privatizations may be superior to publicly owned property.

I. The Radical Lockean Origins of the Colorado Doctrine

The received story about Western water law is that it grew up as a response to the region's aridity. West of the hundredth meridian, where rainfall drops precipitously, Western legislators and jurists considered the common law's riparian rights doctrine too wasteful. While not challenging that sentiment, Schorr shows that it was actually part of a larger expression of agrarian, populist sentiment that also limited distribution of public land to actual settlers, not absentee speculators and Eastern corporations. This agrarian world-view had roots in Republican ideology of the 17th and 18th centuries, and later in Jacksonian Democracy, finding expression in the post-bellum era in the work of the People's Party and farmers' alliances (p. 25).

The animating theme of Radical Lockeanism was that everyone should own some land, both for individual self-sufficiency and political independence. Widespread ownership of land was the key to an America of self-sufficient, independent Jeffersonian yeomen whose labor merited property rights but only in proportion to their labor. Thus, for 19th century Lockeans, equality of opportunity was the dominant concern, not economic efficiency (p. 15). With its immense public land holdings, the West was the perfect laboratory to put Lockean theory—with its aversion to monopoly power, special privilege, and speculation—Into practice. Schorr quotes the Lockean sentiments in Jackson's veto of the Second Bank of the United State to the effect that "the rich and powerful too often bend the acts of government to their selfish purposes" to

[14] See Demsetz, *supra* note 4.

the detriment of "farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors for themselves" (pp. 26-27).[15] To limit monopoly power and attendant speculation Radical Lockeans opposed property accumulation beyond that necessary for personal use as a violation of natural law, and therefore supported limits on property acquisition, while also being highly skeptical of corporate power.

Schorr claims that the framers of the Colorado water law doctrine were not simply reacting to the aridity of the climate but were practitioners of the same Radical Lockeanism that influenced the disposition of the federal public domain and the law of the mining camps. They were, in short, possessed of a pro-settler, anti-monopoly, anti-speculation fervor that limited the size of water rights to that which could be reasonably used, eviscerated the perceived monopoly enjoyed by landowners under the riparian water rights system of the East, required work as a condition of maintaining a water right, and gave those not adjacent to water courses the right to trespass on riparian owner lands to divert irrigation water (p. 30). According to Schorr, the 1876 Colorado Constitution, announcing recognition of the prior appropriation doctrine, reflected all of these Radical Lockean themes, and it also included another Radical Lockean sentiment by including significant restraints on corporate power (pp. 39-40).

Schorr cites the federal Homestead and General Preemption Acts, both of which limited the size of federal land tracts that could be claimed, and which reserved valid claims to actual settlers who labored on improvements, as examples of the Radical Lockean theory so influential in the constitutional, statutory, and judicial ratification of appropriation water law originating in the Colorado mining camps (p. 27). Preemption land sales were informally enforced by "claims

[15] Quoting Andrew Jackson, Veto Message, July 10, 1832, 2 Messages and Papers of the Presidents 576, 590 (James D. Richardson ed., 1968).

clubs" to ensure size limits, claims by actual settlers, and the value of improvements required for settlers to maintain possession (p. 28). These pro-settler vigilante groups were widespread in the Upper Mississippi Valley, and Schorr observes that many immigrants to post-bellum Colorado were from there (p. 28). He mentions influential pro-settler Radical Lockeans including Supreme Court Justice Stephen J. Field, a former miner who emphasized the equality evident in the mining camps; John Wesley Powell, the explorer and first head of the U.S. Geological Survery, who reported to Congress that the law of the mining camps prevented monopoly and promoted equitable division of ownership; and the writer Henry George, who celebrated the camps' recognition of labor as the creator of wealth, providing all with equal opportunity (p. 29).

II. The Ethic of Widespread Use and the Abolition of Riparianism

For Schorr, the institution of prior appropriation in Colorado was more significant for its rejection of riparianism than for establishing temporal priority as the sine quo non of Western water rights. Territorial legislation gave non-riparians both the right to divert streamflows and rights-of-way for their diversions to allow the construction of ditches across land they did not own. (p. 33). Recognition of these rights amounted to an uncompensated attack on riparian rights (p. 34), the purpose of which was to prevent a water monopoly by landowners who otherwise would claim all the water by prior settlement (p. 47), a kind of first-in-time method of allocation but one rejected by the Colorado doctrine. Instead, the founders of the doctrine, fearing that wealthy capitalists and corporations would monopolize water through riparian rights, required water to be productively used, earned via Lockean labor (p. 49).

The paradigm case establishing the Colorado doctrine's rejection of riparian rights is the celebrated case of *Coffin v. Left Hand Ditch.*[16] The *Left Hand Ditch* court rejected a riparian owner's claims that an upstream non-riparian who diverted water out of the watershed unlawfully interfered with his vested common law land ownership right to water, a property right that allegedly antedated the Colorado Constitution's endorsement of prior appropriation law in 1876 (pp. 60-61). Often described as the court's reaction to the scarcity of water imposed by the arid Colorado climate, Schorr maintains that the decision actually reflected a judicial unwillingness to recognize the rights of speculators and corporations to use riparian rights claims to reserve water prospectively, which would have allowed them to divest settlers of their irrigation water. Thus, according to Schorr, *Left Hand Ditch* was grounded on a fear of monopoly by large railroad, ranching, and irrigation companies and a desire to spread the economic benefits of irrigated crops as widely as possible (pp. 62-63).

Schorr's claim is that the anti-riparianism evident in *Left Hand Ditch* was a reflection of anti-monopoly sentiment at the root of the origins of the Colorado doctrine. No doubt there is a great deal of truth to this claim, but Schorr fails to emphasize that the primary riparian landowner in Colorado in these formative years was the federal government, and a water law rule that emphasized actual use of water meant that the federal government would have little role in the economic development of the Colorado territory. [17] The use-rule at the center of the

[16] 6 Colo. 443 (1882). Schorr claims that the Colorado doctrine's foundation case was actually the 1872 decision of Yunker v. Nichols, discussed below at n. 35.

[17] It is true that the federal 1866 Mineral Act, H.R. 365, 39th Cong., 1st Sess. (1866), ratified the rights of prior appropriators on federal land, but not until the Supreme Court's decision nearly seventy years later in California Oregon Power Co. v. Portland Beaver Cement, 295 U.S. 142 (1935), did it became clear that federal unreserved lands lacked riparian rights, as the 1935 Court concluded that the 1877 Desert Land Act, 43 U.S.C. ss. 321-39, severed water rights from federal lands.

Colorado doctrine not only aimed to combat landowner and corporate monopoly and associated speculation but was also a convenient anti-federal rule.

Rejecting riparianism freed up water for widespread distribution, which Schorr maintains was the essence of the Colorado doctrine. The doctrine was thus the water law analogue of federal land policies that limited the size of Preemption and Homestead Act claims to the amount of land which could be reasonably tilled by a farmer. Antipathy to concentrated property ownership—whether land or water—was a basic tenet of Radicalism Lockeanism. As Locke himself wrote: "As much as any one can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in; whatever is beyond this is than his share and belongs to others" (p. 26).[18] Applied to the Colorado frontier, this sentiment for widespread disbursement of property rights required repudiation of common law riparian water rights, which until the gold rushes of the mid-19th century was the uniform Anglo-American rule of water law.

III. The Sufficiency Principle and Role of Temporal Priority

One of the more inspired aspects of Schorr's analysis is his treatment of what he calls "the sufficiency principle." According to Schorr, the water law rules that came out of the Colorado mining camps specified that each appropriator should have enough water to accomplish his purpose. This was a kind of analogue to the mining codes' minimum claim size—sufficient for one person to work but providing a rough equality among miners by limiting the claim to one per person. Sufficiency was thus both a minimum and a maximum: ensuring

[18] Citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, ss. 27 & 31 at 17, 19 (Thomas P. Peardon, ed. 1952) (1690).

that there was enough water for one person to work a mine, run cattle, or grow crops, but not enough to create speculative wealth or monopolize the resource (pp. 15-16).

The principle of sufficiency served the chief goal of the Colorado doctrine—widespread distribution of water. Schorr claims that the sufficiency principle made the appropriation doctrine more like riparian sharing than is generally recognized (p. 17). But since in a water-short environment riparian sharing would quickly exhaust the resource to the detriment of all, sufficiency also incorporated temporal priority as a kind of tie-breaker. Where there were more claimants than available water, priority governed. Thus, Schorr contends that priority was only a secondary tool of the Colorado doctrine:

> Priority was not the primary rule of decision for water rights [in Colorado]; the codes did not allow the pioneer to claim as much water as he wanted, or could physically divert. The primary rule was that each party was entitled to a proportionate share of the water. The element of priority acted as a supplementary principle, having legal effect in cases where there was not enough water for all the parties wishing to use the water to realistically do so (p. 18).[19]

Schorr's research revealed that priority was mentioned only a small minority of Colorado mining camp codes and where it was, in used only to break ties when there was not sufficient water to meet an equal share for all claimants (p. 19).

Schorr locates the sufficiency principle in both section 4 of the first irrigation statute of the Colorado Territory in 1861 (p. 35) and section 13 of the territory's 1862 general incorporation statute (pp. 36-37). Under the latter, prior diversions were valid only if recognized as sufficient for mining or farming purposes, but not in excess of that. Sufficiency,

[19] Emphasis omitted. Schorr proceeded to quote Supreme Court justice Stephen J. Field, a former miner, concerning the effect of the California miners' codes: "And they were so framed as to secure to all comers, *within practicable limits*, absolute equality in working the mines" (p. 18, citing Johnson v. Kirk, 98 U.S. 453, 457 (1878) (emphasis Schorr's).

not priority, was the basis of the Colorado doctrine (p. 37). According to Schorr, had temporal priority dominated, it would have threatened the basic tenets of the agrarian philosophy of anti-speculation and anti-monopoly.

IV. Public Ownership of Water

The same Colorado Constitution that ratified prior appropriation as the litmus for water rights in the state declared that water was the property of the state (p. 40). This of course was a rejection of riparianism, in which water rights were ancillary to land ownership. Schorr quotes a former Colorado Supreme Court justice to the effect that "[t]he doctrine of water rights under our Constitution is a radical departure from the common law. At one stroke the aristocracy of 'riparian privilege' was swept away, and in its stead was established the *common right* of all our people to the beneficial use of water by appropriation. This was a great triumph of popular rights" (p. 40).[20] Schorr suggests that this communitarian perspective flowed from the notion that unlike the Demsetzian notion that the water was unowned—*res nullius*—and available for privatization though capture, water was actually public property, owned by the community—*publici juris.* Thus, water could be privatized only by fulfilling conditions stipulated by the state (p. 41).

Shorr observes that the framers of the Colorado doctrine distinguished public property in water from state ownership "who evidently had something like the public-trust doctrine with its limits on legislative power to dispose of a public resource, in mind for Colorado's water" (p. 41). Public trust-like restraints would prevent the legislature from favoring wealthy capitalists who would monopolize water to the detriment of settlers.

[20] Quoting Victor Elliot (emphasis in original)—p.195, n. 34.

The Colorado Supreme Court repeatedly interpreted the Constitution's declaration of the public property character of water to favor individual irrigators over canal corporations. For example, the court upheld public control of water pricing on the ground that water was "properly part of the public domain" (p. 78).[21] The court also struck down water contracts that imposed charges unrelated to the cost of delivering the water (pp. 84-86).[22] The court even allowed consumers to terminate water contracts with canal companies when subsequently enacted price controls provided a lower price, based on the public's constitutional right to water and "the agrarian ideology of wide distribution of property to individuals" (p. 86).[23]

Public ownership of water then not only swept away "the aristocracy of riparian privilege" (p. 40), it also justified public regulation of water to ensure widespread use of water by settlers at reasonable prices. Like acreage limits on Preemption and Homestead Act claims, public ownership of water was a vehicle in the struggle against monopolies, speculation, and concentrated wealth (pp. 160-61).

IV. Beneficial Use and Limits on Alienability

The requirement that water be used for beneficial purposes, announced for the first time in section 6 of the Colorado Constitution of 1876—which declared that the right to divert waters for beneficial uses "shall never be denied"—is now a cardinal tenet of western water law.[24] Sometimes thought as a potential vehicle for the modernization of the prior

[21] Citing Golden Canal v. Bright, 6 P. 142, 144 (Colo. 1884).
[22] Citing Wheeler v, N. Colo. Irrigation Co., 17 P. 487, 491-92 (Colo. 1888).
[23] Explaining S. Boulder & Rock Creek Ditch Co., 25 P. 504 (Colo. 1890).
[24] *See* 1 WATERS AND WATER RIGHTS, s. 12.02(c)(2) (3rd ed., Amy K. Kelley, ed. 2013)

appropriation doctrine by cabining wasteful uses,[25] the beneficial use requirement originated as a mechanism to curb speculation, avoid concentrated wealth, and encourage widespread use (p. 44). The requirement limited the amount of water a diverter could claim to that needed at the time, which imposed a limitation both on legislative giveaways and the amount of property in water that an individual could acquire. The beneficial use rule, "an organic part of western water law from its inception" (p. 45), was at base another effort at preventing monopolization of water.

Beneficial use wasn't just a condition of a valid water right; it was also the measure of the scope of the right (p. 39). Thus, any diverted water not devoted to productive use was not part of an appropriator's water right. Speculation under such a system was therefore impossible. In this respect, the Colorado doctrine resembled the use-it-or-lose it doctrine of the mining camps.

Schorr argues that the centerpiece of the Colorado doctrine was not temporal priority but instead beneficial use (along with the rejection of riparianism and the pursuit of widespread use) (pp. 52-53). Priority was merely an auxiliary to the equal opportunity offered by beneficial use: temporal priority served to break ties among beneficial users, but priority was not determinative without a beneficial use. Thus, in 1878, the Colorado Supreme Court ruled in the first case in which it endorsed the first-in-time principle, that a diversion, without demonstrable need, was insufficient to establish a property right (p. 57).[26] Three years later, the court limited

[25] *See, e.g.,* Janet C. Neuman, *Beneficial Use, Waste and Forfeiture: The Ineffcient Search for Efficiency in Western Water Use*, 28 Envtl. L. 919 (1998).
[26] Citing Schilling v. Rominger, 4 Colo. 103 (1878).

a diverter's right to that necessary to run the mill he was then operating (p. 58).[27] The court also used the beneficial use requirement to restrict the scope of or to invalidate appropriations with some frequency, including restricting the rights of those using water in excess of their demonstrated need (pp. 116-18). As one water commissioner noted, the vested nature of a water right was based on need, "[b]ut whenever that need ceases then it becomes the property of the public" (p. 118).

By functioning as a limit on the size of claims, the use limit served a Jacksonian-like egalitarian impulse (p. 49). Diversion without use was subject to forfeiture (p. 20), another attempt to prevent speculation and also served as a means of returning water to the common pool of unowned property.

According to Schorr, the beneficial use requirement "encourages wasteful, low-value use for the purpose acquiring or holding water rights; worse, . . . it forms very high barriers to transfers of water rights to more efficient uses and users" (p. 105). The use requirement functions as a barrier to efficient market transfers because of a reliance interest on the part of each downstream appropriator on a continuation of historic streamflows and the legal promise of "no injury" that the Colorado doctrine made to each (pp. 106-07). The effect is that the amount of water that can typically be transferred without injury to downstream diverters is far less than the amount of the upstream diversion; it is only the amount of water actually consumed (p. 106). A litany of law-and-economics criticism has long directed itself at the inefficiency that the "no injury" rule imposes,[28] and some commentators have argued that the

[27] Citing Crisman v. Heiderer, 5 Colo. 589 (1881). *See also* Thomas v. Guiraud, 6 Colo. 530, 532 (1883), discussed on pp. 64, 115.

[28] Schorr provides a catalogue of this criticism in his footnote 10 to chapter 5.

system could be made efficient if downstream appropriators had no rights in upstream return flows, allowing water to flow to the highest and best use as measured by the market (p. 111-12).[29]

Despite the fact that canal companies in frontier Colorado would have benefited from a doctrine that defined the measure of an appropriator's right as the full amount diverted, the framers of the Colorado doctrine chose to define the scope of the right in terms of beneficial use and its attendant inefficiencies. Schorr explains that this choice was a deliberate one, part of the anti-monopoly sentiment at the core of prior appropriation. Even though the Colorado legislature enacted a statute that appeared to decide that water rights would go to those who constructed the ditches free of the no injury rule—and thus be amenable to an efficient market in water rights—the Colorado Supreme Court did not interpret the law as written, as "[f]air distribution, not maximization of productivity was the reigning value of the time . . ." (p. 121). The court also invalidated ditch company "royalty charges;" ruled that actual use of water, not ditch construction, was the basis of a water right; and held that ditch companies, as common carriers, could not be the proprietor of diverted water (pp. 122-25).[30] And even though the court allowed water rights to be transferred separate from the land, it determined that the amount of water available for transfer was only that which did not injure downstream appropriations, meaning that upstream appropriators had no ownership rights in their return flows (p. 129).

[29] Citing a proposal by Charles Meyers and Richard Posner.

[30] Discussing, among other cases, Wheeler v. Northern Colorado Irrigation Co., 17 P. 487 (Colo. 1888); Geer v. Heiser, 26 P. 770 (Colo. 1891); and Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 30 P. 1032 (Colo. 1892).

The court's upholding of the no injury rule is perhaps the best evidence of Schorr's claim that the goal of the Colorado doctrine was never efficiency; instead, it aimed to promote equitable opportunity, ensure widespread distribution of water, and prevent speculation. Fostering these goals was more important to the framers of the Colorado doctrine than the allocative efficiency that would have resulted from rejecting the no injury rule.

V. The Bias Against Corporations

Beginning around 1870, investor-owned canal companies began to become the dominant form of water diversions in Colorado, a development that some contemporaries regarded as immoral profiteering on public resource (pp. 65-68). Antipathy to the rise of corporate influence was widespread, particularly among agrarian appropriators. As Schorr recounts:

> . . . [C]orporate control of water posed a grave threat to hopes for western irrigation as a boon to the smallholding, independent yeoman ideal. Many influential Americans saw irrigation as a panacea for the social and economic ills plaguing Gilded Age America, with its rapid industrialization and urbanization: 'The future belongs to Arid America. There alone can the pollution safely expand; there alone can labor win independence; there alone can a new and better civilization be erected under the impulse of the new century about to be born.' Irrigation, its enthusiasts believed, would reinvigorate the homestead ideal, banish monopoly, and 'save the nation and the state for democracy—making possible small-scale autonomous communities, egalitarian harmony, and justice.' It would 'guarantee industrial independence, and the small farm unit, the equality of man,' while breaking up large landholdings and the power of corporations, returning power to the people. Cooperative ditch-building and ownership, through the vehicle of mutual companies, would bring to these farmers the benefits of independence, self-sufficiency, and social equality, obviating the need for outside capital (p. 69).[31]

Development of irrigation infrastruction—which before had been the province of individual irrigators and mutual companies owned by groups of irrigators—was after 1870 increasingly

[31] Citations omitted (Schorr cites numerous sources in footnotes 8-12 in chapter 4).

dominated by corporations, threatening the vision of individual irrigator self-sufficiency. Farmers saw a threat in this development and claimed that the corporations were taking water in their ditch companies for speculative purposes in violation of the constitutional beneficial use requirement (p. 70). Elwood Mead, a legendary water law pioneer,[32] called this development "corporate feudalism" (p. 70), and others worried about water tyranny from distant and foreign corporations, fearing aristocratic control by distant landlords and a water monopoly reminiscent of the ghosts of monarchy (pp. 70-71). Corporations drafted inequitable water contracts, which Mead decried as unconscionable (p. 72).

Other courts reacted against the threats imposed by increasing corporate influence by upholding police power regulation and sometimes imposing public trust doctrine limits, but the Colorado courts employed public ownership of water and the beneficial use doctrine to curb speculation and corporate control (pp 74-75). For example, the Colorado Supreme Court upheld public control of water prices on public ownership grounds, with the court saying that water was a resource "properly part of the public domain" (p. 78).[33] The court also struck down "royalty" charges imposed on farmers that were unrelated to the costs of delivering the water to farms, denying canal companies property rights in water because "ownership of water should remain with the people, with a perpetual right to its use, free of charge, in the people"

[32] Elwood Mead, one of the irrigation movement's early leaders, was assistant state engineer in Colorado before moving on to Wyoming as territorial state engineer in 1888. He influenced many water laws in both states. He was head of the state of Victoria's water agency in Australia from 1907 to 1911, then became a professor at the University of California. In 1924, he was appointed head of the Bureau of Reclamation and oversaw the construction of the Hoover, Grand Coulee, and Owyhee dams. Lake Mead, the reservoir formed by the construction of the Hoover dam, is named for him.

[33] Discussing Golden Canal Co. v. Bright, 6 P. 142, 144 (Colo. 1884).

(p. 83).[34] A canal company was merely a "quasi-public servant or agent" of the people, with common carrier responsibilities—which the court concluded would have been subject to public control even absent the constitution's authorization of regulation of water companies (p. 83).

In these and other cases involving contractual prorationing rules, special corporate charters, and ditch easements (pp. 89-100),[35] Colorado law and the Colorado Supreme Court consistently favored local settlers over corporate speculators. The vehicle for this agrarian jurisprudence was largely the concept of public ownership of water, coupled with the doctrine of beneficial use. Schorr cites an 1894 editorial in *Irrigation Age* as prototypical of the philosophy underlying the Colorado doctrine:

> Water, sunshine and air are natural elements, existing for the benefit and essential to the life of all . . . The universal law that water must be applied to 'a beneficial use' is in itself a denial of the right of ownership. What a man owns he may apply as he pleases. Water is public property . . . . When any other view of water ownership is admitted it will be time not merely for a kind but for a slave-driver. Private investment in works will always be protected, but private ownership of water will not be conceded until air and sunshine are sold in bottles (p. 101).

The purpose of public ownership was to distribute water widely among appropriators, keeping it from corporate speculation. As Schorr explains, "[p]roperty was 'public' when controlled by the broad population, regardless of whether it took the legal form of widely distributed private property or more concretely state or public assets. The important distinction was between property in the hands of the broad public and property in the hands of a powerful few—

[34] Quoting Wheeler v. N. Colo. Irrigation Co., 17 P. 487, 489-90 (Colo. 1888).

[35] *See* Yunker v. Nicholas, 1 Colo. 551 (1872), in which the territorial supreme court upheld the existence of an orally granted ditch right-of-way across neighboring riparian lands either on the ground that the right-of-way was in effect an easement by necessity under a relevant statute or due to a kind of quasi-constitutional interpretation, or that private property had to give way to the goal of widespread use of water (the three opinions in the case varied, pp, 55-56). According to Schorr, *Yunker,* not the *Left Hand Ditch* decision, was the foundation case of the Colorado doctrine because it emphasized the doctrine's primary object of affording equal access to water among riparian and non-riparian land owners (p. 57).

typically through corporations and 'monopolies'" (p. 102). Samuel Weil, the western water treatise writer of the era, described this "Jacksonian conception of property" as one in which the law made the consumers of water the property owners and reduced the corporate canal owners to the rank of common carriers (pp. 102-03).[36]

VI. Conclusion

The Colorado Doctrine is a significant piece of scholarship, a persuasive assault on the the citadel that holds that the capture rule at the heart of the appropriation doctrin at the heart of western law and federal mining law was an efficiency-based rule unconcerned with distributional equity. Establishing property rights as a result of first capture—property by temporal priority—has long been celebrated as an antidote to the "tragedy of the commons."[37] This privatization by appropriation has been touted by libertarian thinkers as overcoming the inefficiencies of common property through private market transactions.[38] Western water law is seen as a paradigmatic example of this sort of private rights system.[39]

Schorr shows that temporal priority was only a small part of the origins of appropriation water law in Colorado. Far more central than priority was the goal of distributing water widely to settlers without regard to wealth, a populist, Radical Lockean ideology that the framers of the Colorado doctrine borrowed from the distribution of federal public domain lands under the Preemption and Homestead Acts. The doctrine did so by denying riparian rights, announcing

[36] Citing 2 SAMUEL C. WEIL, WATER RIGHTS IN THE WESTERN UNITED STATES 1149-50 (3rd ed. 1911).
[37] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).
[38] *See, e.g.,* Robert Elickson, *Property in Land*, 102 Yale L. J. 1315 (1993); Clifford Holderness, *A Legal Foundation for Exchange*, 14 J. Legal Studies 321 (1985); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32-33 (6TH ED. 2003).
[39] *See, e.g.,* Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. Law & Econ. 163 (1975); James L. Huffman, *Clear the Air,* 21 Envtl. L. 2253 (1991) (responding to Charles F. Wilkinson, *In Memoriam: Prior Appropriation, 1848-1991*, 21 Envtl. L. v (1991)).

the public ownership of water, endorsing the sufficiency and beneficial use principles, and recognizing ditch easements across private lands (p. 140). The Colorado Supreme Court was a persistent ally in pursuit of this ideal of distributive justice, regularly ruling in favor yeomen farmers at the expense of corporate profit and speculation (pp. 141, 150). Schorr also insightfully points out that the beneficial use requirement by limiting the size of valid claims sometimes worked to the detriment of existing yeoman for the benefit of future settlers, demonstrating that even the victorious interest group under the Colorado doctrine didn't always prevail (p. 150). In Schorr's account, special interest pressure gave way to the populist ideology of widespread distribution of property, to which he labels "the Jacksonian or Jeffersionian world view" (p. 152).[40]

The book exposes as myth the claim that allocative efficiency was at the root of western water law through its examination of the effect of the beneficial use doctrine as the measure of an appropriation right. Defining the scope of the property right in water as that which was actually consumed, instead of the amount of water diverted, not only made enforcement of the rights difficult and expensive, it made efficient transfers rare, if not impossible, because of a kind of "anti-commons" created by the "no injury" rule (p. 144). Adoption of the no injury rule curbed speculation at the expense of efficiency and served the fundamental goal of maximizing the number of appropriators, regardless of whether their diversions were efficient from a social utility perspective (pp. 145-47).

Schorr's account is altogether convincing in its claim that the founding of the prior appropriation doctrine has been misunderstood as an efficiency-oriented doctrine by law and

[40] Schorr thus dismisses public choice theory as an explanation for the rise of the Colorado doctrine (pp. 148-51).

economics scholars. In fact, *The Colorado Doctrine* should be cited by Property and Natural Resources Law texts as a counterweight to the Demsetzian notion that the conversion of common property to private property is primarily concerned with maximizing economic efficiency. In fact, Schorr shows that the origins of prior appropriation lie in distributional concerns: spreading property widely among those engaging in Lockean labor and avoiding speculation and monopoly, while promoting equaltiy. Schorr maintains that the real dichotomy between property rights in 19th century Colorado was between widely distributed property and concentrated property (p. 161). These revelations are significant academic contributions.

But Schorr aspires for more. He maintains that the Colorado water experience has practical lessons for other impending decisions, like how to apportion climate change pollution credits, alleging that the problem may not be too much private property but too little, at least if the goal is to spread rights widely and avoid exploitation by powerful economic interests (pp. 157-58).[41] This argument is one that public property advocates may not find as persuasive at the rest of Schorr's book, for it assumes that public property is inevitably subject to "public choice theory" manipulations that assume that common property will be disproportionately distributed to the wealthy and the organized.[42] There is no doubt considerable truth to this prediction, but it is not an inevitable result of common property.[43]

Another criticism of *The Colorado Doctrine* might be that the principal practical difficulty with its legacy today is that the doctrine allocated unlimited rights to appropriators when

[41] Schorr also explains the potential effects of his argument on privatization of water supplies, public land rights, allocating rights to the electromagnetic spectrum, and privatizing public housing (pp. 153-60).
[42] *See* Blumm, *supra* note 6.
[43] *See, e.g.,* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

hindsight suggests that limited terms were more appropriate to accommodate social, economic, and climatic changes that have occurred over the last century-and-a-half. Schorr makes no mention of the problem of the perpetuity of water law rights.

Despite these minor criticisms, the Schorr book is a tour-de-force in explicating the evolution of property rights in water. Its disclosure that at the center of the founding of prior appropriation law was a distributional concern with widespread spreading of water rights and an aversion to monopoly control by riparian landowners and corporate speculators makes a myth of the received understanding of the efficiency-based origins of western water law. Moreover, Schorr's contention that the Colorado doctrine's recognition of the public nature of water was a means to accomplish small privatizations according to actual use fits with the Radical Lockean labor theory of property prominent among the populist philosophy of the mid- and late-19th century. Every Property, Natural Resources, and Water law and history text should rely on *The Colorado Doctrine* for these principles and explain the book as a therepeutic corrective to standard law and economics explanation of the incentives to create private property out of common property.