WILLIAMS REVISITED: SIXTY YEARS AFTER THE CASE THAT DECIDED THE KANSAS WATER APPROPRIATION ACT

By: Diana Stanley[*]

I. INTRODUCTION

"Tonight, we pray for water. Cool water."[1]

Almost sixty years ago, the Kansas Supreme Court issued its final decision in *Williams v. City of Wichita*.[2] In *Williams*, the court upheld the constitutionality of Kansas's water regulatory scheme. While not discussed much beyond water law seminar courses, the opinion was a fundamental natural resource law decision in Kansas and throughout the Western United States.[3] And yet, taken in the broader context of property law, the reasoning in *Williams* is problematic due to its inconsistent application of precedent. This article aims to take a comprehensive look back at *Williams* to reexamine the assumptions Kansas courts have made about water rights and ask if there is a way to get *Williams*'s result without throwing out traditional property law principles.

The story of *Williams* begins with the controversial passage of the 1945 Kansas Water Appropriation Act ("KWAA").[4] This act transformed the state's water law system from riparian common law to a permitted prior appropriation

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[1] MARTY ROBBINS, *Cool Water*, *in* GUNFIGHTER BALLADS AND TRAIL SONGS (Columbia Records 1959).

[2] Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962) (upholding the constitutionality of the state's new water permitting scheme by asserting the groundwater users only had a license to use water rather than a vested property interest).

[3] Many scholars have cited *Williams* in the context of their own state water law debates. *See, e.g.*, Roger Tyler, *Underground Water Regulation in Texas*, 39 TEX. B.J. 532, 538 n.28 (1976) ("The host of articles written after Williams v. City of Wichita . . . was decided are worthy of reading."); Richard S. Harnsberger, *Nebraska Ground Water Problems*, 42 NEB. L. REV. 721, 752 n.155 (1963); James Munro, *South Dakota and the Water Impasse*, 11 S.D. L. REV. 255, 272 (1966).

[4] Kansas Water Appropriation Act of 1945, ch. 390, § 1, 1945 Kan. Sess. Laws 665 (codified at KAN. STAT. ANN. § 82a-701 (West 2009).

scheme.[5] Like many controversial pieces of legislation, KWAA's opponents challenged its constitutionality.[6] The Kansas Supreme Court determined that KWAA was not a governmental taking in *Williams*, making it "the most important case in Kansas water law history."[7]

Williams's impact soon spread beyond Kansas. A year after the decision, the Oklahoma state legislature passed its first regulatory reform for riparian water rights.[8] The year after that, the South Dakota Supreme Court adopted a similar approach to Kansas in *Knight v. Grimes*[9] and solidified a *Williams*-esque view toward water regulation.[10] To date, a slew of courts, including judiciaries in Arizona,[11] California,[12] Indiana,[13] Missouri,[14] North Dakota,[15] South Dakota,[16] and Washington[17] have cited and referenced *Williams* in their own water law decisions. As such, the opinion and the principles established by it lurk in the background of water regulation—the Invisible Man at the inn while burglaries—takings—are happening all over town.[18] As eastern states are increasingly water-stressed and reconsidering their own regulatory schemes,[19]

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[5] The riparian doctrine is, "[t]he rule that owners of land bordering on a waterway have equal rights to use the water passing through or by their property." *Riparian-Rights Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). In contrast, the prior appropriation doctrine is "[t]he rule that, among the persons whose properties border on a waterway, the earliest users of the water have the right to take all they can use before anyone else has a right to it." *Prior-Appropriation Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). Professor Frank Trelease provides a thorough, albeit dated, explanation of the application of both systems in his work *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEX. L. REV. 24 (1954).

[6] *See infra* Section III.A.

[7] John C. Peck, *Water Law in Kansas History*, 61 J. KAN. B. ASS'N 39, 43 (1992).

[8] Todd S. Hageman, Note, *Water Law: Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183, 186–87 (1994).

[9] Knight v. Grimes, 127 N.W.2d 708, 712–14 (S.D. 1964).

[10] The *Knight* decision is interesting because it does not explicitly cite *Williams*, but it does reference two decisions which *Williams* gave retroactive approval to—State v. Knapp, 207 P.2d 440 (Kan. 1949) and Baumann v. Smrha, 145 F. Supp. 617 (D. Kan. 1956). A later South Dakota case made the historical connection somewhat more explicit. Belle Fourche Irrigation Dist. v. Smiley, 176 N.W.2d 239, 245 (S.D. 1970) ("[The d]ecision in the Knight case concerned with underground waters is equally applicable to surface water. Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578.").

[11] Town of Chino Valley v. City of Prescott, 638 P.2d 1324, 1329 (Ariz. 1981).

[12] *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 663 n.6 (Cal. 1979) (citing *Williams* and its precursor Kansas cases).

[13] City of Valparaiso v. Defler, 694 N.E.2d 1177, 1181 (Ind. Ct. App. 1998).

[14] Higday v. Nickolaus, 469 S.W.2d 859, 866 (Mo. Ct. App. 1971).

[15] Baeth v. Hoisveen, 157 N.W.2d 728, 732 (N.D. 1968).

[16] Parks v. Cooper, 676 N.W.2d 823, 834 (S.D. 2004); Belle Fourche Irrigation Dist. v. Smiley, 176 N.W.2d 239, 245 (S.D. 1970).

[17] *In re* Deadman Creek Drainage Basin in Spokane Cnty., 694 P.2d 1071, 1077 (Wash. 1985).

[18] H.G. WELLS, THE INVISIBLE MAN (Edward Arnold 1897).

[19] *See, e.g.*, Michael A. Wehrkamp, Comment, *Groundwater Allocation in Ohio: The Case for Regulated Riparianism and its Likely Consequences Under McNamar*a, 40 U. TOL. L. REV. 525 (2009) (discussing problems with groundwater regulation in the eastern United States given increased demand and strain on aquifers).

the case is becoming even more relevant.

Scholars analyzing KWAA and *Williams* tend to take a global view and focus on how the Act and the case were necessary for the state's conservation program. But reexamining *Williams* shows that this was also a conflict between rural and urban Kansans with policy and ethical implications. Moreover, in pursuit of getting to a policy-focused result, Justice Fatzer's majority opinion went through legal gymnastics of property law.[20]

Scholars too often gloss over this because they see having a settled rule for water rights as essential. As one student author commented in the 1980s: "For all of the shortcomings of the *Williams* decision it is probably better left alone . . . . With almost twenty years having passed since *Williams*, it is too late to upset the system."[21] In other words, because we like the rule and it has been around a long time, it does not matter that it does not make sense. This article attempts to put the shortcomings of *Williams* to bed by proposing alternative solutions to its property law problems.

In Section II, this piece explores the legislative background behind the Kansas Water Appropriation Act. Section III looks at post-1945 Equus Beds litigation before moving on to the role of the urban-rural divide. Section IV takes a deep dive into Justice Fatzer's majority and Justice Schroeder's dissent. This section looks at the arguments in the context of the judges' personal backgrounds and in the wider scope of property law. Finally, Section V looks for possible solutions to the outstanding questions raised by Justice Schroeder.

II. PASSING OF THE 1945 KANSAS WATER APPROPRIATIONS ACT

When I was around ten years old, my parents sent me north from our home in Wichita to stay with my grandparents outside of the state capital for a week. My grandfather took me out to Perry State Park, where a famous two-hundred-year-old cottonwood tree once stood.[22] This was Kansas, but not one I was familiar with. Unlike flat Wichita, where people can see a storm coming from miles away, this part of the state had rolling hills and leafy green forests.

Kansas was settled from the east to the west.[23] The eastern third of Kansas

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[20] Glenn E. Opie, *Constitutional and Administrative Law*, 12 U. KAN. L. REV. 143, 146 (1963) ("In reflecting upon the decision as it presently stands in Kansas, the writer cannot help but feel that the holding of the court is grounded heavily in concepts as to what is desirable public policy and would fall somewhere within the rationale said to have been employed by the late Mr. Justice Cardozo, who in his decisions has been popularly reported to first ask what as a matter of justice ought to be done and then find the rule of law which would support the conclusion.").

[21] Gary H. Hanson, *Water Law—Kansas Water Appropriation Act—Water May Not Be Appropriated without the Approval of the Chief Engineer*—F. Arthur Stone & Sons v. Gibson, 31 U. KAN. L. REV. 342, 352 (1982).

[22] *See* Mike Belt, *Champion Trees Lost to Storms*, LAWRENCE J. WORLD (May 12, 2006, 12:00 AM), https://www2.ljworld.com/news/2006/may/12/champion_trees_lost_storms/ [https://perma.cc/L27T-6VY6].

[23] John C. Peck, *Evolving Water Law and Management in the U.S.: Kansas*, 20 U. DENV. WATER L. REV. 15, 16 (2016).

has a widely different climate than the rest of the state.[24] Like I observed as a child, Eastern Kansas experiences greater rainfall and there are more rivers and streams.[25] In contrast, the rest of the state relies primarily on groundwater and is increasingly arid closer to the Colorado border.[26] Because the eastern third was settled before the west, state courts originally adopted riparian common law for surface water disputes.[27] But soon enough, the Kansas Legislature added prior appropriation law into the mix by passing irrigation statutes requiring permitting for certain diversions.[28]

The flashpoint for Kansas water law, however, was not over the differences between riparian and prior appropriation schemes. Rather, it was a fight over groundwater. Because early geologists did not realize that surface and groundwater are hydrologically connected,[29] courts in many states formed different governing rules for the water sources.[30] In Kansas, the court followed the absolute ownership theory—sometimes called the English Rule—which gives property owners an absolute right to draw water from their property.[31]

The "confusion"[32] from this mixing of groundwater law, riparianism, and prior appropriation[33] led to litigation over the Equus Beds Aquifer in south central Kansas.[34] In the early 1940s, Wichita sought a permit from the Kansas Division of Water Resources ("DWR") to appropriate water from wells in neighboring Harvey County for municipal use.[35] Apparently believing that permit approval would be a foregone conclusion, the City of Wichita had already drilled the wells and constructed a piping system for the water "at the cost of approximately $2,500,000."[36] Several cities in Harvey County opposed the

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[24] *See DWR Map Library*, KAN. DEP'T OF AGRI., https://agriculture.ks.gov/divisions-programs/dwr/dwr-library/maps [https://perma.cc/75BQ-MZJJ] (Aug. 27, 2021, 10:27 PM) (Graphs with average annual rainfall and aquifer recharge).

[25] *Id.*

[26] *Id.*

[27] John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 U. KAN. L. REV. 735, 736 (1995).

[28] 1889 Kan. Laws, ch. 165, § 1 (codified at Kan. Gen. Stat. § 42-109, repealed by Water Appropriation Act of 1945, ch. 390, § 25, 1945 Kan. Sess. Laws 665 (West 2009)).

[29] *See* Joe Gelt, *Managing the Interconnecting Waters: The Groundwater-Surface Water Dilemma*, WATER RES. RSCH. CTR. (1994), https://wrrc.arizona.edu/publications/arroyo-newsletter/managing-interconnecting-waters-groundwater-surface-water-dilemma [https://perma.cc/6UDJ-AN4Z] (discussing in 'Hydrology and Geology' the interconnected nature of surface and groundwater and explaining that this connection was not well understood).

[30] *See* Roath v. Driscoll, 20 Conn. 533, 543 (1850) and Frazier v. Brown, 12 Ohio St. 294, 311 (1861), for examples of this early caselaw phenomenon.

[31] Peck, *supra* note 27, at 736–37; City of Emporia v. Soden, 25 Kan. 588, 589 (1881).

[32] Williams v. City of Wichita, 374 P.2d 578, 581, 587 (Kan. 1962).

[33] Kansas was overwhelmingly a riparian state. But there were hints of prior appropriation doctrine. For example, in Clark v. Allaman, 80 P. 571 (Kan. 1905), the court recognized that some Kansans followed prior appropriation rules as a "local custom[]" but such customs did not have the force of law. *Id.* at 580. The 1886 irrigation statute also had a prior appropriation element. *Id.* at 582.

[34] Peck, *supra* note 27, at 738.

[35] State *ex rel.* Peterson v. Kan. State Bd. of Agri., 149 P.2d 604, 605 (Kan. 1944).

[36] *Id.*

permit, and the county attorney filed an action asserting DWR lacked authority to grant such permits.[37] As there was no comprehensive water legislation, the Kansas Supreme Court agreed.[38] Going further, the court reinforced Kansas's traditional conceptions of property law over groundwater rights, saying,

> [U]nderground waters are part of the real property in which they are situated. The owner of land may convey or grant the underground water, or the right to take it from the land, by an appropriate instrument in writing to the same extent that he might convey or grant any other portion of the real property; or a party, having the right of eminent domain, may appropriate underground water to his use by condemnation proceedings.[39]

The court's decision meant that Wichita could not quantify its water rights. Nor could the city have a guaranteed supply of water every year.[40]

In response, then-Governor Andrew Frank Schoeppel[41] created a Commission to study Kansas water law and propose regulatory solutions.[42] Within ten months, the Kansas Legislature passed the Water Appropriation Act.[43] To say that KWAA represented a sharp change in Kansas water rights is somewhat of an understatement.[44] In one stroke, the legislature converted ownership of water from private to state hands by dedicating "[a]ll water within the state of Kansas . . . to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed."[45]

Not only did KWAA transform the surface water regulatory scheme, it also affected the common law groundwater doctrine. The state could now limit future groundwater withdrawals by denying permits.[46] It could also grant permits to

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[37] *Id.* at 606.
[38] *Id.* at 611.
[39] *Id.* at 608.
[40] *Id.* at 605–06.
[41] Like many of the characters in this story, Governor Schoeppel started his career as a small-town attorney in rural Kansas. *Gov. Andrew Frank Schoeppel*, NAT'L GOV. ASS'N, https://www.nga.org/governor/andrew-frank-schoeppel/ [https://perma.cc/XR4G-MG3V]. His motivations behind water reform may have been tied to general resource consolidation and use efforts for World War II. In his 1943 address to the Kansas Legislature, he noted the resource and manpower strain caused by the war effort and the need to address "changed conditions that [Kansas leaders] are called now upon to deal." *Message of Governor Andrew F. Schoeppel to the 1943 Kansas Legislature*, KAN. STATE LIBR., https://kgi.contentdm.oclc.org/digital/collection/p16884coll3/id/236 [https://perma.cc/8FXA-9Q7N]. On the other hand, scholar John Peck located one contemporary source which tied the act's passage more directly to the Dust Bowl. John C. Peck, *Legal Responses to Drought in Kansas*, 62 U. KAN. L. REV. 1141, 1154 n.95 (2014).
[42] Peck, *supra* note 27, at 738.
[43] Kansas Water Appropriation Act of 1945, ch. 390, § 2, 1945 Kan. Sess. Laws 665 (codified at KAN. STAT. ANN. § 82a-702 (West 1945)).
[44] Peck, *supra* note 27, at 737.
[45] *Id.* at 741.
[46] *Cf. New Applications and Permits*, KAN. DEP'T OF AGRIC., https://agriculture.ks.gov/divisions-programs/dwr/water-appropriation/new-applications-and-permits ("Some areas of the state are

municipalities, even if it meant that neighboring landowners would be unable to drill new wells in the area. In the past, that sort of action would probably have required compensating the landowners for their impaired water rights.

III. EQUUS BEDS LITIGATION AND THE LEAD UP TO *WILLIAMS*

After the passage of KWAA, there was a flurry of scholastic and state activity over its implementation.[47] But the real cloud on the horizon was the reaction of the courts. While there was an initial litigation hiccup over riparian rights in *State ex rel. Emery v. Knapp*,[48] much of the Act's constitutionality over groundwater and destruction of vested property rights was still up for debate. Unfortunately, it would take almost ten years of litigation between the city of Wichita, neighboring towns, and farmers before the state's highest court would issue a decision.[49] A brief overview of this litigation also shows underlying rural-urban dynamics at the heart of the *Williams* decision and KWAA.

A. The Fight Over the Equus Beds

Litigation was brewing back at the Equus Beds. The Equus Beds are a large aquifer system composed of "extremely permeable gravel and sand" overlaying the "ancestral Smokey River."[50] It lies under "portions of McPherson, Harvey, Reno, and Sedgwick counties."[51] For these areas, the aquifer serves as the sole source of fresh groundwater for all municipal, industrial, and agricultural uses.[52] As noted in the *Peterson* case, Wichita had been trying to expand its municipal

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considered fully appropriated, based on safe yield, which now are closed to further new appropriations.").

[47] *See, e.g.*, John Scurlock, *Constitutionality of Water Rights Regulation*, 1 U. KAN. L. REV. 125 (1953); EARL B. SHURTZ, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER: BULL. 3, KAN. WATER RES. BD. (1956) [hereinafter SHURTZ, 1956]; EARL B. SHURTZ, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER: BULL. 5, KAN. WATER RES. BD. (1960) [hereinafter SHURTZ, 1960]. Water Law was also the topic of the University of Kansas Law Review's second symposium. Earl B. Shurtz, *Foreword*, 5 U. KAN. L. REV. 491 (1957).

[48] State *ex rel.* Emery v. Knapp, 207 P.2d 440, 442 (Kan. 1949) (involving a question on riparian reservoir rights from the Republican River).

[49] These cases appear to have been first litigated in 1953. Cities of Hesston & Sedgwick v. Smrha, 336 P.2d 428, 431 (Kan. 1959). *Williams* was decided in 1962 and stated as follows:

> This court takes judicial notice of the many years of protracted litigation that has taken place in state and federal courts over Wichita's municipal well operations in the Equus Beds in Harvey County and is of the opinion that a ruling here on the constitutionality of the Act will have a settling effect on the general controversy which has too long kept ground water users throughout the state in uncertainty and confusion.

Williams v. City of Wichita, 374 P.2d 581, 581 (Kan. 1962).

[50] Baumann v. Smrha, 145 F. Supp. 617, 620 (D. Kan.), *aff'd*, 352 U.S. 863 (1956).

[51] Michael T. Dealy, *Management of the Equus Beds Aquifer in Southcentral Kansas: Are We Measuring Up?*, 15 KAN. J. L. & PUB. POL'Y 525, 528 (2006). *See* Appendix A for a map of this area from *Williams*, 374 P.2d at 582.

[52] *See* Appendix A for a map of this area from *Williams*, 374 P.2d at 582.

well supply into other counties for some time.[53] In the 1940s, the city bought twenty-five well sites in Harvey County.[54] The wells created cones of depression and caused water levels to decline on surrounding farms.[55]

In the early 1950s, Wichita sought to expand its municipal drilling for another 25,000 acre-feet of water per year.[56] Faced with declining water tables and Wichita's expansion, landowners and cities in Harvey and McPherson Counties sued the state water agency. This litigation over the Equus Beds is best understood as four interwoven strands of cases. Each case featured roughly the same cast of characters and pitted the cities of Harvey and McPherson Counties against DWR and the City of Wichita. Even if one of the usual suspects were not originally in the litigation, they would often plead in as interested parties or ask to write intervening briefs.

The saga began with three cases in 1956, two at the state level and one at the federal level. On the state side, the Kansas Supreme Court heard initial interlocutory appeals in *City of McPherson v. Smrha*[57] and *Cities of Hesston & Sedgwick v. Smrha*.[58] R.V. Smrha was the Chief Engineer of DWR—hence the case names.[59] In *City of McPherson*, three municipal water users challenged DWR's decision to grant Wichita well permits.[60] Similarly, in *Cities of Hesston & Sedgwick*, five Harvey County municipalities and a private landowner opposed DWR's well permit decisions.[61]

In both these cases, DWR sought to quash the suit on the basis that the cities sued before a 1955 amendment to KWAA which explicitly allowed water users to challenge agency decisions in court.[62] The trial court judge, Alfred Schroeder, denied DWR's motion and the Kansas Supreme Court affirmed.[63]

These initial cases are significant for two reasons. First, they mark the first appearance of the authors of both the majority and the dissent of the *Williams* opinion. Harold R. Fatzer, the majority's author, represented DWR. Alfred Schroeder, the author of the dissent, was the trial court judge. The local press even quoted Schroeder saying that he found "the state's condemnation and water

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[53] State *ex rel.* Peterson v. Kan. Bd. of Agri.,149 P.2d 604, 605–06 (Kan. 1944); *Baumann*, 145 F. Supp. at 620.
[54] *Baumann*, 145 F. Supp. at 620.
[55] *Id.*
[56] *Id.* at 621. For context, "[a]n acre-foot of water is equivalent to 325,851 gallons." *Irrigation & Water Use*, U.S. DEP'T OF AGRI., https://www.ers.usda.gov/topics/farm-practices-management/irrigation-water-use/ [https://perma.cc/8B6Q-2B6E].
[57] *See* City of McPherson v. Smrha, 293 P.2d 239 (Kan. 1956).
[58] *See* Cities of Hesston & Sedgwick v. Smrha, 293 P.2d 241 (Kan. 1956).
[59] *City of McPherson*, 293 P.2d at 240.
[60] *Id.*
[61] *Cities of Hesston & Sedgwick*, 293 P.2d at 241. "Sedgwick" is both a municipality in Harvey County and the name of a Kansas county. Williams v. City of Wichita, 374 P.2d 578, 582 (Kan. 1962) (providing a map showing both Sedgwick County and the City of Sedgwick).
[62] *Cities of Hesston & Sedgwick*, 293 P.2d at 241; *City of McPherson*, 293 P.2d at 239–40.
[63] *Cities of Hesston & Sedgwick*, 293 P.2d at 241.

laws 'inadequate.'"[64]

Second, these cases were the beginning of a war of attrition that went up and down the judicial escalator for issues both minor and major. For example, one protracted fight was over whether Wichita and DWR could dismiss the private landowner in *Cities of Hesston & Sedgwick* because he died before the issue was finally settled.[65] On the other hand, *Cities of Hesston and Sedgwick* also saw a significant 1959 opinion where the case's new trial court judge—Schroeder, who had since been elected[66] to the Kansas Supreme Court—found the 1945 Act unconstitutional.[67] Harvey County Judge George Allison had abruptly declared the act unconstitutional sua sponte "after two so-called pre-trial hearings" and without any pleadings.[68] The state supreme court found the judge could not consider constitutionality during a purely procedural part of the litigation.[69] They then promptly remanded it back down to the lower courts.[70]

Over in the federal courts, the District of Kansas saw an Equus Beds case in 1956. In *Baumann v. Smrha*, a farmer challenged KWAA as unconstitutional because it violated the Fourteenth Amendment of the United States Constitution.[71] Like the other cases, the plaintiffs sought declaratory and injunctive relief against Wichita's proposed well expansion.[72] The federal court ruled that the *Knapp* decision effectively overturned previous Kansas caselaw—

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[64] *Judge Urges Water Peace*, PARSONS SUN, Mar. 22, 1956, at 2. Judge Schroeder urged that peaceful negotiations begin:

> It is now clear to me that the present Kansas laws relative to both condemnation and water are inadequate. This is evidenced by the fact that almost a score of individual court actions have been fought by the present parties on these questions, and if the same course is followed, with many more to come.

Id.

[65] Cities of Hesston & Sedgwick v. Smrha, 351 P.2d 204, 205 (Kan. 1960).

[66] Until 1956, the Kansas Supreme Court was elected with the governor retaining the power to fill vacancies. This changed with a state constitutional amendment after the 1956 "Triple-Play" incident. *See* R. Alton Lee, *The Triple Switch: How the Missouri Plan Came to Kansas*, J. KAN. BAR ASS'N 28 (Jan. 2004) [hereinafter Lee, *The Triple Switch*], https://www.washburn.edu/reference/cks/politics/pdf/triple.switch.pdf [https://perma.cc/4UPM-T7ZP]; Sam Zeff & Matt Hodapp, TV, *The Triple Play, and the Man from Dodge*, HUMANITIES KAN. (Apr. 19, 2016), https://www.humanitieskansas.org/get-involved/kansas-stories/people/tv-the-triple-play-and-the-man-from-dodge [https://perma.cc/G6ME-H3EK]; R. ALTON LEE, SUNFLOWER JUSTICE: A NEW HISTORY OF THE KANSAS SUPREME COURT 232 (2014) [hereinafter LEE, SUNFLOWER JUSTICE].

[67] Cities of Hesston & Sedgwick v. Smrha, 336 P.2d 428, 435 (Kan. 1959).

[68] SHURTZ, 1960, *supra* note 47, at 47–48 n.199. Shurtz's report reproduced the lower court decision: "[KWAA] is unconstitutional, being in violation of the 14th Amendment of the United States Constitution, having no provision for notice, right to be heard, compensation or other requirements of due process of law." *Id.*

[69] *Cities of Hesston & Sedgwick*, 336 P.2d at 435. Judge Allison did eventually get his day in court—he was also the judge in *Williams* that declared the 1945 Act unconstitutional. *See* Williams v. City of Wichita, 374 P.2d 578 (Kan. 1962). Because the cases had the same plaintiff attorneys, one could safely guess the plaintiff in *Williams* knew at least how Judge Allison would rule on their merits.

[70] *Cities of Hesston & Sedgwick*, 336 P.2d at 435.

[71] Baumann v. Smrha, 145 F. Supp. 617, 619 (D. Kan.), *aff'd*, 352 U.S. 863 (1956).

[72] *Id.* at 621.

it did not[73]—and that even though prior caselaw may have established a vested property right, "departure . . . in a subsequent decision does not . . . constitute a deprivation of property."[74]

The result of all this litigation was that the state needed a decisive Kansas Supreme Court opinion to settle the 1945 Act's constitutionality.[75] The question was which case would get there first. *Williams v. City of Wichita*—the latecomer to the game—was the winner. The *Williams* case started in 1958 as an injunction against the City of Wichita and its hired drilling operator.[76] The plaintiff, Don Williams, was a farmer whose property value dropped after Wichita installed wells.[77] Because Schroeder and Fatzer were not involved in the lower court decision, they did not need to recuse themselves.[78] Still, the case took its time—and one interlocutory appeal up to the state's highest court—before getting there.[79]

B. Motivations of the Cities and the Rural-Urban Divide

Before addressing the decision, it is necessary to take a short detour to ask why small towns in Harvey and McPherson Counties were so against Wichita having municipal wells. This detour is necessary because its policy implications likely had a direct impact on the legal reasoning in *Williams*. Perhaps an initial reading of these cases leads to cynical economics—if Wichita is exporting water down to Sedgwick County, there would be less water for farmers to expand their operations in the future. Subsequent water regulatory schemes in areas like Colorado suggest differently.

As cities expand, they tend to use up water supplies in their near proximity.[80] In Colorado, the traditional solution for growing cities was to buy farmland and permanently convert the water rights from agricultural to

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[73] The main problem with interpreting *Knapp* as such is that its opinion explicitly noted that neither party challenged section 702, which dedicates all water in the state. State *ex rel.* Emery v. Knapp, 207 P.2d 440, 447 (Kan. 1949). Kansas courts do not consider the constitutionality of statutes "on [their] own motion." *Williams*, 374 P.2d at 598 (Schroeder, J., dissenting).

[74] *Baumann*, 145 F. Supp. at 625.

[75] *Williams*, 374 P.2d at 581 ("This court takes judicial notice of the many years of protracted litigation that has taken place in state and federal courts over Wichita's municipal well operations . . . and is of the opinion that a ruling here . . . will have a settling effect . . . .).

[76] Williams v. City of Wichita, 334 P.2d 353, 354 (1959).

[77] *See id.*

[78] *See id.*

[79] *Id.*

[80] Robert I. McDonald, Katherine Weber, Julie Padowski, Martina Flörke, Christof Schneider, Pamela A. Green, Thomas Gleeson, Stephanie Eckman, Bernhard Lehner, Deborah Balk, Timothy Boucher, Günther Grill & Mark Montgomery, *Water on an Urban Planet: Urbanization and the Reach of Urban Water Infrastructure*, 27 GLOBAL ENV'T. CHANGE 96, 96 (2014) ("Past research has shown that as cities grow in population, the total water needed for adequate municipal supply grows as well. . . . Cities by their nature spatially concentrate the water demands of thousands or millions of people into a small area, which by itself would increase stress on finite supplies of available freshwater near the city center.").

municipal use.[81] This process is called "buy-and-dry" because the cities buy the land and export the water elsewhere.[82] The rural counties with buy-and-dry deals saw steep declines in their local economies and property tax bases.[83] Since there were fewer productive farms and farmers to run them, the county towns hollowed out as well.[84] Dry farms mean fewer customers at the local feed store, fewer readers for the newspaper, and fewer people getting a nice dinner in town.

In the present, *Williams*'s particular conflict over the Equus Beds is done,[85] but the rural-urban divide persists.[86] One of the long-term ethical dilemmas posed by legislating water use conservation is that it preserves water for the future. But such legislation denies people in the present self-determination—something the Kansas Groundwater Management District Act poetically describes as, "the right of local water users to determine their destiny."[87] There

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[81] Peter D. Nichols, Leah K. Martinsson & Megan Gutwein, *All We Really Need to Know We Learned in Kindergarten: Share Everything (Agricultural Water Sharing to Meet Increasing Municipal Water Demands)*, 27 COLO. NAT. RES. ENERGY & ENV'T. L. REV. 197, 200 (2016).

[82] *Id.*; *see* Kate Mailliard, *Expanding Pockets, Shrinking Farms: How the Buy and Dry Method Created Vulnerability in the Farming Labor Market*, 22 U. DENV. WATER L. REV. 723 (2019); Liz Baker, *In Colorado, Farmers and Cities Battle Over Water Rights*, KAN. PUB. RADIO (May 28, 2016, 5:07 PM), https://www.npr.org/2016/05/28/479866079/colorado-towns-farmers-battle-over-water-rights [https://perma.cc/Y3XD-E4BZ]; *but see* Ryan McLane & John Dingess, *The Role of Temporary Changes of Water Rights in Colorado*, 17 U. DENV. WATER L. REV. 293, 294–95 (2014).

[83] Nichols et al., *supra* note 81, at 197.

[84] Baker, *supra* note 82.

[85] The City of Wichita now gets much of its water from Cheney Reservoir, built in the 1960s. *History, Wichita Project*, BUREAU OF RECLAMATION, https://www.usbr.gov/projects/index.php?id=403 [https://perma.cc/HEK8-9YSC]. The rest of Wichita's water still comes from the city's municipal wells in the Equus Beds. Amy Bickel, *Data Indicates that Water Levels Up at Equus Beds Aquifer, Other Sites, but Ogallala still Ails*, HUTCHINSON NEWS (Feb. 15, 2017, 12:01 AM), https://www.hutchnews.com/news/20170214/data-indicates-that-water-levels-up-at-equus-beds-aquifer-other-sites-but-ogallala-still-ails [https://perma.cc/KTY5-BHSD]. Despite additional water coming from the Cheney Reservoir, another cold war over the Equus Beds began thirty years after the *Williams* decision. After the droughts in the mid-1990s, Wichita began pursuing an Aquifer Storage and Recovery (ASR) Project, in which it could inject excess stormwater from the Arkansas River back into the aquifer. Amy Bickel, *Wichita's Quest for Water During Drought Draws Concerns from Farmers*, HIGH PLAINS J. (July 17, 2018), https://www.hpj.com/ag_news/wichita-s-quest-for-water-during-drought-draws-concerns-from-farmers-others/article_70c02a88-86ab-11e8-ba56-df6b4ae686e2.html [https://perma.cc/PJ2W-45FH]. The project was controversial—in large part because of concerns over how it would affect a large salt plume headed toward the Wichita well field. *Id.* There is ongoing litigation over how the ASR project impacts water credits. *See* Memorandum of Support for Revised Motion for Summary Judgment, In the Matter of the City of Wichita's Phase II Aquifer Storage and Recovery Project in Harvey and Sedgwick Counties, Kansas, Sept. 25, 2019, 2019-09-25_memo-in-support-of-rev-sj-signed.pdf [https://perma.cc/RA2Z-393E].

[86] For a more thorough coverage of the rural-urban divide, *see* Ann Eisenberg, *The Bundys are Poster Boys for America's Rural/Urban Divide*, L.A. TIMES (Nov. 23, 2017, 4:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-eisenberg-bundy-trial-las-vegas-20171123-story.html [https://perma.cc/X3YM-TXP3].

[87] Kansas Groundwater Management District Act of 1972, ch. 386, § 1, 1972 Kan. Sess. Laws 1416 (codified at KAN. STAT. ANN. § 82a-1020 (West 1972)).

is also the practical reality that water may be preserved for the future, but there may be no one living in rural Kansas to enjoy it. Instead, "it is likely that the groundwater saved and conserved for the future [will] eventually be pumped for municipal use, not irrigation."[88]

While reading popular accounts on groundwater mining, one sometimes gets a sense of naïve realism.[89] Naïve realism is the perception that one's beliefs are objective and that those who disagree are either ignorant or irrational.[90] For example, in one 2011 *New York Times* op-ed, the author asserted: "The true threat is . . . agriculture as it's currently practiced on the Great Plains by the farmers themselves . . . . The aquifer is being wasted and polluted."[91] The reality is that farmers are often acutely aware of their irrigation's costs. As a Kansas farmer noted, "People think that we waste our water out here . . . and we just kind of grin because we work so hard to use that water."[92]

Still, city dwellers have a point. Kansas farmers have been traditionally slow to act to prolong depleted water supplies.[93] And Kansas government has been slow to stop them.[94] Without some outside authority, the state risks its

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[88] John C. Peck, *Groundwater Management in the High Plains Aquifer in the USA: Legal Problems and Innovations*, *in* THE AGRICULTURAL GROUNDWATER REVOLUTION: OPPORTUNITIES AND THREATS TO DEVELOPMENT 304 (M. Giordano & K.G. Villholth eds. 2007).

[89] Bill Conerly, *Water in Abundance, At a Price: Our Grandchildren's Economy*, FORBES (Jan. 18, 2020, 7:30 AM), https://www.forbes.com/sites/billconerly/2020/01/18/water-in-abundance-at-a-price-our-grandchildrens-economy/#26e51ef41a68 [https://perma.cc/EPD8-T9D3]; Brad Plumer, *How Long Before the Great Plains Runs Out of Water?*, WASH. POST (Sept. 12, 2012, 9:20 AM), https://www.washingtonpost.com/news/wonk/wp/2013/09/12/how-long-before-the-midwest-runs-out-of-water/ [https://perma.cc/6PPL-HNGP]; *contra* Jim Malewitz, *In Drought Ravaged Plains, Efforts to Save a Vital Aquifer*, PEW CHARITABLE TRS. (Mar. 18, 2013), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/03/18/in-drought-ravaged-plains-efforts-to-save-a-vital-aquifer [https://perma.cc/8WY3-AAP7]; *see also* Amy Hardberger, *Water is a Girl's Best Friend: Examining the Water Valuation Dilemma*, 62 KAN. L. REV. 893, 928 ("Farmers are often maligned for their water use quantities and frequent wasteful practices; however, when water is diverted to cities, it is for all municipal uses . . . .").

[90] Leaf Van Bowen, *Naïve Realism*, *in* ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY (Roy F. Baumeister & Kathleen D. Vohs eds., 2007), https://sk.sagepub.com/reference/socialpsychology/n359.xml [https://perma.cc/6G2D-8KNQ].

[91] Julene Blair, *Running Dry on the Great Plains*, N.Y. TIMES (Nov. 30, 2011), https://www.nytimes.com/2011/12/01/opinion/polluting-the-ogallala-aquifer.html?_r=1& [https://perma.cc/6TU5-S78R].

[92] Lindsay Wise, *A Drying Shame: With the Ogallala Aquifer in Peril, the Days of Irrigation for Western Kansas Seem Numbered*, KAN. CITY STAR (July 24, 2015, 4:27 PM), https://www.kansascity.com/news/state/kansas/article28640722.html [https://perma.cc/WP6N-8DV5].

[93] Karen Dillon, *Running Out of Water, Running Out of Time, Ch. 7*, KAN. LEADERSHIP CTR. J. (2018), https://klcjournal.com/in-dealing-with-the-ogallala-aquifer-western-kansas-is-running-out-of-water-and-time/ [https://perma.cc/55DV-NUA] ("Critics, including environmentalists, say that the odds against Brownback's control-your-own-destiny path to conserving the aquifer are just too daunting . . . . Unless irrigators are given clear incentives or punishments to adjust their behavior, very little will change, other activists say.").

[94] In the time since the passage of KWAA, parts of the Ogallala Aquifer have declined over 60% from its original saturation. DONALD O. WHITTEMORE, JAMES J. BUTLER, JR. & B. BROWNIE

groundwater becoming a victim to the tragedy of the commons.[95]

In his 1960 report on Kansas water law, Professor Earl Shurtz commented on the "neglect of interrelatedness of economic activities [in] conservation policies."[96] While Shurtz was referring more to the need to create conservation programs that considered activities like oil and gas,[97] the sentiment can also apply here. When developing a conservation policy, some of the first questions should be (1) what are we saving water for and (2) for whom are we saving it? If the ultimate policy decision is that the water must be conserved for municipal or nonagricultural uses, then so be it. But that decision needs to come with recognition that there are ethical implications of telling rural residents to stop irrigating or telling residents to move away from their communities to solve their problems.[98]

As a final take away on the rural-urban policy dynamic in *Williams*, this divide plays directly into the jurisprudence underpinning the arguments. As scholar Ann Eisenberg has written,

> Property rights are a key symbol of the urban/rural divide. According to social science and legal scholarship, rural residents are more likely to associate land with absolute ownership . . . . Urban residents, on the other hand, are more used to obeying rules that limit property freedoms to make city life more livable for all.[99]

WILSON, KAN. GEOLOGICAL SURV., STATUS OF THE HIGH PLAINS AQUIFER IN KANSAS 3 (Tech. Series 22, 2018), https://www.kgs.ku.edu/Publications/Bulletins/TS22/ (showing a map of the decline at Figure 4). As Kansas water law practitioner Dave Stucky has written, "Most places in Kansas are, simply put, over-appropriated." David Stucky, *How Does the Division of Water Resources Determine Whether to Grant a New Water Right?*, KAN. WATER L. (Aug. 30, 2019), https://kswaterlaw.com/how-does-the-division-of-water-resources-determine-whether-to-grant-a-new-water-right/ [https://perma.cc/5XD7-ETG9].

[95] *See* SHURTZ, 1960, *supra* note 47, at 9. ("The inadequacy of our concepts of private property in the allotting of common supplies often leads to greedy scrambles . . . .").

[96] SHURTZ, 1960, *supra* note 47, at 8; *Cf.* Karen Dillon, *Running Out of Water, Running Out of Time, Ch. 4*, KAN. LEADERSHIP CTR. J. (2018), https://klcjournal.com/in-dealing-with-the-ogallala-aquifer-western-kansas-is-running-out-of-water-and-time/ [https://perma.cc/55DV-NUA] ("But the situation isn't only about politics. It's also about economics, and the consequences can be felt all the way down to the level of the family farm.").

[97] SHURTZ, 1960, *supra* note 47, at 8.

[98] *See* Ann M. Eisenberg, *Distributive Justice and Rural Americ*a, 61 B.C.L. REV. 189, 212 (2020) ("This line of thinking also raises the question of whether it is ethically objectionable to mandate mobility, or whether the onus is on public entities to provide basic services to existing communities . . . ."); *see also,* Karen Dillon, Kan. Leadership Ctr., *Chapter 1, in* RUNNING OUT OF WATER, RUNNING OUT OF TIME: DEALING WITH THE OGALLALA AQUIFER IN WESTERN KANSAS (2018), https://klcjournal.com/in-dealing-with-the-ogallala-aquifer-western-kansas-is-running-out-of-water-and-time/ [https://perma.cc/X3Q4-JGPL] ("Instead of just fighting over who gets to use water, we're increasingly in conflict over who doesn't get to use it and who decides that.").

[99] Eisenberg, *supra* note 86.

IV. THE *WILLIAMS* DECISION

Into this litigious and social fray comes Justice Fatzer's *Williams v. City of Wichita* opinion. To set the stage for the intellectual conflict in the split decision, Harold R. Fatzer was a life-long public servant.[100] He grew up in the small town of Fellsberg and after graduating from Kansas State University and Washburn School of Law, he returned home to Edwards County to be the county attorney.[101] Eventually, he was appointed the Attorney General of Kansas in 1949 by Republican Governor Frank Carlson.[102] In this role, his office had the dubious obligation of representing the state in *Brown v. Board of Education*.[103] Governor Fred Hall appointed him to the Kansas Supreme Court in 1956.[104]

Justice Alfred Schroeder authored the *Williams*' dissent. Like Fatzer, Schroeder grew up in a small town and later rose to Chief Justice of the Kansas Supreme Court.[105] Also like Fatzer, Schroeder's tenure as Chief Justice was marked by an intense drive to modernize the state's judicial system.[106]

And yet, Schroeder was his own man. He grew up in Newton along the Equus Beds[107] and majored in agricultural economics at Kansas State University.[108] From there, he attended Harvard Law.[109] After returning to Harvey County, he was elected Probate Judge in 1946 and then District Court judge of Harvey and McPherson Counties in 1952.[110] He successfully ran for the Kansas Supreme Court in 1957—beating out Fatzer's protégé in the state Attorney General's office, Paul Wilson.[111] Schroeder was a staunchly conservative judge and a farmer at heart. After he retired, he lived at his Greenwood County ranch until his death.[112]

The background on these judges is necessary for two reasons. First, both men make appearances in the litigation leading up to *Williams*—Fatzer

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[100] S*ee generally* Washburn Law Journal Editors, *Dedication*, 7 WASHBURN L.J. 0 (1967).
[101] *Id.*
[102] *Id.*
[103] LEE, SUNFLOWER JUSTICE, *supra* note 66, at 165; After the United States Supreme Court issued its *Brown* decision, Fatzer wrote to Chief Justice Earl Warren to congratulate him on his opinion. Letter from Harold Fatzer to Chief Justice Earl Warren (May 20, 1954), https://www.kansasmemory.org/item/211844/page/1 [https://perma.cc/5PSU-DA3C]. Fatzer wrote that: "[His] office felt constrained to attempt to sustain the Kansas statute as it had theretofore interpreted by the Kansas Supreme Court." *Id.*
[104] Washburn Law Journal Editors, *supra* note 100.
[105] *Schroeder Serves Decade as Chief Justice*, 56 J. KAN. B. ASS'N 7 (1987).
[106] *Id.*; *The Hon. Harold R. Fatzer 1910-1989*, 58 J. KAN. B. ASS'N 14 (1989).
[107] *Schroeder Serves Decade as Chief Justice*, *supra* note 105, at 7.
[108] *Alfred Schroeder*, KAN. STATE UNIV, https://www.ageconomics.k-state.edu/alumni-resources/distinguished_alumni/alfred-schroeder/index.html [https://perma.cc/N5S6-WDL3].
[109] *Schroeder Serves Decade as Chief Justice*, *supra* note 105, at 7.
[110] *Id.*
[111] *Id*.; Sandra Craig McKenzie, *Paul Wilson: Kansas Lawyer*, 37 U. KAN. L. REV. 1, 22, 53 (1988). Wilson is now better known as one of the most distinguished law professors to ever grace the University of Kansas Law School faculty.
[112] *See Schroeder Serves Decade as Chief Justice*, *supra* note 105, at 7; *Former Kansas Chief Justice Dies*, IOLA REG., Sept. 9, 1998, at 2.

defending the Division of Water Resources and Schroeder as a lower court judge.[113] Second, it gives some context on their judicial philosophies. As historian R. Alton Lee has noted about this period of Kansas judicial history:

> [H]istorical background is vital not only because it was within this context that judges shaped Kansas law, but also because the political processes involved them directly, as they were nominated by political parties, campaigned for political office, and sometimes participated in partisan activities while on the bench until the mid-twentieth century.[114]

Justice Fatzer formed his opinion as a former state attorney general and was perhaps more favorable to the interests of urban Kansans, while Justice Schroeder was perhaps more interested in the consequences to the Kansas farmers bearing the brunt of the Act's effects.

A. Fatzer's Majority

The majority asserted that prior courts were simply confused about the nature of groundwater rights.[115] As Justice Fatzer wrote, "the confusion . . . in our decisions that has resulted in the application of the common-law rule may be attributed to a lack of understanding of the meaning of the term 'ownership.'"[116] Rather than having ownership over the corpus of groundwater—as Kansans had since before the state entered the Union—property owners only had a license to the water.[117] Because they only had a license, the state did not need to compensate landowners or provide them notice when those rights could be abridged.[118]

The court reasoned that it was not possible for landowners to have physical possession of every water molecule under a piece of property. Quoting from a Corpus Juris Secondum section, Judge Fatzer wrote, "There can be no ownership in seeping and percolating waters in the absolute sense, because of their wandering and migratory character, unless and until they are reduced to the actual possession…of the person claiming them."[119] Justice Fatzer went on to say, "the use of the term 'ownership'…has never meant that the overlying owners had a property or proprietary interest in the corpus of the water itself."[120]

The majority acknowledged that having water rights—unused or otherwise—adds value to the land.[121] Losing those rights completely could be a

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[113] Cities of Hesston & Sedgwick v. Smrha, 293 P.2d 241, 241 (Kan. 1956).
[114] LEE, SUNFLOWER JUSTICE, *supra* note 66, at xii.
[115] Williams v. City of Wichita, 374 P.2d 578, 587 (Kan. 1962).
[116] *Id.*
[117] *Id.* at 588.
[118] *Id.* at 595.
[119] *Id.* at 588 (quoting 93 C.J.S. Waters § 90, p. 765).
[120] *Id.*
[121] *Id.* at 594.

taking.[122] Justice Fatzer distinguished the 1945 Act by asserting that the Act did not require surface owners to seek a permit before drilling a well.[123] Instead, it merely subjected them to the "hazard of injunction" should they drill and impair some other permit that the state had granted.[124] Instead of a vested property right, landowners have the privilege of using the state's water.[125] And privileges can be taken away.

The court concluded with some language about its neutral role in this litigation saying, "it is not for this court to decide matters of policy, nor indeed, to weigh the beneficial results of any particular legislative policy . . . . It is our duty to declare the law as it exists. We are not responsible for its consequences."[126] Given that the 1945 Act was the direct result of a socio-political conflict between Wichita and its neighbors, this seems disingenuous. Almost every judicial decision is shaped by policy in some way. Even decisions decided on precedent are ultimately relying on another set of cases that made a policy decision. Nothing about the *Williams* litigation—from the judges penning the decision to the law—was truly neutral.

B. Schroeder's Dissent

Under the majority's opinion, landowners do not own groundwater because it is impossible to wholly reduce it to actual possession.[127] So why was Justice Schroeder so incensed to the point of implying the other judges were communists?[128] Schroeder's dissent can be broken down into two main critiques. First, he takes issue with majority's ownership classification for the corpus of water. Second, he thought the historical interplay between the state legislature and the courts showed a prior vested property interest.

1. Theories of Ownership

Before examining Schroeder's criticism on water ownership, it is necessary to step back and understand general theories of subsurface property. The common law maxim for subsurface ownership is *cuius est solum, eius est usque ad coelum et ad inferos* or "whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell."[129] In other words, if a property owner has ownership in

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[122] *Id.*

[123] *Id.* The state now requires landowners seek a permit before drilling a well due to a subsequent KWAA amendment. KAN. STAT. ANN. § 82A-711 (West 1999).

[124] *Williams*, 374 P.2d at 579; § 82A-711.

[125] *See id.* at 594–95.

[126] *Id.* at 594.

[127] *Id.* at 588.

[128] *Id.* at 596 (Schroeder, J., dissenting) ("If such *arbitrary* exercise of the *police power* of the state withstands the federal constitutional test of due process, the formula has been found, and the precedent is established, by which all private property within Kansas may be *communized* without cost to the state.").

[129] ALISON CLARKE, PRINCIPLES OF PROPERTY LAW 284 n.69 (2020). This sentiment was more mockingly described by William Empson in the 1920s:

> Your rights extend under and above your claim
> Without bound; you own land in Heaven and Hell;

fee simple, they own everything underneath the surface. That includes gravel, sand,[130] precious minerals, uranium,[131] and even the void pore spaces in the subspace.[132]

The discovery of oil and gas threw a proverbial wrench into this concept. One of the early concerns in oil and gas was that other producers could commit subsurface trespass or conversion.[133] In other words, producers could drill near a property line and steal hydrocarbons that had previously been underneath the adjacent property.[134] Hydrocarbons, like water, are migratory, and it can be difficult—if not impossible—to know their exact movements through the subsurface.[135]

To resolve these disputes, state courts adopted one of two variants of the *ad caelum* doctrine. In "ownership in place" states, landowners physically own every hydrocarbon molecule underneath their property.[136] Once the molecules leave their property, they no longer own them.[137] In "exclusive right to take" states, property owners own an exclusive license to take any hydrocarbons while the molecules are in the bounds of their property.[138] But since the property owner cannot physically control the individual molecules, the property owner can only "own" them upon capture.[139] As a final gloss, jurisdictions following either theory tend to recognize oil and gas leases as granting a *profit a prende*, or an exclusive right, for the operator to take oil and gas off the property.

In the oil and gas context, while the theories are different, the practical application is usually the same as it is rare to see a landowner totally barred from drilling. That is why scholars like Professor E. Kuntz have said that the difference between the ownership in place and exclusive right to take theories is

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Your part of earth's surface and mass the same,
Of all cosmos' volume, and all stars as well.

William Empson, *Legal Fiction*, *in* IMMORTAL POEMS OF THE ENGLISH LANGUAGE 578 (Oscar Williams ed., 1958).

[130] *Cf.* Wulf v. Shultz, 508 P.2d 896, 899–900 (1973) (holding that fee simple owners did not bargain away the right to mine limestone and similar argillaceous materials when they signed an oil and gas lease).

[131] Moser v. U.S. Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (notoriously deciding whether uranium was included in a deed conveyance).

[132] See Joseph A. Schremmer, *Pore Space Property*, 2021 UTAH L. REV. 1, 14 (2021), for a more thorough explanation of pore-spaces and its ownership.

[133] William Lyndon Storey, *Oil and Gas-Deviation of Wells from the Vertical-Liability for Subsurface Trespass*, 16 TEX. L. REV. 543, 545–46 (1938).

[134] *Cf. id.*

[135] "Hydrocarbon: An organic chemical compound of hydrogen and carbon, called petroleum. The molecular structure of hydrocarbon compounds varies from the simplest, methane (CH_4), a constituent of natural gas to the very heavy and very complex." PATRICK H. MARTIN & BRUCE M. MARTIN, WILLIAM & MEYERS, 8 OIL & GAS L. § 482.2 (LexisNexis Matthew Bender 2020).

[136] E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 2.4, 58 (1987); BLACK'S LAW DICTIONARY 1215–16 (9th ed. 2009).

[137] KUNTZ, *supra* note 136, § 2.4 at 58.

[138] *Id.*

[139] *Id.*

like describing a checkered pattern.[140] Regardless of if one describes the pattern as black squares on white or white squares on black, the result is the same.[141] As such, many states have tempered their theoretical approaches over the years. For example, Texas—the long champion of the ownership in place theory[142]—softened its stance in cases like *Coastal Oil and Gas Corp. v. Garza Energy Trust*.[143] But none of these developments had happened in 1962, at the time of the *Williams* decision.

Kansas is an ownership in place state.[144] In fact, the Kansas Supreme Court had reaffirmed its commitment to this rule nine months before it issued the *Williams* decision in *Shepard v. John Hancock Mutual Life Insurance Co.*[145] In that case, the court distinguished between royalty interests and mineral interests for the purposes of construing a deed.[146] Royalty interests are a type of personal property interest created by oil and gas leases.[147] In contrast, mineral rights, or subsurface rights, means present real ownership of subsurface hydrocarbons.[148] Justice Fatzer incidentally wrote this opinion.[149]

In summary, in 1962, Kansas landowners "owned" every hydrocarbon in the subterranean space of their property. This was true even though hydrocarbons are migratory and property owners could not physically possess every hydrocarbon molecule in the subsurface. In contrast, the *Williams* majority found landowners did not own their groundwater because water is migratory and property owners cannot physically possess every water molecule in the subsurface.[150] Unlike with right to take states with oil disputes, this ownership distinction mattered.

Justice Schroeder took issue with this dichotomy. As he hinted in a dissent he wrote several years after *Williams*, Schroeder perceived the entire subsurface as real property, and he balked at any characterization that limited this.[151] If a substance was naturally occurring and underground, it was real property, and the

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[140] *Id.*
[141] *Id.*
[142] Patrick M. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 770, 802–03 (1992).
[143] Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 4 (Tex. 2008) (finding no trespass for fracing company whose fracing liquids went onto another property). Interestingly enough, Texas has not softened its stance on ownership-in-place ownership of groundwater. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 832 (Tex. 2012).
[144] N. Nat. Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 217 P.3d 966, 974 (Kan. 2009) (quoting Mobil Oil Corp. v. Kan. Corp. Comm'n, 608 P.2d 1325 (Kan. 1980)); *see* Richards v. Shearer, 64 P.2d 56 (Kan. 1937).
[145] Shepard v. John Hancock Mut. Life Ins. Co., 368 P.2d 19, 24 (Kan. 1962) ("The term 'mineral interest' means an interest in and to oil and gas in and under the land and constitutes present ownership of an interest in real property.").
[146] *Id.*
[147] *Id.* at 23.
[148] *Id.* at 24.
[149] *Id.* at 21.
[150] Williams v. City of Wichita, 374 P.2d 578, 604 (Kan. 1962) (Schroeder, J., dissenting).
[151] Mobil Oil Corp. v. Kan. Corp. Comm'n, 608 P.2d 1325, 1338 (Kan. 1980).

government needed to compensate landowners for taking it away.

With this theory in mind, Schroeder vigorously disagreed with the majority's migratory particle argument. First, he commented that since "water is homogeneous in character," the loss of particular water molecules is irrelevant.[152] If one gallon of water moves to the south of a property line, there is likely another gallon coming into the property in the north.[153] Schroeder goes on to say that there are other examples for commodities where one does not need actual possession in order to own its corpus.[154] For example, if a farmer deposits wheat to a grain elevator and receives a warehouse receipt in exchange, the farmer has a property right to that grain.[155] It does not matter that the grain is fungible and that the farmer will be unable to withdraw the exact kernels that she deposited.[156]

In summary, Justice Schroeder found the majority's characterization of the corpus of water inconsistent with Kansas's other theories of subsurface ownership. In fairness to his position, even if one disagrees with the application of the ownership in place theory to groundwater, it still needs to be addressed due to the theory's ubiquity in Kansas caselaw. For the majority to ignore it makes the exclusion seem purposeful and suggests they knew it was a weakness to their argument.

2. Historical Underpinnings to the Schroeder Dissent

To bolster his criticism of the majority's ownership theory, Justice Schroeder looked to the historical understanding of water rights in Kansas and other western states. After citing to various Kansas cases that had explicitly referred to water rights as real property,[157] he noted that the text of KWAA suggested that the state legislators were aware their actions affected valuable property rights.[158] Particularly damning in Schroeder's view was that the City of Wichita itself acknowledged unused water rights were real property when it acquired additional well sites in 1953.[159] Wichita bought the water rights from a

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[152] *Williams*, 374 P.2d at 604.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* at 604–05.
[157] *E.g.*, *id.* at 596 (citing State *ex rel.* Peterson v. Kan. Bd. of Agric., 149 P.2d 604 (Kan. 1944)); *id*. at 597 (citing Arensman v. Kitch, 165 P.2d 441 (Kan. 1946)); Clark v. Allaman, 80 P. 571, 578–79 (Kan. 1905).
[158] *Williams*, 374 P.2d at 599 ("The legislature, however, recognized that *private property rights* to 'unused' water were taken from the common law owners in 82a-702."). It was apparent at the time that at least the Equus Bed water rights were valuable. As one contemporary news article explained,

> An equus bed farmer, at least in years past, had no holes in his socks, his bank account didn't need replenishing every Monday, and he thought a 12-bushel corn crop was a flat failure. His land was fertile and his reputation as a good farmer was secure, but essentially the difference between the equus bed farmer and his kind in other parts of Kansas was answered by one word—water.

Gene Byer, *'Equus Farmer' Position Shaken*, PARSONS SUN 5 (Sept. 1, 1954).
[159] *Williams*, 374 P.2d at 601.

Harvey County farming couple.[160] In the water rights assignment, the landowners conveyed, "[a]ll of the water bearing sands and water rights now, or at any time . . . in or under said tracts . . . ."[161] Schroeder took this as Wichita's apparent lack of faith in KWAA's constitutionality.[162] Given that landowners in Harvey County had been fighting Wichita's well field expansion to the point it led to the passage of KWAA, the city cannot be blamed for being cautious contract drafters.

This value-based analysis tracks with more recent Kansas takings decisions. In *Creegan v. State*, landowners challenged the state transportation agency's violations of a restrictive covenant as a taking.[163] The Kansas Court of Appeals focused most of its analysis on whether there was a physical taking.[164] The Kansas Supreme Court noted that the real question was whether "the right to a certain amount of legal control . . . was vaporized. This right . . . was one of the 'sticks' in the valuable 'bundles of sticks' [the plaintiffs] paid for when they acquired their land."[165]

The dissent also highlighted the difference between Kansas and other states that had adopted permitting schemes that included groundwater. Most of the states with regulated prior appropriation schemes were populated by the Desert Land Act of 1877.[166] The Desert Land Act had a water provision that subsequent courts interpreted to mean that the federal government had not given individual property owners ownership over water rights, but delegated ownership to the states.[167] Kansas was not admitted under the Desert Land Act, and property owners got their water rights directly from United States patents.[168] Since Kansas technically never owned the groundwater, the state could not claim ownership a hundred years later like L. Frank Baum's Ozma telling Dorothy she was the real ruler of Oz all along.[169]

Schroeder's ideas about the Desert Land Act have not been discussed in depth in the legal literature, and to do so here would be beyond the scope of this article. In the thirteen states where the Desert Land Act applies,[170] they all have

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[160] *Id.*

[161] *Id.* Schroeder also highlighted other sections of the deed as evidence. To avoid rehashing Schroeder's argument, this article omits every deed section that the justice ably handled there.

[162] *Id.* at 602.

[163] Creegan v. State, 391 P.3d 36, 36 (Kan. 2017).

[164] *Id.* at 43.

[165] *Id.*

[166] *Williams*, 374 P.2d at 603; Desert Land Act of 1877, ch. 107, § 3, 19 Stat. 377 (codified at 43 U.S.C.A. § 323 (West 1921)); *see also* Memorandum for the Assistant Att'y. Gen., Land & Nat. Res. Div., *Federal "Non-Reserved" Water Rights*, 348 n.38 (1982).

[167] *Williams*, 374 P.2d at 604.

[168] *Id.*

[169] L. FRANK BAUM, THE MARVELOUS LAND OF OZ 270 (1904).

[170] California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. Dessert Land Act, § 3. But note that not all of property in California was distributed under the Desert Land Act—leading to some of the state's water law battles.

fairly settled prior appropriation systems. In contrast, Nebraska, Oklahoma, and Texas—which like Kansas, are not covered by the Desert Land Act—have all struggled over water ownership and takings issues.[171]

The main takeaway from Schroeder's historical discussion is that once something has been established as a property right, it is difficult and potentially unconstitutional to do away with it without compensation.[172] The police power is broad, but Schroeder believed that "[t]here are acts which the federal or state legislature cannot do without exceeding their authority. They may not violate the right of private property."[173]

As a final note on Justice Schroeder, he remained adamant in his view of groundwater ownership long after his *Williams* dissent. Nearly twenty years after *Williams*, he once again dissented from the majority in the last major constitutional challenge to KWAA, *Arthur Stone (and) Sons v. Gibson*.[174] Even if people disagree with Schroeder's conception of property rights, they must at least admire his consistency. Considering his role in the trial courts for Harvey and McPherson Counties, he essentially opposed the 1945 Act as a judge for over twenty-five years.

V. WAYS FORWARD BEYOND *WILLIAMS*

Justice Schroeder raised valid concerns about KWAA's constitutionality in his dissent that Kansas courts have never fully dealt with. Notably, in a later case on KWAA's constitutionality, the court noted Schroeder's "vigorous" dissent before extensively quoting from the *Williams* majority—thereby acknowledging the tenor of Schroeder's words without dealing with his argument.[175] So with sixty years of perspective and more water litigation on the horizon as the Ogallala Aquifer dries out,[176] what are actual answers to Schroeder's concerns?

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[171] Wasserburger v. Coffee, 141 N.W.2d 738 (Neb. 1966); Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972 (Cal. 1935); Franco-American Charolaise v. Okla. Water Res. Bd., 855 P.2d 568 (Okla. 1990); DAVID H. GETCHES, SANDRA B. ZELLMER & ADELL L. AMOS, WATER LAW: IN A NUTSHELL 197 (5th ed. 2015).

[172] *Williams*, 374 P.2d at 609; *but see id.* at 589. The majority bypassed this by clarifying that a property right had never been established.

[173] *Id.* (citing Calder v. Bull, 3 U.S. 386 (1786)).

[174] F. Arthur Stone & Sons v. Gibson, 630 P.2d 1164, 1174 (Kan. 1981) (Schroeder, J., dissenting). Justice Schroeder ended his dissent with a bit of irony:

> I am the only present member of the Kansas Supreme Court who participated in that decision. Here, ironically, counsel for the Kansas State Board of Agriculture argues *stare decisis* to uphold Supreme Court decisions since 1962, whereas the identical argument was made by the landowner Williams to uphold decisions of the Supreme Court prior to 1962 to affirm the trial court and have the Act declared unconstitutional, when *Williams v. City of Wichita* was decided.

Id. at 1175–76.

[175] *Id.* at 1170 ("The Act . . . was found constitutional . . . in Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962), an exhaustive opinion to which Justice Schroeder, now Chief Justice Schroeder, *vigorously* dissented . . . .") (emphasis added).

[176] The Kansas Division of Water Resources is reviewing a dispute between Groundwater Management District No. 2 and the City of Wichita. *See* WICHITA ASR, KAN. DEP'T OF AGRIC.,

This section provides three potential solutions. As noted in the subsections, none of these theories are sufficient on their own. Rather, a court would likely need to use some hybrid combination in supporting its decision.

A. Water is different because it is important.

When I initially posed the question of how water could be distinguished from the rest of the subsurface to other observers of water law, the first response I received was that water was just different and more important than the rest of the underground.[177] This is a valid point. After all, people can still use real property if they pump all the hydrocarbons out. It is much more difficult to develop property without water. And since the state would never be able to afford compensating all of Kansas for their water rights, landowners must go without. Stated more directly, this argument is that the courts must treat water as a license for reasons of public policy.

It would not be the first time that the Kansas Supreme Court has taken a position contrary to the rest of its property law for public policy reasons. In *Jason Oil v. Littler*, the court recently rejected applying the rule against perpetuities to term mineral interests based on public policy grounds.[178] Even though applying the rule against perpetuities would be logically correct, it would upend decades of Kansas oil and gas deals.[179] Given that *Williams* has now been the rule for sixty years, it could be justified in saying public policy merits treating water as a license.

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https://agriculture.ks.gov/divisions-programs/dwr/managing-kansas-water-resources/aquifer-storage-and-recovery/wichita-asr [https://perma.cc/ZK2J-GPWH]. The Audubon of Kansas is also in litigation with the agency over water right enforcement for the Quivira Wildlife Refuge. *Audubon of Kansas Files Suit to Restore Quivira National Wildlife Refuge's Water Rights*, AUDUBON OF KAN. (Jan. 18, 2021), https://www.audubonofkansas.org/aok-news.cfm?id=218 [https://perma.cc/6QMJ-XEV9]. Another case worth considering is Garetson Bros. v. Am. Warrior, Inc., 435 P.3d 1153 (Kan. 2019), *rev. denied* (Sept. 9, 2019). *Garetson* is notable because it was a water rights enforcement case. Enforcement cases are very rare due to their unpopularity. The Garetsons had a prima facia enforcement case—they had a prior vested water right and there was a clear impairment by a junior water user. *Id.* But they withdrew their initial complaint for years due to local outcry. *Id.* at 1158 (explaining that the Garetsons withdrew their complaint with DWR and refiled it several years later); Ian James & Steve Reilly, *Pumped Beyond Limits, Many U.S. Aquifers in Decline*, DESERT SUN (Dec. 10, 2015, 8:33 AM), https://www.desertsun.com/story/news/environment/2015/12/10/pumped-beyond-limits-many-us-aquifers-decline/76570380/ [https://perma.cc/4P4K-QMNK] (interviewing the Garetsons and describing how they received "death threats" after filing their complaint). The fact that water users reached the point where they would willingly sue another permit holder should be a warning sign for water law observers.

[177] I posed this question to water law practitioners from Kansas, Oklahoma, and Colorado. These conversations were informal and there was no expectation that I would be citing these people in a published article. Takings caselaw can be politically contentious. As such, I am protecting their privacy.

[178] Jason Oil Co. v. Littler, 446 P.3d 1058, 1066 (Kan. 2019) ("[E]xpanding the Rule to void the future interest following the reserved defeasible term mineral interest in this case serves no valid purpose or public policy, but rather it would be a nonsensical act of legal formalism.").

[179] *Id.*

Still, the fact that the first solution to the *Williams* problem is that the court should declare it so under some sort of judicial fiat is a sign of how the world has changed since 1962. Remember that in Justice Fatzer's majority, he explicitly denied that the court was making a policy decision.[180] While once eschewed, judicial policymaking has slowly become "standard and legitimate."[181] Of course, this begs the question of whether judges are the right people to make certain policy decisions.[182] This is the old legal formalism versus legal realism debate among constitutional law scholars.[183] Unlike in the 1950s, Kansas Supreme Court judges are not elected. That is why resource allocation policy questions are usually put in the hands of the executive and legislative branches.

In this case, the question is a little different from other legal process questions. The Kansas Legislature did make a policy decision to switch to a permitted groundwater system—they just decided not to compensate anyone for it. Is that a policy decision better left to the courts?

Also, any time that people argue that government should do something without compensating property owners because policy outweighs a particular property interest, it is worth returning to Justice Oliver Wendall Holmes's words in *Pennsylvania Coal Co. v. Mahon*:

> In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders…We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . . .[184]

KWAA was undoubtably a key step in conserving water for future Kansans, but it was also a political move that shifted the burden of Wichita's water woes onto its neighbors. Assuming, as this article does, that a vested property interest existed before *Williams*, this solution allows the Kansas Supreme Court to declare that interest nonexistent because the justices think it is good policy. And while it may be good policy for water conservation, policies abolishing property on policy alone are arguably a step toward tyranny.[185]

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[180] Williams v. City of Wichita, 374 P.2d 578, 594 (Kan. 1962).

[181] Edward L. Rubin & Malcolm M. Feeley, *Velazquez and Beyond: Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 617 (2003) ("This, of course, leaves an important question open. Judicial policy making may be standard and legitimate, but is it a good idea? This question is a crucial one in assessing the value of litigation against the government. Modem litigants very often go to court because they want to obtain a decision that declares new public policy, and they sometimes obtain such a decision whether they wanted it or not.").

[182] *See id.*

[183] *Id.* at 619–20.

[184] Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[185] *Williams*, 374 P.2d at 596 (Schroeder, J., dissenting) (implying the majority had "communized" private property).

B. Water is different because of its properties.

For the devotees of the ownership in place theory, another solution is to characterize water as different from subsurface minerals because of its properties. The majority in *Williams* notes that water in the Equus Beds flows at about three-acre feet a day.[186] Oil has a higher viscosity than water[187] which means that hydrocarbon particles migrate at a slower rate through the subsurface. In other words, hydrocarbons look more attached to the real property than water particles.

The Equus Beds do have a faster flow rate than other aquifers. For example, the east to west groundwater flow in the Ogallala Aquifer is about a foot per day.[188] That is still probably a faster rate than oil reservoirs. On the other hand, hydrocarbons and groundwater are both fluids that have usually mixed with other minerals and mixtures underground. Both require digging wells to access the resource, albeit considerably deeper in the case of oil.

Another option is to focus on the hydrological connection between surface and groundwater. There are no rivers of hydrocarbons—at least not naturally occurring ones.[189] The *Williams* majority made a passing attempt at this point, but it was more in reference to Schroeder's Desert Land Act discussion than as a justification for asserting water use is a license and not a property right.[190] Of course, there is also a lot more water on the planet than hydrocarbons.

Likewise, hydrocarbons do exist on the planet's surface naturally at petroleum seeps like the California Oil Sands.[191] Petroleum seeps are usually

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[186] *Id.* at 584.

[187] Water has a dynamic viscosity of 0.8949 centipoise at 25 degrees Celsius. *Water*, NAT'L LIBR. OF MED. ¶3.2.11 https://pubchem.ncbi.nlm.nih.gov/compound/water#section=LogP [https://perma.cc/SK9V-ABMC]. In contrast, Kansas crude oil has a much higher viscosity. *See* J. P. Everett & Charles F. Weinaug, *Physical Properties of Eastern Kansas Crude Oils*, KAN. GEOLOGICAL SURV. BULL. 114 (1955).

[188] EDWIN D. GUTENTAG, FREDERICK J. HEIMES, NOEL C. KROTHE, RICHARD R. LUCKEY & JOHN B. WEEKS, GEOHYDROLOGY OF THE HIGH PLAINS AQUIFER IN PARTS OF COLORADO, KANSAS, NEBRASKA, NEW MEXICO, OKLAHOMA, SOUTH DAKOTA, TEXAS, AND WYOMING 1 (1984), https://pubs.usgs.gov/pp/1400b/report.pdf [https://perma.cc/SD4C-7T7P].

[189] Let us just say that "Oil Creek" near where Colonel Drake struck oil earned its name. *See* LELAND R. JOHNSON, THE HEADWATERS DISTRICT: A HISTORY OF THE PITTSBURGH DISTRICT, U.S. ARMY CORPS OF ENGINEERS 123–24 (1979); DANIEL YERGIN, THE PRIZE 27–29 (1991).

[190] *Williams*, 374 P.2d at 588.

[191] ALEJANDRA BADIA & ERICK BURRES, A CITIZEN MONITOR'S GUIDE TO HYDROCARBONS § 2.0 (2010), https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/cwt/guidance/384.pdf [https://perma.cc/67HT-YAM9]. Humans have known about natural petroleum seeps for thousands of years. For example, the Dead Sea was called the Asphalt Lake by ancient writers and was the site of the "first known war for control of a hydrocarbon deposit" in 312 B.C.E. WILLIAM SMITH, DICTIONARY OF GREEK AND ROMAN GEOGRAPHY 10–11 (1854), http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0064:id=palaestina-geo ("Its common name among the classical authors . . . is "Asphaltitis Lacus" (ἀσφαλτῖτις λίμνη), or simply ἡ ᾽ασφαλτῖτις."); *see* Arie Nissenbaum, *Dead Sea Asphalts: Historical Aspects*, 62 AM. ASS'N PET. GEOLOGY BULL. 837 (1978), https://archives.datapages.com/data/bulletns/1977-79/data/pg/0062/0005/0800/083

caused by pressure systems in virgin reservoirs that move hydrocarbons to the surface where they mix with surface water.[192] That is why one of the early oil collection methods was to soak rags in rivers and streams.[193]

Also, while surface and groundwater are hydrologically connected, some aquifers are less connected to surface waters than others. The High Plains Aquifer, for example, exhibits poor connectivity to some of the alluvial aquifers.[194] For every water right in the Equus Beds that is fast flowing and connected to the Arkansas River, there is a water right on the High Plains Aquifer which is slow migrating and can be mined for economic benefit.

Neither the migration nor the connectivity theories are particularly satisfying solutions for Schroeder's broader point about historically vested property rights. Both would require a similar assumption that previous Kansas courts had never directly acknowledged real property ownership for water. It would at least bolster the theoretical position that the substances should be treated differently.

C. Water is a property interest, but it can be limited under the government's police power.

A third solution that is similar to the public policy option is to acknowledge that the property interest exists, but assert the interest can be limited under the police power without compensation.[195] The police power is the ability to "direct the activities of persons within [a government's] jurisdiction" in support of the general welfare and the public interest.[196] Local and state governments use the police power regularly on real property for things such as zoning.[197] It is also

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7.htm?doi=10.1306%2FC1EA4E5F-16C9-11D7-8645000102C1865D [https://perma.cc/7HNK-LJA6] (actual text noting the first hydrocarbon conflict).

[192] *See What Are Natural Oil Seeps?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/resources/what-are-natural-oil-seeps.html [https://perma.cc/BQ5K-KZXX].

[193] Ryan Schnurr, *The Oil Pipelines Putting the Great Lakes at Risk*, BELT MAG. (July 28, 2017), https://beltmag.com/oil-pipelines-great-lakes-risk/ [https://perma.cc/RT6F-W3DP] ("Along Oil Creek near Titusville, in northwestern Pennsylvania, small amounts of crude would percolate. To collect it, people soaked blankets in pools of oily water, wrung them into a pan, and boiled the mixture down. Sometimes they could skim oil right off the surface of the water.").

[194] P.A. Macfarlane, G. Misgna & R. W. Buddemeier, *Aquifers of the High Plains Region*, KAN. GEOLOGICAL SURV. (2000), http://www.kgs.ku.edu/HighPlains/atlas/ataqhpr.htm [https://perma.cc/YE5Y-RZE4].

[195] In fact, at least one source posits the police power was the reasoning behind the majority's decision. GETCHES ET AL., *supra* note 171, at 233 (citing *Williams*, 374 P.2d at 595 for the proposition that, "The police power is extensive enough to justify permit systems and strict regulatory schemes so long as vested property rights are respected.").

[196] William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1057 (1980); *see also* Gibbons v. Ogden, 22 U.S. 1 (1824) (first time coining the idea of the government's police power).

[197] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see also* Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENV'T AFFS. L. REV. 683, 683 (2001).

commonly used in oil and gas for governmental restrictions requiring permitting or well set back distances.[198] Using the police power in the oil and gas context is not new—there are law review articles about it going back to the 1930s.[199]

It is worth noting, however, that Kansas's justification for oil and gas regulation has its roots in a fundamentally different property assumption. Kansas regulates oil and gas as a way to protect correlative rights of reservoir owners.[200] In the early years of the oil and gas industry, operators drilled too many wells close together in the same formations.[201] This practice damaged the formations[202] and precipitated price crashes.[203] One of the solutions to this problem was a legal theory called correlative rights. Correlative rights, as described by scholar E. Kuntz, "is simply a term to describe such reciprocal rights and duties of the owners in a common source of supply."[204] This concept became "an explicit part of most state conservation regulation, be it pooling, unitization, spacing or proration."[205] In other words, the state of Kansas can regulate oil well-spacing as a way to regulate property owners with a common interest in a specific reservoir. It is not designating hydrocarbons as public property or prohibiting existing mineral owners from producing oil and gas.

Taking a step back from oil and gas regulation, the government's police power is broad, but it is not infinite. As Justice Holmes suggested in *Pennsylvania Coal Co.*, limitations or destructions on private property rights based on the police power can reach a point where they would constitute a taking under the Fifth and Fourteenth Amendments.[206] Likewise, Brandeis's famous

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[198] Joseph R. Dancy & Victoria A. Dancy, *Regulation of the Oil and Gas Industry by the Oklahoma Corporation Commission,* 21 TULSA L. J. 613, 630–31 (1986) ("The power to establish drilling and spacing units is an attribute of the police power inherent in every sovereign state."). *See generally* 1 SUMMERS OIL AND GAS Ch. 5 (3d ed.) (explaining setback regulations); 1 SUMMERS OIL AND GAS § 4:9 (3d ed.) (explaining the police power's role in early conservation statutes).

[199] *See generally* Elizabeth C. Davis, *Police Power: Validity of Oil and Gas Conservation Statutes*, 19 CAL. L. REV. 416 (1931) (examining the state of conservation statutes to prevent waste from overproduction).

[200] *See* Bay Petroleum Corp. v. Corp. Comm'n of Kan., 36 F. Supp. 66, 68 (D. Kan. 1940).

[201] *See* Owen L. Anderson, *The Evolution of Oil and Gas Conservation Law and the Rise of Unconventional Hydrocarbon Production*, 68 ARK. L. REV. 231, 232–39 (2015).

[202] Schremmer, *supra* note 132, at 31.

[203] Tara Kathleen Righetti & Joseph A. Schremmer, *Waste and the Governance of Private and Public Property,* 93 U. COLO L. REV. (forthcoming 2022) ("Such rapid production far exceeded the capacity of transportation facilities and the demands of the market, causing volatile and, at times, disastrously low prices.").

[204] E. Kuntz, *Correlative Rights of Parties Owning Interests in a Common Source of Oil or Gas*, *in* PROCEEDINGS OF THE SEVENTEENTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 225 (Armine Carol Ernst ed., 1966).

[205] Bruce M. Kramer, *Basic Conservation Principles and Practices: Historical Perspectives and Basic Definitions*, FED. ONSHORE OIL & GAS POOLING & UNITIZATION 1-1 (ROCKY MT. MIN. L. FOUND. 2006).

[206] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (allowing regulation of brickyards under the police power but noted that an absolute prohibition on the action would be an overreach); *but see* Miller v. Schoene, 276 U.S. 272 (1928) (allowing officials to cut down healthy cedar trees to prevent blight to orchards).

dissent in *Pennsylvania Coal Co.* focused on the government's ability to limit ownership where conduct causes a nuisance.[207] The Supreme Court of the United States added to this discussion in cases like *Penn Central Transportation Co. v. City of New York*[208] and *Agins v. City of Tiburon*.[209]

The *Penn Central* Court distinguished between physical and economic takings and found that physical invasions are more likely to be considered takings over interference "from some public program adjusting the benefits and burdens of economic life to promote the common good."[210] In *Agins*, the court created a two-part test which found land restrictions were not takings if the restriction "substantially advance[d] legitimate state interests," and the property owner was not denied "economically viable use of his land."[211] Economically viable is now typically understood as a restriction that makes the property right valueless.[212]

Under the *Agins* rule, then, large parts of KWAA such as requiring permits or well monitoring are valid exercises of the police power. It is less clear on whether actually denying permits would be a valid exercise of the police power. One of the goals of KWAA is to deny permits if there is not enough water in a basin or an aquifer to accommodate a new user. If a landowner has a preexisting property right to drill for water, the state can use the police power to make them register before they do it. If the state denies the permit and thus totally restricts the landowner's ability to exercise their unused water rights, then it has effectually made that right valueless.

One suggested solution for this problem is to treat these water rights as part of the larger bundle of sticks. While landowners would lose unused water rights, their properties would probably still be economically viable. There is an example of this in the pleadings for *Williams*. The plaintiff's injury was that his land value dropped from $300 per acre to $100 per acre after Wichita started drilling.[213] That meant he could not continue to irrigate corn and alfalfa, but the land was still worth something and he could continue to farm it.[214] Likewise, there are no investment expectation damages from denying a permit for unexercised water rights.

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[207] *Pa. Coal Co.*, 260 U.S. at 417 (Brandeis, J., dissenting); s*ee also* Robert M. Washburn, *Land Use Control, the Individual, and Society:* Lucas v. South Carolina Coastal Council, 52 MD. L. REV. 162, 181 (1993).
[208] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
[209] Agins v. City of Tiburon, 447 U.S. 255 (1980).
[210] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[211] *Agins*, 447 U.S. at 260.
[212] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) ("When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").
[213] Williams v. City of Wichita, 374 P.2d 578, 583 (Kan. 1962).
[214] *Id.*

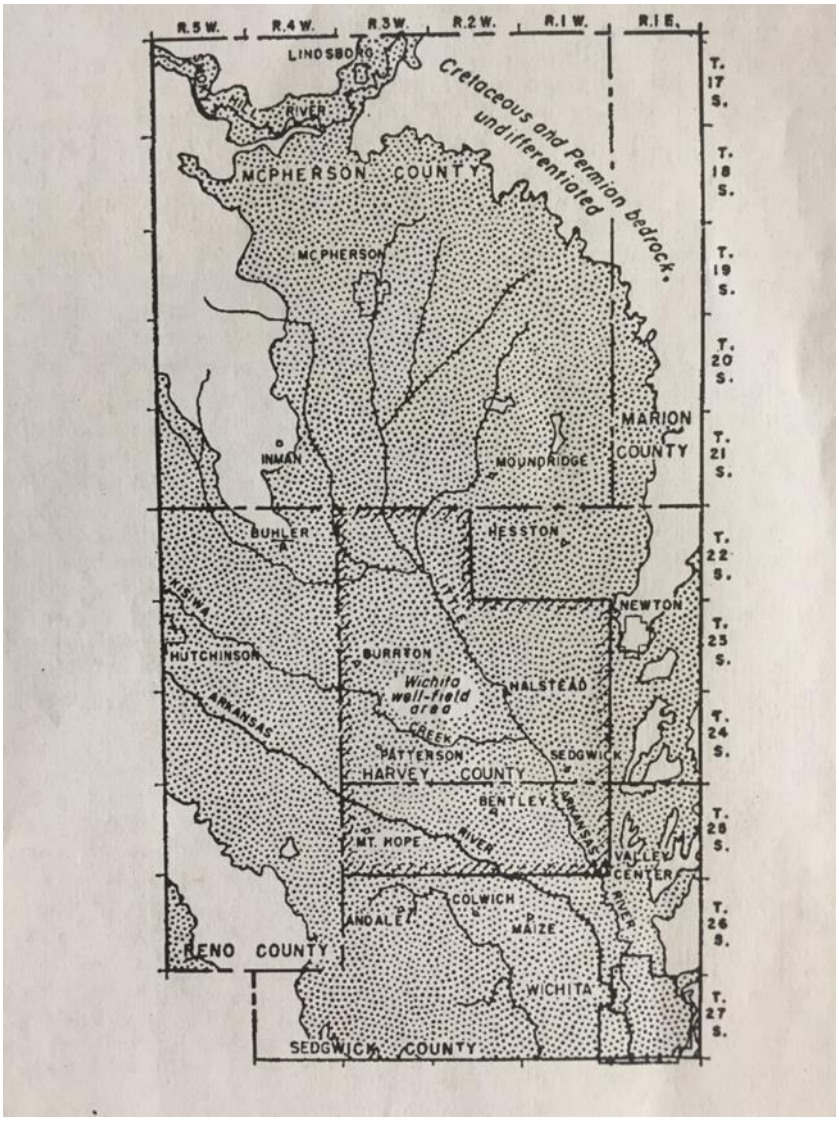
VI. CONCLUSION

Sixty years ago, the Kansas Supreme Court threw out the rule it had been using for groundwater and adopted a new one. In the time since *Williams*, some things have changed, but many others have not. Irrigators are still irritated by state actions they perceive as takings. Urban Kansans keep using water without questioning where it is coming from. And drop by drop, the groundwater in many of the state's aquifers is drying up.

If there is one lesson to take away from the historical and social background of *Williams*, it is that the state's regulation of water rights came out of a rural-urban divide going back to the 1930s. That rural-urban divide did not just shape the legislation, but it also shaped the jurisprudence of the judges writing the opinions.

As climate change and groundwater mining mean a shrinking amount of water to go around, it seems more litigation over it is inevitable. So, the next time that this issue makes it up to the state's highest court, let it be a chance to finally put *Williams*' inconsistencies to bed—if only because courts in other states are watching.

Appendix A: Map of the Equus Beds included in *Williams v. City of Wichita*[215]



[215] *Id.* at 592.