Texas Groundwater Rights and Immunities: From *East* to *Sipriano* and Beyond

Dylan O. Drummond, Esq.
GRIFFITH NIXON DAVISON, PC
5420 LBJ Freeway, Ste. 900
Dallas, TX 75240

(972) 392-8900 (telephone)
(972) 392-8901 (facsimile)
(512) 789-2939 (cell)

ddrummond@gndlaw.com
dodrummond@gmail.com
@dodrummond

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I. INTRODUCTION

"I concur in the view that, for now—but I think only for now—*East* should not be overruled."[1] So cautioned Justice Nathan Hecht over a decade ago in his concurrence to the Texas Supreme Court's last major, critical examination of groundwater law in its 1999 decision in *Sipriano v. Great Spring Waters of America, Inc.*[2] It was this sobering proclamation, in part,[3] that brought the long-simmering dispute surrounding groundwater rights and immunities back to the forefront of the Texas policy debate.

Even in *Sipriano*, Justice Hecht presciently acknowledged that, "if the Court abandoned the rule of capture as part of the common law," the Legislature could adopt the rule [of capture] by statute …."[4] Indeed, just a few months ago—and almost 107 years to the day after an early iteration of what is now the law firm of Baker Botts, LLP filed an application for writ of error at the Texas Supreme Court on behalf of the Houston & Texas Central Railroad to seek reversal of the opinion of the Dallas Court of Civil Appeals holding in W.A. East's favor—a bill was introduced in the Texas Legislature to do just that: codify the holding of the Texas Supreme Court's eventual decision in the case.[5] ***See Fig. 1***.

The intervening century between the Texas Supreme Court's first pronouncement on groundwater rights and immunities in *Houston & Tex. Cent. R.R. Co. v. East* in 1904 and the present day has produced a robust

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[1] *Sipriano v. Great Spring Waters of American, Inc.*, 1 S.W.3d 75, 83 (1999) (Hecht., J., joined by O'Neill, J., concurring).

[2] *Id.* at 75-81.

[3] Even though then-Justice Greg Abbott issued a unanimous opinion three years before *Sipriano* recognizing the central touchstone of controversy regarding "the point at which water regulation unconstitutionally invades the property rights of landowners," the Court did not resolve the debate because the plaintiffs "brought this challenge … before the [defendant] has even had an opportunity to begin regulating the aquifer." *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996).

[4] *Sipriano*, 1 S.W.3d at 83.

[5] *See* Tex. S.B. 332, 82d Leg., R.S. (2011) (introduced version) ("A landowner, or the landowner's lessee or assign, has a vested ownership interest in and right to produce groundwater below the surface of the landowner's real property"). *Compare* Houston & Tex. Cent. R.R. Co. Appl. for Writ Error, *in Houston & Tex. Cent. R.R. Co. v. East*, No. 1333 (filed Jan. 16, 1904), *with id.* (introduced Jan. 12, 2011). *See also East*, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904) ("So the owner of land is the absolute owner of the soil and of percolating water, which is a part of, and not different from, the soil.").

record of groundwater law development in Texas.[6] However, the modern focus on groundwater law in Texas really began to reconstitute itself in 1999—thee volumes of the Southwestern Reporter later[7]—with the issuance of the Texas Supreme Court's decision in *Sipriano*.[8]

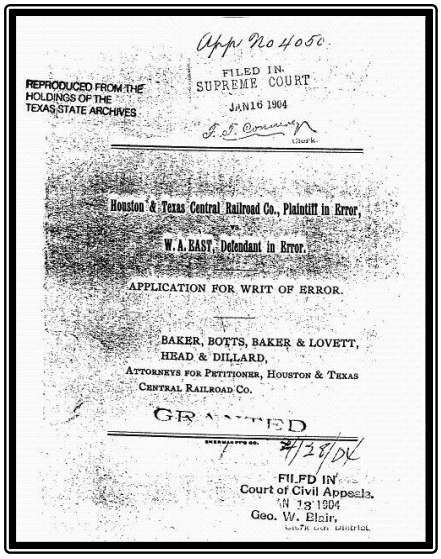

Fig. 1 – The cover from Houston and Texas Central Railroad Company's application for writ of error at the Texas Supreme Court filed January 16, 1904. *See* Houston & Tex. Cent. R.R. Co. Appl. for Writ Error, *in Houston & Tex. Cent. R.R. Co. v. East*, No. 1333 (filed Jan. 16, 1904).

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[6] *See, e.g.*, *City of Sherman v. Pub. Util. Comm. of Tex.*, 643 S.W.2d 681, 686 (Tex. 1983); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25 (Tex. 1978); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 290, 276 S.W.2d 798, 799 (1955); *Tex. Co. v. Burkett*, 117 Tex. 16, 29, 296 S.W.273, 278 (1927).

[7] Of minor note, a little over 40 years elapsed between the first Texas case published in the first series of the Southwestern Reporter (*Poole v. Jackson*, 66 Tex. 380, 1 S.W. 75 (1886)) and the first Texas case published in the second series (*Sovereign Camp W.O.W. v. Boden*, 117 Tex. 229, 1 S.W.2d 256 (1927)), and just over 70 years between *Boden* and the first Texas case published in the third series—*Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75 (1999). *Compare Poole*, 1 S.W. 75, *Boden*, 1 S.W.2d 256, *with Sipriano*, 1 S.W.3d 75. Put another way, between pages 75 of the first and third series of the Southwestern Reporter over 11 decades passed. *Id.* As of January of this year, the most recent Texas case published in the third series of the Southwestern Reporter is *In re C.J.O.* in the 325th volume. 325 S.W.3d 261 (Tex. App.—Eastland 2010, pet. denied). Therefore, in just over 11 years, about a third of the current series of the Southwestern Reporter has been filled. While it took 70 years for Texas jurisprudence to consume the second series of the Southwestern Reporter, it appears the third series, if it keeps up with its current pace, will exhaust itself in about half that time.

[8] *See* 1 S.W.3d 75 (1999).

II. PRELIMINARY HISTORICAL CONTEXT AND NOMENCLATURAL CLARIFICATION

A. Historical Context in Which the Groundwater Debate Has Arisen

1. Ancient development

As Justice Oliver Wendell Holmes remarked seven years before the Texas Supreme Court issued its opinion in *East*, the "rational study of law is still to a large extent the study of history."[9] Before groundwater property rights and tort immunities were first recognized in Texas by the *East* Court a century ago, or last examined at depth in *Sipriano* just over a decade ago, the underpinnings of the debate between the two had already raged for some 2,000 years.

Although Rome was founded in 753 B.C., the first written expression of Roman law was not completed until 300 years later in 451 B.C.[10] This first written code is referred to as the "Twelve Tables" after the twelve bronze tablets upon which it was inscribed.[11] A few hundred years after the promulgation of the Twelve Tables, a system of nationally renowned jurists developed in Rome during the first century B.C., who interpreted the Twelve Tables, as well as the edicts of the Roman emperors.[12] Because the writings of these jurists were drafted mainly as a critique of or response to the Imperial edicts and the Twelve Tables, such writings were called *responsa*.[13] These jurists were somewhat akin to modern-day law professors except that their written legal critiques were accorded precedential weight and applied

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[9] Hon. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 March 1897). Justice Holmes served as an Associate Justice on the United States Supreme Court for three decades from December 1902 until his retirement in January 1932. FEDERAL JUDICIAL CENTER, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES: HOLMES, OLIVER WENDELL JR., http://www.fjc.gov/servlet/nGetInfo?jid=1082&cid=999&ctype=na&instate=na (last visited Jan. 26, 2011).

[10] ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 10, 13 (1970) [hereinafter LAW OF THE ANCIENT ROMANS]; PHARR ET AL., THE THEODOSIAN CODE AND NOVELS AND SIRMONDIAN CONSTITUTIONS xxiii (1952).

[11] LAW OF THE ANCIENT ROMANS, at 13.

[12] W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 21-23 (3d ed. 1966) [hereinafter ROMAN LAW TEXTBOOK]; LAW OF THE ANCIENT ROMANS, at 26-27.

[13] *See Still So Misunderstood*, 37 TEX. TECH L. REV. at 19 n.71, 21 n.91; BLACK'S LAW DICTIONARY 1427 (9th ed. 2010) (the legal opinions of leading jurists were called *responsa*).

by Roman judges of the day,[14] thereby becoming legally binding in many instances.[15] Some may argue modern-day law professors believe this to currently be the case as well.

The *responsa* of these jurists were eventually collected into a single comprehensive code by the Emperor Justinian in 533 A.D.—along with previous Roman codes, constitutions, and Imperial edicts—called the *Digest of Justinian* (the "*Digest*").[16] ***See Fig. 2***. As part of this monumental effort, a sort of legal textbook for students—not unlike a first-year law student's casebook—called the *Institutes of Justinian* (the "*Institutes*") was also promulgated.[17] Indeed, the *Institutes* later formed the basis of much of Western jurisprudence, including being relied upon both by Bracton and Blackstone,[18] as well as by common law judges in England and throughout Europe,[19] in addition to forming the basis of Spanish mainland law.[20]

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[14] *See*, *e.g.* BLACK'S LAW DICTIONARY 1427 (9th ed. 2010) (quoting HANK TAYLOR, THE SCIENCE OF JURISPRUDENCE 90-91 (1908) ("the *judex*, or as we would call him, the referee, might have no technical knowledge of law whatever. Under such conditions[,] the unlearned judicial magistrates naturally looked for light and leading to the jurisconsults who instructed them through their *responsa prudentium*, the technical name given to their opinions as experts")). At Roman law, a judex was a "private person appointed by a praetor or other magistrate to hear and decide a case," who was "drawn from a panel of qualified persons of standing." . BLACK'S LAW DICTIONARY 916 (9th ed. 2010).

[15] During the reign of Emperor Augustus from 31 B.C. to 14 A.D., he issued the right of *public respondere* (referring to the Juristic Responses to the Imperial Edicts) to certain jurists, which made their *responsa* binding. ROMAN LAW TEXTBOOK, at 23. Around a century later, when jurists of equal stature would issue conflicting opinions, Emperor Hadrian settled the resulting quandary by declaring *responsa* binding only if they were in agreement with each other. *Id.*

[16] LAW OF THE ANCIENT ROMANS, at 92-93; ROMAN LAW TEXTBOOK, at 40-41. Through the intervening centuries, the *Digest* has sometimes been referred to as the *Pandects*. ROMAN LAW TEXTBOOK, at 41.

[17] ROMAN LAW TEXTBOOK, at 28; LAW OF THE ANCIENT ROMANS, at 17, 93.

[18] Henry of Bracton's seminal 13th-century work, *The Laws and Customs of England* is the "earliest scientific exposition of the English common law," and relies heavily upon the *Digest*, even to the extent that the first third of *The Laws and Customs of England* contains "quotations from almost two hundred different sections of Justinian's Digest." PETER STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 152 (1988); PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 64 (1999) ("[m]any passages echo the language of Digest and Code[,] … [t]hey show that he had made Roman law part of his way of thinking as a lawyer"); Harbert Davenport & J. T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 138, 157 (1956) ("The English Common Law of Waters … derive … from the Institutes of Justinian, the ancient Roman Law."). In turn, Blackstone's *Commentaries on the Laws of England* published some 500 years later in the late 1700s relied upon the previous works of many other early legal scholars, including Bracton. ALAN WATSON, ROMAN AND COMPARATIVE LAW 166 (1991)

Fig. 2 – This page is from the *Pandectarum codex Florentinus*, the oldest existing edition of the *Digest*, copied just after its promulgation in the sixth century A.D. ROMAN LEGAL TRADITION AND THE COMPILATION OF JUSTINIAN, THE ROBBINS COLLECTION, SCHOOL OF LAW (BOALT HALL), UNIVERSITY OF CALIFORNIA AT BERKELEY, http://www.law.berkeley.edu/library/robbins/RomanLegalTradition.html#just (last visited Jan. 21, 2011).

[hereinafter ROMAN AND COMPARATIVE LAW]. The "fundamental structure" of Blackstone's *Commentaries* was "a direct descendant of Justinian's *Institutes*." *Id.* at 173, 175-76 (noting Book 2 of Blackstone's *Commentaries*, addressing the law of things, corresponds to books 2 and 3 of Justinian's *Institutes*).

[19] *See*, *e.g.*, *Acton v. Blundell*, 152 Eng. Rep. 1223, 1234 (1843) (allowing that, while "Roman law forms no rule, binding in itself, upon the subject these realms," it has nevertheless formed the "fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe"); IV SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 221 (1926) [hereinafter HISTORY OF ENGLISH LAW] ("The text of Justinian was both the Aristotle and the Bible of the lawyers."); ROMAN AND COMPARATIVE LAW, at 167 ("[t]hroughout many centuries, when Continental lawyers had to find a ruling, they looked for it in Justinian's *Corpus Juris Civilis*"). The *Corpus Juris Civilis* was comprised of Justinian's *Institutes*, *Digest*, and second *Code*. Hans W. Baade, *The Historical Background of Texas Water Law: A Tribute to Jack Pope*, 18 ST. MARY'S L.J. 1, 57-87 (1986); LAW OF THE ANCIENT ROMANS, at 93.

[20] *Law of Flowing Waters*, 8 BAYLOR L. REV. at 157-58 (the "law as declared in the *Las Siete Partidas* [which governed peninsular Spain], … was taken almost bodily from the Roman Law; and, more particularly, from the *Institutes*"); LAS SIETE PARTIDAS lii, liv (Samuel Parsons Scott trans., 1931); Dylan O. Drummond, Lynn Ray Sherman, and Edmond R. McCarthy, Jr., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 31, 31 n.196, 32 (Winter 2004) [hereinafter *Still So Misunderstood*]; *see also State v. Balli*, 144 Tex. 195, 248, 190 S.W.2d 71, 99 (1944) (referring to the *Institutes* as the foundational text of the *Las Siete Partidas*); *State v. Valmont Plantations*, 346 S.W.2d 853, 857 (Tex. Civ. App.—San Antonio 1961, writ granted), *aff'd* 163 Tex. 381, 355 S.W.2d 502 (1962).

2. British application

Exemplary of this European influence is the British Exchequer Chamber court's 1843 decision in *Acton v. Blundell*.[21] Some twenty years prior to the court's decision, a cotton-mill owner sunk a well on his property in 1821 to help facilitate the working of the mill.[22] The cotton-mill owner later sold his property to Acton.[23] In 1837, an adjacent landowner—Blundell—dug a coal pit about a mile from the cotton-mill owner, and dug another somewhat closer around 1840.[24] While the first coal pit greatly diminished the cotton-mill owner's springs, the second rendered the spring completely insufficient to supply the mill.[25] After Acton unsuccessfully sued Blundell for "disturbance of [Acton's] right to the water of certain underground springs, stream, and watercourses, which, as he alleged, ought of right to run, flow, and percolate into the closes of [Acton],"[26] the central question before the Exchequer Chamber court[27] was "whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface."[28]

During oral argument, Acton's counsel alluded to the groundwater *responsa* of one Roman jurist—Marcellus[29]—to which a member of the panel

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21 152 Eng. Rep. 1223 (1843).

22 *Id.* at 1232.

23 *Id.*

24 *Id.*

25 *Id.* at 1233

26 *Id.* at 1232.

27 The Exchequer Chamber court was an intermediate appellate court, established in 1822, which heard appeals from English common law courts (Court of King's Bench, Court of Common Pleas, and the Court of Exchequer), and from which appeal could only be had to the parliamentary House of Lords. *See* A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 93 (1902) [hereinafter ENGLISH LEGAL HISTORY]; BLACK'S LAW DICTIONARY 645 (9th ed. 2010). The Court of Exchequer derived its name from the checkered cloth, which was said to resemble a chef's board, that covered the bench. II JOHN ADOLPHUS, THE POLITICAL STATE OF THE BRITISH EMPIRE 481 (1818).

28 *Acton*, 152 Eng. Rep. at 1233.

29 Marcus Claudius Marcellus, who is credited with authoring the passage quoted in the Digest's Ad Edictum 53, is believed to have died in 45 B.C. COLUM. ENCYCLOPEDIA 1752 (6th ed. 2000). Marcellus was made Curule Aedile in 56 B.C. (the sixth-highest elected office in ancient Rome) and was named Consul five years later in 51 B.C. (the second-highest elected office in Rome). *Id.*

interjected, "It appears to me what Marcellus says is against you. The English of it I take to be this: if a man digs a well in his own field, and thereby drains his neighbour's, he may do so, unless he does it maliciously."[30]

In delivering the holding of the Court, Chief Justice Tindal directly quoted Marcellus's passage from the *Digest*, and then explained:

> [W]e think the present case, for the reasons given [(referring to Marcellus's *responsa*)], is not to be governed by the law which applies to rivers and flowing streams, but that it rather fall within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbor falls within the description of damnum absque injuriâ, which cannot become the ground of an action.[31]

Therefore, after *Acton*, the rule of capture and absolute ownership became the law of England, subject to reversal only by the House of Lords.[32] The relevance of this expositional context to Texas groundwater law and the Texas Supreme Court's decision in *Sipriano* is twofold. First, the Legislature of the Republic of Texas explicitly adopted the common law of England in 1840, and this provision has been recodified since statehood in the Texas Civil Practices and Remedies Code.[33] Second, and more expressly pertinent to Texas groundwater law, the Texas Supreme Court in *East* directly relied

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[30] *Id.* at 1228 (citing DIG. 39.3.1.12 (Ulpian, Ad Edictum 53) (as translated in 3 THE DIGEST OF JUSTINIAN 396 (Theodor Mommsen & Paul Krueger trans., Alan Watson ed., 1985)).

[31] *Id*. at 1235.

[32] A decision of the Exchequer Chamber court could only be overturned by the House of Lords. *See* ENGLISH LEGAL HISTORY, at 93.

[33] Act approved Jan. 20, 1840, 4th Cong., R.S., reprinted in 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177, 177-78 (Austin, Gammel Book Co. 1898) (recodified as amended at TEX. CIV. PRAC. & REM. CODE § 5.001 (adopting and recognizing the common law of England).

upon this holding in *Acton* to adopt the rule of capture and absolute ownership six decades later in *East.*[34]

B. "Rule of Capture" vs. "Absolute Ownership"

The longer one makes the foolish choice of consorting with Texas groundwater lawyers, the more insufferable two terms will undoubtedly become: (1) "rule of capture;" and (2) "absolute ownership." Nevertheless, these terms are the touchstones around which both the current and age-old debates focus regarding what property rights Texas overlying landowners have in the groundwater beneath their land.[35]

The terms are seemingly opposed.[36] The word, "capture" logically "implies the exertion of dominion over something not owned, or more precisely, the act of 'tak[ing] into one's possession or control …."'[37] In contrast, "absolute ownership" connotes a "super-right [of ownership] subject to no limitations whatever."[38] Neither assumption is entirely accurate. Instead, the rule of capture is a "corollary to absolute ownership of groundwater,"[39] and indeed, the nonliability attributes of the rule of capture have always been tied to and derivative of absolute ownership of the resource in place.[40] A "surface owner has immunity from drainage damages *because* he or she owns the groundwater in place."[41] Put another way, "only because the overlying landowner had a property right to the groundwater beneath

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[34] *Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 149-50, 81 S.W. 279, 280-82 (1904); *Acton*, 152 Eng. Rep. at 1228, 1230, 1235.

[35] Dylan O. Drummond, *Groundwater Ownership in Place: Fact or Fiction?*, *in* UTCLE, Texas Water Law Institute 1-3 (2008) [*Fact or Fiction?*]; *Still So Misunderstood*, 37 TEX. TECH L. REV. at 60-61.

[36] *Fact or Fiction?*, at 2; *Still So Misunderstood*, 37 TEX. TECH L. REV. at 53.

[37] *Still So Misunderstood*, 37 TEX. TECH L. REV at 54 (quoting THE NEW OXFORD AMERICAN DICTIONARY 257 (2001)); A. W. Walker, Jr., *Property Rights in Oil 1930-39 and Gas and Their Effect Upon Police Regulation of Production*, 16 TEX. L. REV. 370, 375 (1938) (lamenting the rising prevalence of the term "law of capture").

[38] *Fact or Fiction?*, at 2 (quoting Corwin W. Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L.J. 1281, 1288-93 (1986)).

[39] *City of Sherman v Pub. Util. Comm'n*, 643 S.W.2d 681, 686 (Tex. 1983).

[40] *Fact or Fiction?,* at 2, 4-5 (explaining that, since before the beginning of the first millennium, the reason why no action could lie against a well-digger was that he "was digging on his own land and using what he found there for his own uses").

[41] *Id.* at 7 (citing *Acton*, 152 Eng. Rep. at 1235).

surface owner's land could the surface owner enjoy immunity from neighboring landowners due to drainage."[42]

1. What is the Rule of Capture?

The rule of capture, in its original formulation by Marcellus in ancient Rome—which has uniquely direct ties to Texas groundwater law[43]—states:

> [N]o action, not even the action for fraud, can be brought against a person who, while digging on his own land, diverts his neighbor's water supply.[44]

A scant 2,050 years later,[45] the Texas Supreme Court most recently addressed the rule of capture in *Sipriano*, in which Justice Craig Enoch—writing for the Court—explained the rule of capture provides:

> [A]bsent malice[46] or willful waste,[47] landowners have the right to take all the water they can capture under their land and do

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[42] *Id.* at 9-10.

[43] *See Still So Misunderstood*, 37 TEX. TECH L. REV at 22-29, 34-37 (tracing the various juristical *responsa*s authored by first-century B.C. jurists relating to modern-day groundwater law, and relied upon by the court in *Acton v. Blundell*, 152 Eng. Rep. 1223, 1228, 1230, 1235 (1843); *Fact or Fiction?*, at 6-7 (same), 8-10 (examining *East*'s reliance upon *Acton*); *see also Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 149-50, 81 S.W. 279, 280-82 (1904).

[44] DIG. 39.3.1.12.

[45] Approximately 2,050 years elapsed between the time when Marcellus likely wrote his famous *responsa* before his death in 45 B.C., and the Texas Supreme Court's 1999 opinion in *Sipriano*. *Compare* COLUM. ENCYCLOPEDIA 1752 (6th ed. 2000) (recounting the date of Marcellus's death), *with Sipriano v. Great Spring Waters of American, Inc.*, 1 S.W.3d 75, 75 (1999).

[46] Malice (as well as waste—sometimes referred to as "wanton" conduct) has been recognized as an exception to the rule of capture since it was adopted in *East*. *East*, 98 Tex. at 151, 81 S.W. at 282. But in practice, legal findings of malice in the groundwater context are a rarity. Lana Shannon Shadwick, Note, *Obsolescence, Environmental Endangerment and Possible Federal Intervention Compel Reformation of Texas Groundwater Law*, 32 S. TEX. L. REV. 641, 663 (1991). In order to find that a landowner "'maliciously [took] water for the sole purpose of injuring [his or her] neighbor,'" the complainant must prove affirmatively that no other possible explanation for why the defendant was draining the complainant's property other than malicious spite exists. *Id.* (quoting *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 294, 276 S.W.2d 798, 801 (1955). Some commentators have even proposed that proving such a level of intent in a court of law is impossible. *Id.* Because of this dissension, the Texas Supreme Court even went as far as to reaffirm the "malicious injury" limitation in its 1978 opinion in *Friendswood Development Company v. Smith-Southwest Industries, Inc.*, 576 S.W.2d 21, 26 n.10 (Tex. 1978).

[47] One of the most controversial limitations applied to the use of groundwater is the waste restriction. *See*, *e.g.*, *Corpus Christi*, 154 Tex. at 297-305, 276 S.W.2d at 804-09 (Griffin, J., dissenting; Wilson, J. joined by Culver, J., dissenting). As with malice, Texas

> with it what they please, and they will not be liable to neighbors even if in doing so they deprive their neighbors of the water's use.[48]

More recently in a 2008 oil and gas case,[49] Justice Hecht wrote for a majority of the Court, and allowed that the rule of capture is both "fundamental … to property rights"[50] and "'recognized as a property right,'"[51] and therefore, "determines title to gas that drains from property owned by one person onto property owned by another."[52]

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courts have shown great reluctance to find waste. *See*, *e.g.*, *id.* 154 Tex. at 295-97, 276 S.W.2d at 803-04; George W. Pring & Karen A. Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-1, 25-18 (1979). This reluctance is exemplified by the Texas Supreme Court's 1955 decision in *City of Corpus Christi v. City of Pleasanton*, where the Court refused to find waste even though only 25% of the groundwater transported in the Nueces River reached its destination. *Corpus Christi*, 154 Tex. at 291, 297, 276 S.W.2d at 800, 804.

[48] *Sipriano*, 1 S.W.3d at 76. In *Friendswood*, the Court also added negligent subsidence as another exception to the rule of capture. *Id.* at 30. Of note, an attempt was made in 2008 to add "unnatural" actions such as hydraulic fracturing as an exception to the application of the rule of capture in the oil and gas context. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 13-14 (Tex. 2008). In brushing this distinction aside "as meaningless or circular because all extraction of oil and gas is by artificial means," Justice Hecht reasoned that "such activity is the very basis for the rule, not a reason to suspend its application." *Id.* at 13, 13 n.39.

[49] Oil and gas law and water law share a common ancestry in *East*. *See Friendswood*, 576 S.W.2d at 26 (tracing how *East* was cited as the earliest case establishing the rule of capture by *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935), which itself was "one of the basic cases recognizing private ownership of oil and gas in place"); Robert A. McCleskey, Comment, *Maybe Oil and Water Should Mix-At Least in Texas Law: An Analysis of Current Problems with Texas Ground Water Law and How Established Oil and Gas Law Could Provide Appropriate Solutions*, 1 TEX. WESLEYAN L. REV. 207, 213 (1994) [hereinafter *Oil & Water Should Mix*] ("*East* influenced early oil and gas law as well as water law."); Hon. Joe R. Greenhill & Thomas Gibbs Gee, *Ownership of Ground Water in Texas: The* East *Case Reconsidered*, 33 TEX. L. REV. 620, 621 (1955) [hereinafter East *Reconsidered*] ("Beyond doubt the [*East*] decision influenced the formative stages of the Texas law of il and gas as the courts developed the ownership-in-place rationale."). In this sense, oil and gas law is an offshoot of groundwater law, but oil and gas law developed more quickly because of the rapidity with which an oil and gas market emerged. *Oil & Water Should Mix*, at 213-14 (recounting how, after oil was accidentally discovered in Corsicana in 1894, the oil and gas industry grew extremely quickly in the 1920s and 1930s).

[50] *Coastal Oil*, 268 S.W.3d at 13.

[51] *Id.* at 15. (quoting *Texaco, Inc. v.. R.R. Comm'n*, 583 S.W.2d 307, 310 (Tex. 1979)).

[52] *Id.* at 14.

The rule of capture has also been summarized by the Latin maxim, *damnum absque injuria*,[53] which has been translated to mean a "[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy,"[54] or, more succinctly, "an injury without a remedy."[55] However, the historical focus of the maxim is slightly different from these modern recastings.

Instead of "injury without *remedy*," *damnum absque injuria* literally means "loss; damage suffered"[56] "without"[57] "affronting wrong"[58] or "*in jus*, contrary to law."[59] In short, "damage without *injury*."[60] In other words, *damnum absque injuria* does not even recognize that an injury occurs. Instead, the fundamental concept embodied by the maxim as applied to groundwater law is that a "neighboring landowner may be *damaged* by an

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[53] Although the *Acton* and *East* courts are more famously known for applying *damnum absque injuria* to groundwater law, the maxim was first applied to this debate by the Massachusetts Supreme Court in its 1836 opinion in *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 123 (1836). Incidentally, *Greenleaf* was issued in March 1836, the same month and year that some 190 militiamen were slaughtered in an old, crumbling Spanish mission just outside of San Antonio de Bexar. Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of its Defenders*, 36 S.W. HIST. Q. 251, 265 (April 1933); Amelia Williams, *A Critical Study of the Siege of the Alamo and of the Personnel of its Defenders*, 37 S.W. HIST. Q. 237, 237-38 (1934). Seven years later and an ocean apart from Massachusetts, the *Acton* court sitting in England relied upon this maxim (in addition to absolute ownership) in issuing its landmark groundwater law holding. *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843). What is more, *East* was not the first time the Texas Supreme Court recognized vested property rights are subject to *damnum absque injuria*. *See Tolle v. Correth*, 31 Tex. 362, 365 (1868). Thirty-six years before *East* was issued in 1904, the Court did so, albeit in a surface-water dispute. *Compare id.* (issued in 1868), *with Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).

[54] *Sw. Bell Tel., L.P. v. Harris County Toll Rd. Auth.*, 282 S.W.3d 59, 62 n.3 (Tex. 2009) (quoting BLACK'S LAW DICTIONARY 450 (9th ed. 2010)).

[55] *See Sipriano*, 1 S.W.3d at 76.

[56] BLACK'S LAW DICTIONARY 449 (9th ed. 2010).

[57] *Id.* at 8.

[58] *Id.* at 856 (quoting JAMES HADLEY, INTRODUCTION TO ROMAN LAW 243 (N.Y., D. Appleton & Co., 1881)).

[59] *Id.* (quoting R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 13 nn. 51-52 (17th ed. 1977) [hereinafter SALMOND]).

[60] *But see id.* (quoting SALMOND, at 13 nn. 51-52) ("The modern use of 'injury' as a synonym for damage is unfortunate but inveterate."). Here, injury is used as a synonym not for "damage," but for an "affronting wrong" that is "contrary to law."

overlying landowner's withdrawal of groundwater, but such resulting damage cannot form the basis of a compensable *injury*."[61]

The distinction is fine but important because it is constructed from some of the oldest underpinnings of Western jurisprudence known to exist. Specifically, the genesis of this concept may be traced back to the *responsa* of several of the Roman jurists. The logical precept underlying *damnum absque injuria* was first laid down by one of the most celebrated jurists in antiquity: Ulpian.[62] In Book 53 of his collection, *Ad Edictum*, Ulpian reasoned that "anyone who fails to protect himself in advance … against anticipated injury [by work carried out on neighboring land] has only himself to blame."[63] Construing the *responsa* of another jurist who lived some 250 years before him, Ulpian explained how this theory of damage without injury applied to groundwater rights:

> Again, let us consider when injury is held to be caused; for the stipulation coves such injury as is caused by defect of house, site, or work. Suppose that I dig a well in my house and by doing so I cut off the sources of your well. Am I liable? Trebatius says that I am not liable on a count of anticipated injury [because] I am not to be thought of as having caused you injury as a result of any defect in the work that I carried out, seeing that the matter is one in which I was exercising my rights.[64]

As Ulpian commented regarding another jurist's *responsa*, no action may lie:

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61 *Fact or Fiction?*, at 16-17.

62 LAW OF THE ANCIENT ROMANS, at 93 ("Ulpian was the most popular jurist."); ROMAN LAW TEXTBOOK, at 32-33. Not only do Ulpian's works form the basis for approximately one third to one half of the *Digest*, his name was almost synonymous with Roman law in general during the Middle Ages. ROMAN LAW TEXTBOOK, at 32-33; LAW OF THE ANCIENT ROMANS, at 93. Indeed, after his death at the hands of his own guards in 228 A.D., the study and development of Roman law went into decline until the publication of the *Theodosian Code* in the fifth century A.D. LAW OF THE ANCIENT ROMANS, at 90; ROMAN LAW TEXTBOOK, at 32.

63 DIG. 39.3.3.3 (Ulpian, Ad Edictum 53).

64 DIG. 39.2.24.12 (Ulpian, Ad Edictum 81) (discussing the writings of the jurist Trebatius). Trebatius lived from 84 B.C. to 4 A.D. Alan Watson & Khaled Abou El Fadl, *Fox Hunting, Pheasant Shooting, and Comparative Law*, 48 AM. J. COMP. L. 1, 21 (2000) [hereinafter *Comparative Law*]. Interestingly, the legal rationale applied by the Texas Supreme Court in *Friendswood* to subsidence caused by overpumping was foretold to some extent by Ulpian's concluding thought in this passage, where he cautioned, "[h]owever, if I dig so deeply on my land that one of your walls cannot stand upright, a stipulation against anticipated injury will become operative." DIG. 39.2.24.12 (Ulpian Ad Edictum 81).

> [U]nder this stipulation; the grounds for this are that a person who prevents somebody from enjoying an advantage which he has hitherto enjoyed should not be held to be causing injury, there being a great difference between the causing of injury and the prevention of enjoyment of an advantage previously enjoyed.[65]

The late-1600s French legal scholar, Jean Domat, summarized Ulpian and Proculus's property rights *responsa*, cautioning that an aggrieved landowner ought to have acted "so as to be out of danger of this inconvenience, which he had no right to hinder, and which he might have easily foreseen."[66] Specific to groundwater law, Domat wrote that a landowner "may dig for water on his own ground, and if he should thereby drain a well or spring in his neighbor's ground, he would be liable to no action of damages on that score."[67]

At oral argument, the ultimately successful appellee in the 1843 British decision in *Acton v. Blundell*—upon which the Texas Supreme Court directly relied in *East* in adopting the rule of capture and absolute ownership—convinced the panel, in part, by reasoning that, in order "[t]o constitute a violation of that maxim [(*damnum absque injuria*)], there must be injuria as well as damnum. There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbor, so as it be not injuriosm."[68]

A modern-day scholar explained the concept this way, "There are many forms of harm of which the law takes no account …. For example, the harm done may be caused by some person who is merely exercising his own

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65 DIG. 39.2.26 (Ulpian, Ad Edictum 81) (discussing the writings of the jurist Proculus). Proculus was an active jurist in the first century A.D. *Comparative Law*, 48 AM. J. COMP. L. at 25. His writings were held in such high regard around 27 A.D. that one of the two dominant schools of juridical thought in Rome—the more liberal and interpretative school—was named after him. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1545 (1995). Around 27 A.D., at the inception of the Roman Empire, two contrasting schools of legal thought became dominant, the Proculians and the more conservative, textualist Sabinians. *Id.;* ROMAN LAW TEXTBOOK, at 27. Although the Proculians took their name from Proculus, the school was actually founded by Antistius Labeo (who was a republican—in the Roman sense) who died around 21 A.D. *Id.*; *Comparative Law*, 48 AM. J. COMP. L. at 25. In fact, Proculus was a follower of Nerva, who was himself a follower of Labeo. ROMAN LAW TEXTBOOK, at 27.

66 JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER § 1047 (William Strahan trans. Luther S. Cushing ed. 1980) (1850).

67 *Id.* § 1581.

68 *Acton v. Blundell*, 152 Eng. Rep. 1223, 1230 (1843).

rights."[69] Similarly, in 1978, the Texas Supreme Court defined *damnum absque injuria* as "denot[ing] a loss without injury in the legal sense, that is, without the invasion of a legal right or the violation of a legal duty."[70]

2. What is Absolute Ownership?

Absolute ownership, as the Massachusetts Supreme Court first applied in a groundwater context in 1836, recognizes a landowner's "absolute dominion of the soil, extending upwards and below the surface so far as [the landowner] pleases."[71]

Like the rule of capture, the doctrine of absolute ownership is also derived from long-held legal principles.[72] It can be traced back to the original publication in 1766 of William Blackstone's *Commentaries on the Laws of England*.[73] A Latin maxim that has undergirded absolute ownership is "*cujus est solum ejus est usque ad coelum et ad infernos*,"[74] which is translated to mean "[w]hoever owns the soil owns everything up to the sky and down to

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69 BLACK'S LAW DICTIONARY 450 (9th ed. 2010) (quoting SALMOND, at 13).

70 *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25 (1978).

71 *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 122 (1836). In *Greenleaf*, the court affirmed a jury verdict dismissing a trespass action for the diversion of well water, based in part, upon the doctrine of absolute ownership. *Id.* at 122-23.

72 *See*, *e.g.*, *Acton*, 152 Eng. Rep. at 1235 (ownership of groundwater "falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that he land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water"). It is an "ancient doctrine that at common law ownership of the land extended to the periphery of the universe." *United States v. Causby*, 328 U.S. 256, 260-61 (1946). While it is unlikely *cujus est solum ejus est usque ad coelum et ad infernos* comes as directly from Roman law as does *damnum absque injuria*, Roman law certainly recognized the concept of absolute ownership. *Compare* W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE 67, 69 (2d ed. 1952) ("[f]or the Roman lawyers ownership was absolute … [because] "a positive root of title, with nothing relative about it … gave absolute ownership"), *with* John G. Sprankling, *Owning the Center of the Earth*, 55 U.C.L.A. L. REV. 979, 982-83 (April 2008) [hereinafter *Owning the Center of the Earth*] (although "Blackstone boldly proclaimed the doctrine in his famous treatise Commentaries on the Laws of England … [i]t was not a principle of Roman law"). Indeed, Professor Goudy of Oxford even attributed some sections of the *Digest* as the theoretical forebears of the doctrine. H. Goudy, *Two Ancient Brocards*, *in* ESSAYS IN LEGAL HISTORY 230-31 (Paul Vinogradoff, ed., 2004) (1913) [hereinafter ESSAYS IN LEGAL HISTORY].

73 2 WILLIAM BLACKSTONE, COMMENTARIES *18; *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11 n.30 (Tex. 2008); *Owning the Center of the Earth*, 55 U.C.L.A. L. REV. at 982-83.

74 *See*, *e.g.*, *Wheatly v. Baugh*, 25 Pa. 528, 530 (1855).

the depths."[75] This maxim was apparently first recorded at common law in the case of *Bury v. Pope* in 1586,[76] but therein, the King's Bench court indicated it had been applied since the time of Edward I in the late thirteenth century.[77] The doctrine debuted in Texas jurisprudence when Justice Alvin Williams in *East* quoted a passage from an 1866 New York intermediate appellate case, which held "'the owner of land is the absolute owner of the soil and of percolating water, which is a part of and not different from the soil.'"[78]

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[75] BLACK'S LAW DICTIONARY 1712 (8th ed. 2004).

[76] Cro. Eliza. 118 (1586). Incidentally, this decision is reprinted at 78 Eng. Rep. 375 (1586), exactly 74 volumes and 257 years before *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843), appeared in the same reporter.

[77] *Id.*; VII HISTORY OF ENGLISH LAW, at 485 ("This maxim is referred to in Croke's reports in 1586, and is there said to be as old as Edward I"); ESSAYS IN LEGAL HISTORY, at 230 ("It is cited in Croke's Reports, in an action for stopping lights, as *Cujus est solum ejus est summitas usque ad coelum*, and a reference is there made to its use at the time of Edward I."). This is plausible, because Blackstone himself acknowledged the influence of Bracton, whose *Laws and Customs of England* was published in the same century that Edward I ruled England. *See* ROMAN AND COMPARATIVE LAW, at 166. For his efforts "of ordering, of methodizing, [and] of arranging" the "too luxuriant growth" of English law, Edward I was even known as the "English Justinian." FREDERIC W. MAITLAND AND FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 91 (James F. Colby ed. 1915). Of more recent notoriety, Edward I is perhaps better known to modern audiences as the villainous English king from 1996's *Braveheart*. *Synopsis for Braveheart*, IMDB.COM, http://www.imdb.com/title/tt0112573/synopsis (last visited Jan. 30, 2011).

[78] *Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 150, 81 S.W. 279, 281 (1904) (quoting *Pixley v. Clark*, 35 N.Y. 520, 527 (1866)). In a 1915 case explaining the concept behind absolute ownership in the oil and gas context, the first Justice Phillips to serve on the Court explained the concept quite eloquently:

> In place, they lie within the strata of the earth; and necessarily are a part of the realty. Being a part of the realty while in place, it would seem to logically follow that whenever they are conveyed while in that condition or possessing that status, a conveyance of an interest in the realty results.
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> Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession and analogizing their ownership to that of things ferae naturae, have made a distinction between their conveyance while in place and that of other minerals, holding that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. A purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape from beneath that particular tract of land, and, of course, if they are not discovered the conveyance is of no effect; just as the purchaser of solid mineral within the ground incurs the risk of its absence and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within the strata beneath the particular tract and capable of possession by appropriation from it. There they clearly

In at least two decisions in the intervening decades since *East*, the Texas Supreme Court has reiterated that, in *East*, "this Court adopted the absolute ownership doctrine of underground waters."[79]

III. *SIPRIANO*: JURISPRUDENTIAL CONFIRMATION OR A SHOT ACROSS THE JURIDICAL BOW?

When the Texas Supreme Court addressed again the rule of capture and—more circuitously—absolute ownership in its 1999 decision in *Sipriano v. Great Spring Waters of Am., Inc.*, it marked the first time the Court

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> constitute a part of the realty. Is the possibility of their escape to render them while in place incapable of conveyance, or is their ownership while in that condition, with the exclusive right to take them from the land, anything less than ownership of an interest in the land?
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> * * *
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> The opposing argument is founded entirely upon their peculiar property and, therefore, the risk of their escape. But how does that possibility alter the character of the property interest which they constitute while in place beneath the land? The argument ignores the equal possibility of their presence, and that the parties have contracted upon the latter assumption; that if they are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectual at all, is a grant of an interest in the realty.
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> * * *
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> The possibility of the escape of the oil and gas from beneath the land before being finally brought within ac-tual control may be recognized, as may also their incapability of absolute ownership, in the sense of positive possession, until so subjected. But nevertheless, while they are in the ground they constitute a property interest. If so, what is the nature of it in the hands of the original owner? It embraces necessarily the privilege or right to take them from the ground. But is that its extent, or sole character? While they lie within the ground as a part of the realty, is the ownership of the realty to be denominated, as to them, a mere license to appropriate, as distinguished from an absolute property right in the corpus [***29] of the land? With the land itself capable of absolute ownership, everything within it in the nature of a mineral is likewise capable of ownership so long as it constitutes a part of it. If these minerals are a part of the realty while in place, as undoubtedly they are, upon what principle can the ownership of the property interest which they constitute while they are beneath or within the land, be other than the ownership of an interest in the realty?

Texas Co. v. Daugherty, 107 Tex. 226, 235-36, 176 S.W. 717, 719-20 (1915).

[79] *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25 (1978); *see also City of Sherman v Pub. Util. Comm'n*, 643 S.W.2d 681, 686 (Tex. 1983) (again citing *East* as adopting the "absolute ownership theory regarding groundwater").

examined the issue at depth in over two decades.[80] While the decision confirmed the state's adherence to the rule of capture, it was the first decision of the Texas Supreme Court to do so without explicitly relying upon the doctrine of absolute ownership as well.[81] Perhaps one of the most notable aspects of the decision was the concurrence authored by Justice Hecht and joined by Justice Harriet O'Neill, which "had the dulcet tones of a dissent"[82] and unequivocally announced his dissatisfaction with the rule of capture.[83]

A. Procedural and Factual Background

Ironically, one year after the Texas Supreme Court's decision in *East*, Great Spring Waters of America—otherwise known as "Ozarka Natural Spring Water Co." or "Ozarka Spring Water Company" ("Ozarka")—began

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[80] 1 S.W.3d 75 (Tex. 1999); *see Friendswood*, 576 S.W.2d at 25 (creating an exception to the rule of capture for negligent subsidence); *see also Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996) (recognizing "it is not necessary to the disposition of this case to definitively resolve the clash between property rights in water and regulation of water"); *City of Sherman*, 643 S.W.2d at 686 (devoting only a paragraph to briefly recounting the Court's line of groundwater decisions).

[81] *See*, *e.g. City of Sherman*, 643 S.W.2d at 686 ("The *absolute ownership* theory regarding groundwater was adopted by this Court in … *East*," and "the Court had an opportunity to reconsider the propriety of this rule [in *Friendswood*] and refused to depart from it.") (emphasis added); *Friendswood*, 576 S.W.2d at 25-26 ("The English rule of so-called "*absolute ownership*" was applied by this Court in *Texas Co. v. Burkett* …, which held that a landowner has the absolute right to sell percolating ground water for industrial purposes off the land.") (emphasis added); *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 293, 276 S.W.2d 798, 801 (1955) ("Thus it may be said that by its decision the court, in adopting the 'English' rule established at least this much: that an *owner of land* had a legal right to take all the water he could capture *under his land* that was needed by him for his use, even though the use had no connection with the use of the land as land and required the removal of the water from the premises where the well was located.") (emphasis added); *Texas Co. v. Burkett*, 117 Texas 16, 29, 296 S.W. 273, 278 (1927) (holding percolating water was "the exclusive property of Burkett, who had all the rights incident to them that one might have as to any other species of property."); *East*, 98 Tex. at 150, 81 S.W. at 281 ("An owner of soil may divert percolating water, consume or cut it off, with impugnity. It is the same as land, and cannot be distinguished in law from land. So the owner of land is the *absolute owner* of the soil and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.") (emphasis added); *Fact or Fiction?*, at 16 ("What the Court left unsaid in *Sipriano* that it said so often previously was that the tort framework established by the rule of capture is a natural derivation of the property ownership framework established by the same rule.").

[82] *Still So Misunderstood*, 37 TEX. TECH L. REV at 72.

[83] *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., joined by O'Neill, J., concurring) ("What really hampers groundwater management is the established alternative, the common law rule of capture.").

operation in Arkansas.[84] In the late 1980s, a representative from Ozarka began inquiring about leasing property in East Texas, particularly near the springhead of Roher Springs in Henderson County.[85] Roher Springs flows into Mill Creek, and is itself fed by the Carrizo aquifer.[86]

Fig. 3 – Henderson County landowner Dale Groom stands next to a sign unambiguously noting his displeasure with Ozarka. Stuart Eskenazi, *The Biggest Pump Wins*, DALLAS OBSERVER, Nov. 19, 1998, available at http://www.dallasobserver.com/1998-11-19/news/the-biggest-pump-wins/ (last visited Jan. 30, 2011) (photographs by Mark Graham).

When none of the local landowners would agree to lease their property, Ozarka leased the property of a resident of Dallas's Highland Park neighborhood, who was an absentee landowner in Henderson County.[87] ***See Fig. 3***. Although Ozarka had originally planned to begin its pumping operation in the fall of 1995, it postponed doing so for six months due to local outrage from county residents.[88] Ozarka eventually began operations at its pumping substation in March 1996.[89]

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[84] *Compare Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 75 (Tex. 1999) (noting the corporate identity of Ozarka as "Great Spring Waters of America a/k/a Ozarka Natural Spring Water Co."), *with* ABOUT US, http://www.ozarkawater.com/AboutUs/Default.aspx (last visited Jan. 30, 2011) (identifying itself as "Ozarka Spring Water Company").

[85] Carol Countryman, *Bottleneck*, TEXAS MONTHLY, August 1995, at 56, 57-58 [hereinafter *Bottleneck*].

[86] *Id.* at 57; Stuart Eskenazi, *The Biggest Pump Wins*, DALLAS OBSERVER, Nov. 19, 1998, *available at* http://www.dallasobserver.com/1998-11-19/news/the-biggest-pump-wins/ (last visited Jan. 30, 2011). [hereinafter *Biggest Pump Wins*].

[87] *Bottleneck.* at 57.

[88] *Biggest Pump Wins.*

[89] *Fain v. Great Spring Waters of Am., Inc.*, 973 S.W.2d 327, 328 (Tex. App.—Tyler 1998), *aff'd* 1 S.W.3d 75.

Fig. 4 – Bart Sipriano examines a pond on his property in Henderson County, Texas. Stuart Eskenazi, *The Biggest Pump Wins*, DALLAS OBSERVER, Nov. 19, 1998, available at http://www.dallasobserver.com/1998-11-19/news/the-biggest-pump-wins/ (last visited Jan. 30, 2011) (photographs by Mark Graham).

Bart Sipriano owned a 44-acre tract across the road from the parcel leased by Ozarka.[90] ***See Fig. 4***. Since 1976, Sipriano had relied upon a 24-foot deep, 100-year old well, which he recollected had always had at least 7 or 8 feet of water in it.[91] Four days after Ozarka began operations, Sipriano's well went nearly—if not completely—dry.[92] Similarly, Harold Fain—who was a retired Southwestern Bell employee and onetime black-eyed pea farmer[93]—and his wife, Doris, lived on land nearby the Ozarka tract.[94] ***See Fig. 5***. The Fains' 37-foot deep well dropped 5 feet just days after Ozarka began pumping.[95]

90 *Biggest Pump Wins*.

91 *Id.*

92 *See Fain*, 973 S.W.2d at 328; *Biggest Pump Wins*.

93 *Biggest Pump Wins*. Nearby Athens, Texas is the self-proclaimed "Black-Eyed Pea Capitol of the World." CITY OF ATHENS, WELCOME TO THE CITY OF ATHENS, http://athenstexas.us/ (last visited Jan. 30, 2011).

94 *Biggest Pump Wins*.

95 *See Fain*, 973 S.W.2d at 328; *Biggest Pump Wins*.

Fig. 5 – Harold Fain checks the well on his property in Henderson County, Texas. Stuart Eskenazi, *The Biggest Pump Wins*, DALLAS OBSERVER, Nov. 19, 1998, available at http://www.dallasobserver.com/1998-11-19/news/the-biggest-pump-wins/ (last visited Jan. 30, 2011) (photographs by Mark Graham).

Ozarka's operation itself utilized two pumps drilled around 80 feet deep, which together pumped some 90,000[96] to 110,000[97] gallons per day continuously—24 hours a day, 7 days a week.[98] Once brought to the surface, Ozarka stored the water in twin tanks, each holding some 20,000 gallons of water.[99] ***See Fig. 6***. Ozarka estimated it invested around $500,000 in constructing and developing the Henderson County facility.[100]

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

97 *Biggest Pump Wins*.

98 *Sipriano*, 1 S.W.3d at 76.

99 *Bottleneck*, at 57 (stating each tank could hold approximately 20,000 gallons of water); *Biggest Pump Wins* (stating that "together, [the 2 tanks] can hold as much as 50,000 gallons of water").

100 *Bottleneck*, at 58.

Fig. 6 – Ozarka's pumping substation in Henderson County, Texas. Stuart Eskenazi, *The Biggest Pump Wins*, DALLAS OBSERVER, Nov. 19, 1998, available at http://www.dallasobserver.com/1998-11-19/news/the-biggest-pump-wins/ (last visited Jan. 30, 2011) (photographs by Mark Graham).

Soon after Ozarka began operation in March 1996,[101] the Fains, along with Sipriano, sought injunctive relief against Ozarka, as well as actual and punitive damages for Ozarka's alleged nuisance, negligence, gross negligence, and malice.[102] Although Ozarka disputed whether its pumping operation, in fact, affected Sipriano or the Fains' wells,[103] Ozarka moved to summarily dismiss the landowners' claims on purely legal grounds under the rule of capture and absolute ownership as failing to state a claim.[104] In their response, the landowners asserted their claims did indeed fall within the recognized exceptions to the rule of capture (negligent subsidence, waste, or malice),[105] but they failed to identify which exception specifically applied or introduce any sufficient evidence supporting any exception.[106] Instead, they generally cited to the Texas Supreme Court's 1978 case recognizing the

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101 *See id.* (as of July 5, 1996 when Ozarka held a town meeting to discuss its pumping facility, no lawsuit had apparently yet been filed).

102 *Sipriano*, 1 S.W.3d at 76; TWELFTH COURT OF APPEALS, CASE SEARCH RESULTS ON CASE # 12-97-00044-CV, http://www.12thcoa.courts.state.tx.us/opinions/case.asp?FilingID=5644 (last visited Jan. 30, 2011) (noting the trial court returned judgment in December 1996).

103 *Compare Biggest Pump Wins* (relating that a Texas Water Development Board geologist asserted test wells that were located 600 to 700 feet away from Ozarka's boreholes and some 2,000 feet closer than Sipriano's well "showed no appreciable signs of change while pumping was going on."), *with Bottleneck*, at 58 (reporting that, in order to alleviate local concerns, Ozarka ceased pumping during August 1996, which was the driest month of the year) and *Biggest Pump Wins* (Sipriano alleged the only time water returned to his well was during this one-month pumping hiatus).

104 *Compare Fain*, 973 S.W.2d at 328, *with Sipriano*, 1 S.W.3d at 76.

105 *Sipriano*, 1 S.W.3d at 76, 78.

106 *Fain*, 973 S.W.2d at 329.

negligent subsidence exception to the rule of capture, as support for their contention that it was time to overrule absolute ownership and the rule of capture.[107] Accordingly, the trial court granted summary judgment in Ozarka's favor two days before Christmas in 1996, and the landowners timely appealed.[108]

Before the Tyler Court of Appeals, Sipriano and the Fains put forward two points of error: (1) that the prayer in their live pleadings asserting Ozarka acted maliciously, when liberally construed, showed a genuine issue of material fact as a matter of law sufficient to defeat Ozarka's summary judgment;[109] and (2) the "absolute ownership rule should be overruled as antiquated and violative of public policy."[110] In January 1998,[111] the appellate court affirmed the trial court's summary judgment on both grounds, finding first that the landowners' response had been too nebulously pled to show a genuine issue of material fact existed sufficient to prevent the issuance of the trial court's summary judgment.[112] Second, the Twelfth Court of Appeals also rejected the landowners' oblique assault on the rule of capture, reasoning that, "for so well-settled law as the absolute ownership rule, we conclude that it would be more appropriate for the [L]egislature or the Texas Supreme Court to fashion a new rule if it should be more attuned to the demands of modern society."[113]

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107 *Id.* (noting the landowners generally relied upon *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21,25 (Tex. 1978)); *Sipriano*, 1 S.W.3d at 76. It is interesting that—in adjuding the same case on the same facts—the intermediate appellate court opinion in *Fain* does not mention the "rule of capture" once, instead referring only to "absolute ownership," but the Texas Supreme Court opinion in *Sipriano* only discusses the rule of capture, and never mentions "absolute ownership." *Compare Fain*, 973 S.W.2d at 328-30, *with Sipriano*, 1 S.W.3d at 76-80.

108 *See Fain*, 973 S.W.2d at 328-29; TWELFTH COURT OF APPEALS, CASE SEARCH RESULTS ON CASE # 12-97-00044-CV, http://www.12thcoa.courts.state.tx.us/opinions/case.asp?FilingID=5644 (last visited Jan. 30, 2011) (noting the trial court returned judgment on December 23, 1996).

109 *Fain*, 973 S.W.2d at 329.

110 *Id.*

111 *Id.* at 330 (noting the appellate court issued its opinion on Jan. 29, 1998).

112 *Id.* at 329.

113 *Id.* at 329-30.

B. The Texas Supreme Court's Decision

1. The majority opinion

Between the Tyler Court of Appeals and the Texas Supreme Court, the Fains and Sipriano waived their claim that they sufficiently pled an exception to the rule of capture, and instead relied upon their policy argument that it and absolute ownership should be abandoned entirely.[114]

Sipriano's actual holding was unremarkable in that it reaffirmed the state's century-long adherence to the rule of capture.[115] In doing so, however, the Court reiterated its recognition a half-century before in *City of Corpus Christi v. City of Pleasanton* that the 1917 constitutional amendment (termed the "Conservation Amendment") mandated the Legislature to preserve Texas's natural resources—including water[116]—but "[n]o such duty was or could have been delegated to the courts."[117] To the contrary, "[i]t belongs exclusively to the legislative branch of the government."[118]

While Justice Enoch—writing for the majority—undoubtedly emphasized the tort-immunity characteristics of the rule of capture, he nevertheless acknowledged its tethering to a landowner's rights in the groundwater beneath their property.[119]

As discussed above, one disconcerting aspect of the Court's opinion in *Sipriano* is its mistranslation of *damnum absque injuria* to mean "an injury without a remedy,"[120] instead of "damage without injury."[121] The distinction, although admittedly obscure, is material because the rule of capture does not even recognize that an injury can be inflicted on a neighboring landowner

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114 *Sipriano*, 1 S.W.3d at 76.

115 *Id.* at 80-81.

116 *See* TEX. CONST. art. XVI § 59 (amended 2003). As the Court recounted in *Barshop v. Medina County Underground Water Conservation District*, the "droughts of 1910 and 1917 prompted the citizens of this state to approve the Conservation Amendment to the Texas Constitution, which provides that the conservation, perseveration, and development of the state's natural resources are public rights and duties." 925 S.W.2d 618, 626 (Tex. 1996).

117 154 Tex. 289, 295-96, 276 S.W.2d 798, 803 (1955).

118 *Id.*

119 *See*, *e.g.*, *id.* at 76 (recognizing the rule of capture "provides that … *landowners* have the *right to take all the water* they can capture under *their land*") (emphasis added).

120 *Id.*

121 *Fact or Fiction?*, at 16-17.

resulting from withdrawal of groundwater.[122] Instead, while a "neighboring landowner may be *damaged* by an overlying landowner's withdrawal of groundwater, … such resulting damage cannot form the basis of a compensable *injury*."[123]

2. Justice Hecht's concurrence

Perhaps most instructive, if only because he is the only remaining member of the *Sipriano* Court,[124] is Justice Hecht's concurrence.[125] His concurrence was an unvarnished and comprehensive frontal assault on both the practical effects and theoretical foundation of the rule of capture.[126] Of note, however, Justice Hecht's concurrence did not mention absolute ownership at all.[127]

He began by acknowledging the Legislature's empowerment by virtue of the Conservation Amendment to regulate the state's resources, and the Legislature's subsequent declaration that "[g]roundwater conservation districts … are the state's preferred method of groundwater management."[128] "Yet," he observed, "in the fifty years since the Legislature first authorized the creation of groundwater conservation districts … only some forty-two

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122 *Id.* Provided, of course, that such withdrawal is not malicious, wasteful, or causes negligent subsidence. *See Sipriano*, 1 S.W.3d at 76, 78.

123 *Fact or Fiction?*, at 16-17.

124 THE SUPREME COURT OF TEXAS, COURT HISTORY—SINCE 1945, CHIEF JUSTICE, PLACE 1, http://www.supreme.courts.state.tx.us/court/cj.asp (last visited Jan. 30, 2011); THE SUPREME COURT OF TEXAS, COURT HISTORY—SINCE 1945, JUSTICES, PLACE 2, http://www.supreme.courts.state.tx.us/court/j2.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 3, http://www.supreme.courts.state.tx.us/court/j3.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 4, http://www.supreme.courts.state.tx.us/court/j4.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 5, http://www.supreme.courts.state.tx.us/court/j5.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 6, http://www.supreme.courts.state.tx.us/court/j6.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 7, http://www.supreme.courts.state.tx.us/court/j7.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 8, http://www.supreme.courts.state.tx.us/court/j8.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 9, http://www.supreme.courts.state.tx.us/court/j9.asp (last visited Jan. 30, 2011).

125 *Sipriano*, 1 S.W.3d at 81-83 (Hecht., J., joined by O'Neill, J., concurring).

126 *Id.*

127 *See id.*

128 *Id.* at 81 (citing TEX. CONST. art. XVI § 59 and TEX. WATER CODE § 36.0015).

such districts have been created."[129] Therefore, he dryly concluded, "[n]ot much groundwater management is going on."[130]

Making abundantly clear what he viewed as the cause of the stagnation in groundwater law, Justice Hecht concluded "[w]hat really hampers groundwater management is the established alternative, the common law rule of capture."[131] As support for his contention, Justice Hecht reasoned neither of the two original justifications he argued the *East* Court relied upon in adopting the rule of capture were still valid:[132]

> (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible[; and]
>
> (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.[133]

Justice Hecht continued, explaining "it is not regulation that threatens progress, but the lack of it."[134] Unimpressed with the similar arguments of

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[129] *Id.* Currently, there are some ninety-six groundwater conservation districts in Texas. TEXAS WATER DEVELOPMENT BOARD, GROUNDWATER CONSERVATION DISTRICTS, *available at* http://www.twdb.state.tx.us/mapping/maps/pdf/gcd_only_8x11.pdf (last visited Jan. 31, 2011).

[130] *Id.*

[131] *Id.*

[132] *Id.* at 82. While Justice Williams did acknowledge two policy arguments originally postulated by the Ohio Supreme Court, they were far from the only two justifications for the Court's decision in *East*. *See Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 149-50, 81 S.W. 279, 280-81 (1904) (quoting Marcellus's *responsa* from *Acton* and repeatedly citing to *Acton* as justification for the adoption of the rule of capture and absolute ownership).

[133] *East*, 98 Tex. at 149, 81 S.W. at 281 (quoting *Frazier v. Brown*, 12 Ohio St. 294, 311 (1861)).

[134] *Sipriano*, 1 S.W.3d at 82 (Hecht., J., joined by O'Neill, J., concurring).

the 19 some-odd amici curiae in favor of retaining the rule of capture that it has been settled law in Texas for "a long time," Justice Hecht offered Justice Holmes's observance that:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[135]

Finally, returning to the Legislative Branch's constitutionally-delegated power to manage water resources, Justice Hecht reasoned that, "even if the Court abandoned the rule of capture as part of the common law, the Legislature could adopt the rule by statute …."[136] Only because Justice Hecht assumed the 75th Legislature's comprehensive rewrite of the Water Code just two years before would "make the rule of capture obsolete," he concluded that "for now—but I think only for now—*East* should not be overruled."[137]

IV. THE DECADE SINCE *SIPRIANO* AND BEYOND

Ironically, it has not been the one groundwater law decision the Texas Supreme Court has issued since *Sipriano*,[138] but two oil and gas cases the

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[135] *Id.* (quoting Hon. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 March 1897)). While no one would credibly quibble with Justice Holmes on this point, Justice Hecht perhaps too broadly framed the amicis' concern. Indeed, one of the oldest maxims in Texas jurisprudence is that, "where a decision has been made, adhered to and followed for a series of years, it will not be disturbed, except on the most cogent reasons, and it must be shown in such case that the former decisions are clearly erroneous; and, where property rights are shown to have grown up under the decision, the rule will rarely be changed for any reason." *Groesbeck v. Golden*, 7 S.W. 362, 365 (1887); *see also*, *e.g.*, *McLendon v. City of Houston*, 153 Tex. 318, 322-23, 267 S.W.2d 805, 807 (1954) ("The law should be settled, so far as possible, especially where contract rights and rules of property have been fixed."). Here, the concern of many observers is that, regardless of the original reasoning or wisdom of the *East* Court in adopting the rule of capture and absolute ownership, over a century of property rights have now "grown up" and become "fixed" under its decision.

[136] *Id.* at 83.

[137] *Id.* (referring to Senate Bill 1, Act of June 1. 1997, 75th Leg., R.S., ch. 1010, 1997 Tex. Gen. Laws 3610).

[138] *Guitar Holding Company, L.P. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910 (Tex. 2008) (op. on reh'g) (holding that, because the underground water conservation district's "transfer rules, in essence, grant franchises to some landowners to export water while denying that right to others," and these restrictions are not uniformly applied to new applications, the district's "transfer rules exceed the statutory authorization and are thus invalid").

Court has handed down since 1999 that may provide the clearest indication of how the Court may rule in its next major examination of the rule of capture and absolute ownership as applied to groundwater.[139]

A. The Texas Supreme Court's Recent Oil & Gas Decisions

1. *Seagull Energy E&P, Inc. v. Railroad Commission of Texas*

In its 2007 decision in *Seagull Energy E&P, Inc. v. Railroad Commission of Texas*, the Texas Supreme Court was called upon to decide "whether a statute that grants the Texas Railroad Commission (the "Commission") authority to regulate production of commingled oil and/or gas deposits includes the authority to regulate drilling," and whether the Commission "may consider the commingled deposits as though they were one reservoir."[140] In holding the Commission's treatment of the commingled gas as a common reservoir did not violate Seagull Energy E&P, Inc.'s vested property rights, Justice David Medina wrote for a unanimous Court.[141]

Of particular interest to the groundwater law debate was one passage in which Justice Medina held, "[a]lthough a mineral owner has a right to its fair share of the minerals on and under its property, this right does not extend to specific oil and gas beneath the property."[142] While this passage expressly limited its application to "mineral owner[s]" and did not mention the rule of capture at all, this passage is directly at odds with *cujus est solum ejus est usque ad coelum et ad infernos*, from which the doctrine of absolute ownership has developed.

2. *Coastal Oil & Gas Corp.v. Garza Energy Trust*

One year later in *Coastal Oil & Gas Corp.v. Garza Energy Trust*, the Texas Supreme Court decided, in part, whether damages from drainage caused by the oil & gas extraction method of hydraulic fracturing—or

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139 *See Coastal Oil & Gas Corp.v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008); *Seagull Energy E&P, Inc. v. R.R. Comm'n of Tex.*, 226 S.W.3d 383 (Tex. 2007).

140 *Seagull Energy*, 226 S.W.3d at 384.

141 *Id.* In 2007, the Court had the identical makeup that it does currently, save that Justices O'Neill and Scott Brister have since retired and been succeeded by Justices Debra Lehrmann and Eva Guzman, respectively. *See* SUPREME COURT OF TEXAS, JUSTICES, PLACE 3, http://www.supreme.courts.state.tx.us/court/j3.asp (last visited Jan. 30, 2011); SUPREME COURT OF TEXAS, JUSTICES, PLACE 9, http://www.supreme.courts.state.tx.us/court/j9.asp (last visited Jan. 30, 2011).

142 *Id*. at 388.

"fracing" as it is called in the industry—are precluded by the rule of capture.[143] Writing for the majority, Justice Hecht held they were.[144] Ironically, although the Court technically reaffirmed the rule of capture by applying it to fracing,[145] it nevertheless did so by eviscerating the theoretical underpinnings of absolute ownership as it applies to oil and gas.[146]

Specifically, Justice Hecht adopted the reasoning from a 1946 United States Supreme Court opinion, which opined *cujus est solum ejus est usque ad coelum et ad infernos* "'has no place in the modern world.'"[147] Expressly relying upon Justice Medina's formulation in *Seagull Energy* that "'this right does not extend to specific oil and gas beneath the property,'"[148] Justice Hecht reasoned the "minerals owner is entitled, not to the molecules actually residing below the surface, but to 'a fair chance to recover the oil and gas in or under his land ….'"[149] The Court continued, stating "the rule of capture determines title to gas that drains from property owned by one person onto property owned by another. It says nothing about the ownership of gas that has remained in place."[150] Of note, only one other Justice currently sitting on the Court joined Justice Hecht in this part of the opinion.[151]

The dissent, authored, in part, by Justice Phil Johnson, and joined by Chief Justice Jefferson and Justice Medina, cited to a line of oil and gas cases that hold, "'since the gas … will flow to a point of low pressure the landowner is not restricted to the particular gas that may underlie his property originally but is the owner of all that which he may legally recover.'"[152]

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143 *Coastal Oil*, 268 S.W.3d at 17.

144 *Id.*

145 *Id.*

146 *See id.* at 11.

147 *Id.*, at 11 n.30 (quoting *United States v. Causby*, 328 U.S. 256, 260-61 (1946)).

148 *Id.* at 15.

149 *Id.*

150 *Id.* at 14.

151 *Id.* at 4. Part II.B was joined by Justices Brister (who has since retired), and Green (who is still serving on the Court), as well as two intermediate appellate Justices sitting by appointment. *Id.*; *see* SUPREME COURT OF TEXAS, JUSTICES, PLACE 5, http://www.supreme.courts.state.tx.us/court/j5.asp (last visited Jan. 30, 2011).

152 *Id.* at 43. (Johnson, J. , joined by Jefferson, C.J. and Medina, J., dissenting in part and concurring in part) (quoting *Halbouty v. R.R. Comm'n*, 163 Tex. 417, 433-34, 357 S.W.2d 364, 375 (Tex. 1962)).

3. Construction together

Both these cases make clear they apply expressly to oil and gas and mineral owners. Specifically, oil and gas law has developed a distinct and limited version of both the rule of capture and absolute ownership whereby ownership of the resource in place was long ago abrogated.[153] In contrast, groundwater, "unsevered expressly by conveyance or reservation, has been held to be a part of the surface estate," but never part of the mineral estate despite its proximity to other minerals.[154] Therefore, absent a radical extension to groundwater of this restricted form of the rule of capture and absolute ownership recognized in oil and gas law, the predictive value of these opinions in the groundwater law context may be minimal. However, oil and gas law developed from *East*,[155] and, in this sense, "oil and gas law is an offshoot of groundwater law."[156] Accordingly, applying the oil and gas limitations on the rule of capture and absolute ownership as applied to groundwater does not represent an insurmountable juristical leap.

This is particularly true here, where the only remaining Justice from *Sipriano* has made abundantly clear his opposition to the doctrines of absolute ownership (at least as applied to oil and gas)[157] and the rule of capture (as applied to groundwater).[158] If applied to groundwater, the description laid out in *Coastal Oil* by the Court of a landowner's entitlement, "not to the molecules actually residing below the surface, but to 'a fair chance to recover the oil and gas in or under his land'"[159] would juridically abrogate

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153 *See*, *e.g.*, *Halbouty*, 163 Tex. at 433-34, 357 S.W.2d at 375.

154 *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972).

155 East *Reconsidered*, 33 TEX. L. REV. at 621 ("Beyond doubt the [*East*] decision influenced the formative stages of the Texas law of oil and gas as the courts developed the ownership-in-place rationale."); *Oil and Water Should Mix*, 1 TEX. WESLEYAN L. REV. at 213 ("*East* influenced early oil and gas law as well as water law.").

156 *Still So Misunderstood*, 37 TEX. TECH L. REV. at 59. One reason for the differing rates and paths of development of the two property regimes is due to the "rapidity with which an oil and gas market emerged." *Id.*; *Oil and Water Should Mix*, 1 TEX. WESLEYAN L. REV. at 213-14 (recounting how, after oil was accidentally discovered in Corsicana in 1894, the industry grew extremely quickly in the 1920s and 1930s).

157 *Coastal Oil*, 268 S.W.3d at 11 n.30 (quoting *United States v. Causby*, 328 U.S. 256, 260-61 (1946)) ("*cujus est solum ejus est usque ad coelum et ad infernos* 'has no place in the modern world'").

158 *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 81 (Tex. 1999) (Hecht, J., joined by O'Neill, J., concurring) ("[w]hat really hampers groundwater management is the established alternative, the common law rule of capture").

159 *Coastal Oil*, 268 S.W.3d at 15.

ownership of groundwater in place. Just as intriguing is Justice Hecht's recasting of the rule of capture as "determin[ing] title to gas that drains from property owned by one person onto the property owned by another," which therefore cannot speak to "ownership of gas that has remained in place."[160] This may well be a new paradigm through which the rule of capture and absolute ownership of groundwater may be redefined.

Even though the Texas Supreme Court has repeatedly labeled the rule of capture as a property right,[161] it is more accurately a rule of tortious immunity granted by virtue of the title granted by absolute ownership.[162] It is not the rule of capture itself that "determines title," to anything—it instead insulates a landowner from liability to neighboring landowners arising from drainage.[163] Conversely, absolute ownership confers title to groundwater that, while "in place beneath the tract"—so long as it has "not departed and [is] beneath it"—"is essentially a part of the realty, and [its] grant, therefore, while in that condition, if effectual at all, is a grant of an interest in the realty."[164] In this sense, absolute ownership can only be tied to the specific groundwater beneath the surface—that is, to the "molecules actually residing below the surface" as long as they are beneath the overlying tract.[165] Applied to the Court's phrasing in *Coastal Oil*, it is absolute ownership—not the rule of capture—that determines title *both* to groundwater "drain[ed] from property owned by one person onto the property owned by another," as well as the groundwater "that has remained in place."[166] Accordingly, absolute ownership transfers title to groundwater from one landowner to another based upon the location of the molecules of water beneath the overlying tract, and the rule of capture prevents liability from attaching between these landowners based upon the migration of that groundwater.

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160 *Id.* at 14.

161 *See*, *e.g.*, *Corzelius v. Harrell*, 143 Tex. 509, 514, 186 S.W.2d 961, 964 (1945); *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 29*6, 305, 83 S.W.2d 935, 940 (1935).

162 *See Fact or Fiction?*, at 4, 7.

163 *See*, *e.g.*, *Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 149, 81 S.W. 279, 280 (1904) (quoting *Acton v. Blundell*, 152 Eng. Rep. 1223, 1235 (1843)).

164 *Tex. Co. v. Daugherty*, 107 Tex. 226, 235-36, 176 S.W. 717, 719-20 (1915).

165 *Contra Coastal Oil*, 268 S.W.3d at 15.

166 *Id.*

B. S.B. 332

Perhaps having seen the jurisprudential writing on the wall after the Texas Supreme Court's decisions in *Coastal Oil & Gas Corp. v. Garza Energy Trust* and *Seagull Energy E&P, Inc. v. Railroad Commission of Texas*, Senator Troy Fraser introduced S.B. 332 during the opening days of the 82d Session in January 2011.[167]

Specifically, S.B. 332 amends the somewhat noncommittal bromide currently ensconced in section 36.002 of the Water Code, which proclaims:

> The ownership and rights of the owner of the land and their lessees and assigns in groundwater are hereby recognized, and nothing in this code shall be construed as depriving or divesting the owners or their lessees and assigns of the ownership or rights, except as those rights may be limited or altered by rules promulgated by a district. …."[168]

Section 36.002 would now read:

> A landowner, or the landowner's lessee or assign, has a *vested ownership interest in and right to produce* groundwater below the surface of the landowner's real property, and nothing in this code may be construed as granting the authority to deprive or divest a landowner or the landowner's lessee or assign of the ownership interest in the groundwater or the right to produce groundwater, except as those rights and interests may be reasonably limited by rules promulgated by a district.[169]

There are several noteworthy changes proposed by S.B. 332. First and foremost, it would recognize for the first time the ownership in place of groundwater beneath an overlying landowner's tract.[170] That is, it would codify absolute ownership of groundwater. Second, it would prohibit the Water Code from being judicially construed to "deprive or divest" an overlying landowner's ownership interest in the groundwater beneath his or her land.[171] Third, it no longer would allow a landowner's ownership rights

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167 Tex. S.B. 332, 82d Leg., R.S. (2011) (introduced version); TEXAS LEGISLATURE ONLINE, HISTORY, SB 332, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB332 (last visited Jan. 31, 2011).

168 TEX. WATER CODE § 36.002.

169 Tex. S.B. 332, 82d Leg., R.S. (2011) (introduced version) (emphasis added).

170 *See id.* § 1.

171 *See id.*

in groundwater to be "limited or altered" by rules promulgated by a conservation district, but would instead allow such limitation only if it is "reasonable."[172] Finally, S.B. 332 would also amend section 36.101 of the Water Code, which governs considerations a conservation district must weigh when adopting new rules, to require the vested ownership rights established in section 36.002 be considered during the rulemaking process.[173] Similarly, such vested ownership rights would have to also be considered when a conservation district reviews any management plan.[174]

Because, since the ratification of the Conservation Amendment in 1917,[175] "Texas voters made groundwater regulation a duty of the Legislature,"[176] the Texas Supreme Court has largely deferred to the Legislature to enact policy changes to the rule of capture and absolute ownership."[177] Consequently, the Court may very well wait to see what, if anything, the Legislature passes this Session before judicially wading into the fray.

C. *Edwards Aquifer Authority v. Day*

Whether the Texas Supreme Court continues to defer to the Legislature regarding the rule of capture and absolute ownership is of paramount importance because the Court currently has pending before it a groundwater law case—*Edwards Aquifer Authority v. Day*—in which it has already heard oral argument and which was submitted to the Court in February 2010.[178]

In *Day*, Burrell Day and Joel McDaniel sought a permit from the Edwards Aquifer Authority (the "Authority") to allow them to pump some

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172 *Compare* TEX. WATER CODE § 36.002, *with* Tex. S.B. 332 § 1, 82d Leg., R.S. (2011) (introduced version).

173 Tex. S.B. 332 § 2, 82d Leg., R.S. (2011) (introduced version).

174 *Id.* § 3 (amending section 36.108(c) of the Water Code).

175 TEX. CONST. art. XVI § 59 (amended 2003).

176 *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999).

177 *See, e.g.*, *id.*; *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 296, 276 S.W.2d 798, 803 (1955) ("No such [groundwater policymaking] duty was or could have been delegated to the courts [by the Conservation Amendment]. It belongs exclusively to the legislative branch of the government.").

178 THE SUPREME COURT OF TEXAS, CASE INFORMATION: CASE 08-0964, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=29927 (last visited Jan. 31, 2011) (noting oral argument was held Feb. 17, 2010, and the case submitted for disposition thereafter).

700 acre-feet[179] of groundwater from the Edwards Aquifer to irrigate crops on their land.[180] After the Authority denied Day and McDaniel a permit based upon deemed insufficient historical use, they exhausted their administrative remedies and sued the Authority.[181] Among their other claims on appeal, Day and McDaniel asserted the Authority's denial of their irrigation permit "resulted in a confiscation of their [ground]water rights, under color of law, without just compensation in violation of … art. I, § 17" of the Texas Constitution.[182] The appellate court agreed, holding Day and McDaniel had "some ownership rights in the groundwater beneath their property."[183] Because they had "some ownership rights in the groundwater," the court reasoned "they have a vested right therein."[184] The court concluded Day and McDaniel's "vested right in the groundwater beneath their property [wa]s entitled to constitutional protection."[185]

It is this holding of the San Antonio Court of Appeals—that Texas landowners possess a "vested right in the groundwater beneath their property"—which is directly at issue before the Texas Supreme Court. After the filing of S.B. 332, this issue is also before the 82d Legislature as well.

V. CONCLUSION

Twelve years after the Texas Supreme Court's decision in *Sipriano*, undoubtedly more "groundwater management is going on," but not much more resolution has been reached regarding the rights and immunities conferred by the rule of capture and absolute ownership. However, between the Court's pending decision in *Day*, and the Legislature's pending action on S.B. 332, a long-awaited legal denouement may well be realized by Texas landowners.

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179 An acre-foot is the amount of water necessary to cover an acre of land to a depth of one foot, and equates to approximately 325,850 gallons in volume. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 624 n.1 (Tex. 1996).

180 *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742, 748 (Tex. App.—San Antonio 2008, pet. pending).

181 *Id.* at 749-51.

182 *Id.* at 756.

183 *Id.*

184 *Id.*

185 *Id.*