

ENVIRONMENTAL JUSTICE IN THE UNITED STATES: THE HUMAN RIGHT TO WATER

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Abstract:

Many low-income communities, communities of color, and indigenous communities in the United States are suffering from unequal access to safe and affordable water. This is partially the result of an ineffective and fragmented legal framework governing water issues in the country. In addition, the notion of a human right to water and sanitation, accepted internationally to reinforce and protect human needs related to water, has yet to be meaningfully recognized in the United States. This article sets out, first, to examine the legal framework governing access to freshwater in the United States and the concerns underlying the reluctance of the federal government and most states to acknowledge the human right to water and sanitation as a legal right. The article then assesses the potential of such recognition to promote laws and policies that would ensure water justice for vulnerable or disadvantaged communities across the United States.

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I. INTRODUCTION

Inequities and limitations in access to safe and affordable water and to the decision-making processes that guide water management and distribution affect communities around the world and across the U.S., and, with the added impacts of climate change,¹ present a growing problem of environmental justice.² Moreover, while water has cultural, spiritual, and social values that extend beyond economic interests (for instance, water features prominently in some indigenous cultural traditions), these values have few legal or political protections, particularly with regard to water rights.³ This complex significance of water coupled with the unequal distribution of water resources in the world has given rise to the notion of a human right to water and sanitation, designed to reinforce and protect human demands and needs related to water.⁴

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1. Water-related impacts of climate change include exacerbated water scarcity in many regions as a result of drought and extreme temperatures; reduced access to freshwater resources as a source of drinking water or irrigation as a result of flooding; and declining food security in many parts of the world leading to famine and malnutrition as a result of contaminated water sources. INT'L BAR ASSOC., *ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION* 39–42 (2014), <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> [<https://perma.cc/U24S-T5P5>].

2. The term “environmental justice” describes “the disproportionate impacts that environmental pollution has on the health and well-being of low-income communities and communities of color as compared with other populations. . . . [E]nvironmental justice communities are those communities bearing the greatest share of environmental and social problems associated with polluting industries.” Rose Francis & Laurel Firestone, *Implementing the Human Right to Water in California’s Central Valley: Building a Democratic Voice Through Community Engagement in Water Policy Decision Making*, 47 WILLAMETTE L. REV. 495, 500 (2011) (internal quotations and citation omitted). The three major concepts of environmental justice are that no community should bear a disproportionate burden of environmental hazards; all communities should have access to environmental benefits; and decision-making processes need to be transparent and include community voices. Amy Vanderwarker, *Water and Environmental Justice*, in *A TWENTY-FIRST CENTURY U.S. WATER POLICY* 54 (Juliet Christian-Smith et al. eds., 2012).

3. Rebecca Bates, *The Road to the Well: An Evaluation of the Customary Right to Water*, 19 RECIEL 282, 282 (2010); Vanderwarker, *supra* note 2, at 74.

4. Eyal Benvenisti, *Water, Right to, International Protection*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* ¶ 1 (Rudiger Wolfrum ed., 2010).

This human right has been recognized at the international level by the U.N. General Assembly, Human Rights Council, and Committee on Economic, Social and Cultural Rights, and international law now imposes specific obligations on states in relation to their populations' access to safe drinking water and sanitation.⁵ The recognition and enforcement of the human right to water and sanitation is of great importance in both developing and developed countries, including in the U.S. There is a widespread assumption that safe and affordable water and sanitation services are available to all residents of the U.S. However, many low-income communities, communities of color, and indigenous communities in the country in fact lack access to water for the most basic human needs as well as to basic sanitation.⁶

This is in part a result of the fragmented legal framework governing water issues in the U.S., as well as ineffective laws and regulations that purport to protect safe and affordable access to water and sanitation. Moreover, unlike its increasing foothold at the international level, the human right to water and sanitation has yet to be meaningfully recognized in the U.S. This article sets out to assess the potential for such recognition to promote laws and policies in the U.S. that would ensure water justice across the country, and, in particular, for vulnerable or disadvantaged communities.

Section I of the article will first set out the hydrological profile of the U.S., as well as the inadequacies of the current federal- and state-level legal frameworks governing freshwater and associated water justice issues. The article will then turn to evaluate the role that the human right to water and sanitation could play in overcoming the current deficiencies in U.S. water regulation and in ensuring that disadvantaged communities have access to safe and affordable water and sanitation services. To do so, Section II will first briefly

5. Sara De Vido, *The Right to Water: From an Inchoate Right to an Emerging International Norm*, 45 *BELGIAN REV. INT'L L.* 517, 526–29 (2012) (citing G.A. Res. 64/292, *The Human Right to Water and Sanitation* (Jul. 28, 2010) (affirmed by a Resolution of the Human Rights Council on 30 September 2010, and General Comment No. 15 of the Committee on Economic, Social, and Cultural Rights of 2002)); UNITED NATIONS, *THE RIGHT TO WATER: FACT SHEET NO. 35*, at 3, 27 (2010) (setting out three types of obligations of states in this regard: to respect, protect, and fulfill).

6. Vanderwarker, *supra* note 2, at 57.

examine the human right to water and sanitation at the international level, its recognition as a protected legal right, and its content. Section III will then discuss the current recognition, or lack thereof, of this human right in the U.S. It will examine the concerns underlying the reluctance of the federal government and most states to acknowledge the human right to water and sanitation as a legal right, and suggest how the benefits of such recognition would in fact outweigh much of these concerns.

II. WATER AND SANITATION IN THE UNITED STATES

A. *Freshwater Availability in the United States*

The human right to water and sanitation is intrinsically linked to the domestic quality, availability, and use of freshwater. The U.S. is one of ten countries that together account for approximately 60% of the world's total freshwater supply⁷ and has never suffered from absolute scarcity of water.⁸ However, “[t]he vast size of the country, coupled with the tremendous geological, geophysical, and hydrological variations across the landscape, complicate any description or characterization of the nation’s current water availability or use.”⁹ The most significant characteristic of water availability in the U.S. is that rain is abundant in the east while it is relatively dry in the west, with the exception of the Pacific Northwest and parts of northern California.¹⁰ Therefore, the country faces increasingly difficult challenges associated with “regional disparities in water availability, climatic variability and the seasonality of the hydrologic cycle, worsening water quality, and increasingly, controversies over management strategies and policies.”¹¹

7. Derrick Howard, *The Appearance of Solidity: Legal Implementation of the Human Right to Water in the United States*, 11 APPALACHIAN J.L. 123, 128 (2011); see also *Review of World Water Resources by Country*, FOOD & AGRIC. ORG., UNITED NATIONS, <http://www.fao.org/docrep/005/y4473e/y4473e08.htm#bm08> [https://perma.cc/W8CF-QR87] (last visited May 2, 2018).

8. Peter Gleick, *The Water of the United States: Freshwater Availability and Use, in A TWENTY-FIRST CENTURY U.S. WATER POLICY*, *supra* note 2, at 2.

9. *Id.* at 3.

10. *Id.* at 3–4.

11. *Id.*

Water is used in the U.S. for domestic and residential purposes, agriculture, and energy production,¹² and the demand for water “has tripled in the past 30 years while the population has grown only 50%.”¹³ The pressure placed on the nation’s fixed water supplies as a result of demand growth has also led “to increased diversion and manipulation of surface water resources and substantial withdrawals of groundwater supplies.”¹⁴ In California’s Central Valley, on which the country relies for one-third of its vegetables and two-thirds of its fruits and nuts, “annual water demands for agriculture have exceeded renewable water resources since the early 20th century.”¹⁵ In southern California, a severe drought during most years since 2007 has increased demand for groundwater to such an extent that neither surface water replenish nor policy changes are likely to recover groundwater capacity “without large usage reductions.”¹⁶ Similarly, in the southern High Plains aquifer that underlies eastern New Mexico and northwestern Texas,¹⁷ “withdrawals of groundwater to support irrigated agriculture that exceed recharge. . . have persisted for decades. . . [t]he fringes of the aquifer have already run dry in places, and recent estimates predict that the. . . aquifer could be depleted within 30 years.”¹⁸

Moreover, while “long-term sustainable use of groundwater requires avoiding pumping at rates that exceed natural recharge, which will ultimately deplete stocks,” few measurements of groundwater levels are available in the U.S. because “no nationwide, systematic groundwater monitoring program exists.”¹⁹

12. *Id.* at 9.

13. Howard, *supra* note 7, at 128.

14. Gleick, *supra* note 8, at 9.

15. M. Rodell et al., *Emerging Trends in Global Freshwater Availability*, NATURE (May 16, 2018), <https://www.nature.com/articles/s41586-018-0123-1>.

16. *Id.*

17. *Groundwater Resources Program*, U.S. GEOLOGICAL SURVEY, <https://water.usgs.gov/ogw/gwrp/activities/gspdata/Studies/HighPlains.html> [<https://perma.cc/X8RE-FFP2>].

18. Rodell et al., *supra* note 15.

19. Gleick, *supra* note 8, at 7. Because of these serious data limitations and gaps on U.S. water availability, Congress passed Public Law 111–11 (2009), which directed the U.S. Geological Survey to prepare a National Water Availability and Use Assessment Program. *Id.* at 6. For more details on this program, see *National Water Census*, U.S.

A nationwide study examining the sustainability of changing water demand and supply under future climate change scenarios has found that “70 percent of counties in the U.S. may be at moderate to extreme risk of water demand outstripping supply by 2050.”²⁰ While there has been substantial investment in water-related infrastructure such as “dams, aqueducts, irrigation systems, and municipal water purification and wastewater collection and treatment systems,” existing infrastructures “are sometimes deteriorating faster than they are being maintained.”²¹ Moreover, “many rivers are being diverted to the maximum extent possible, . . . [and] environmental flows that satisfy ecosystem health. . . are no longer available at adequate levels.”²²

B. Freshwater Inequalities in the United States

In addition to the hydrological complications arising from water availability and use in the U.S., “access to safe, reliable and affordable water is unequally distributed across the country.”²³ “The adverse consequences of inadequate water quality or quantity,” coupled with the “lack of responsiveness. . . to community input and participation,” have given rise to issues of water justice and calls for reform to water policies.²⁴ Indeed, vulnerable or disadvantaged communities in the U.S., such as low-income communities, communities of color, and indigenous communities, have been shown to bear disproportionate environmental burdens.²⁵ For instance, such

Geological Survey, <https://water.usgs.gov/watercensus/> [<https://perma.cc/W89H-RM24>] (last visited May 2, 2018).

20. Gleick, *supra* note 8, at 7.

21. *Id.*

22. *Id.*

23. Radhika Fox, *How Water Agencies Are Tackling Inequity*, WATER DEEPLY (Nov. 1, 2017), <https://www.newsdeeply.com/water/community/2017/11/01/how-water-agencies-are-tackling-inequity> [<https://perma.cc/5XEA-CMHN>].

24. *Id.*

25. Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT'L L. 319, 319 (1993); Vanderwarker, *supra* note 2, at 54. Those who are “facing obstacles in the enjoyment of the rights to water and sanitation [are] disproportionately Black, Latino, American Indian, homeless, or otherwise disadvantaged.” *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Mission to the United States of America*, ¶ 79, U.N. Doc.

vulnerable or disadvantaged communities in Detroit, Baltimore, Boston, California, Alabama, New Mexico, and Puerto Rico “lack equal access to basic levels of safe and affordable drinking water.”²⁶ Others are unable to access and manage water for such basic needs as drinking, waste removal, cultural and spiritual practices, and recreation.²⁷

Water injustices suffered by vulnerable communities across the U.S. also include, for instance, “water hazards, ranging from lack of clean drinking water to higher exposure to fish contamination” that disproportionately affect disadvantaged communities; “legacies of discrimination in land-use planning and housing that perpetuate water inequities. . . ; inequalities in the enforcement of water-specific policies and regulations; gaps in existing regulations around water policy and a lack of regulations around critical water justice issues; cumulative risks and impacts. . . that are overlooked; [and] community voices and water needs that have been excluded from federal water policy.”²⁸ An analysis of California health data in 2011, for instance, suggested that “about 250,000 Californians sometimes go without water due to insufficient supply or are exposed to contaminated water, and that many of these residents reside in rural, economically disadvantaged communities.”²⁹ Moreover, “[s]ixty-one percent of drinking water systems on Native American reservations had health violations or other significant reporting violations in 2006, compared with 27 percent of all public systems in the United States.”³⁰ Finally, in 2009, “[i]n the Appalachia region of West

A/HRC/18/33/Add.4 (Aug. 2, 2011).

26. SANTA CLARA UNIV. SCH. OF L., INT'L HUMAN RIGHTS CLINIC, THE HUMAN RIGHT TO WATER IN THE UNITED STATES 4 (Sept. 15, 2015), http://law.scu.edu/wp-content/uploads/150915_IACHR-Water-Rts-Questionnaire_United-States_Santa-Clara.pdf [<https://perma.cc/GRL5-5ZYU>].

27. Vanderwarker, *supra* note 2, at 52.

28. *Id.* at 56.

29. *Id.* at 55–56 (internal quotations omitted). For instance, in East Oroquieta, “a small predominantly low-income, Latino town in California’s [San Joaquin Valley], . . . [t]he groundwater that is the source of drinking water . . . has been contaminated with nitrates, as a result of fertilizer application at large farms and confined animal facilities.” *Id.* at 57; *see also* Fox, *supra* note 23 (“200,000 people have chronically contaminated water and more than 1.5 million receive water from a system that has had a health violation.”)

30. Vanderwarker, *supra* note 2, at 55–56.

Virginia, the drinking water supply of low-income communities [was] contaminated with coal slurry injections containing a host of toxic chemicals.”³¹

Most recently, a water crisis developed in Flint, Michigan, a poor, post-industrial city with a majority African-American population.³² Flint has found itself in water distress as a result of decades of “structural racism, deindustrialization, white flight, economic deprivation and isolation,”³³ as well as an Emergency Management regime imposed by the state that “displaced democratic institutions and further marginalized citizen participation and the role of civil society.”³⁴ Between April 2014 and October 2015, “almost 100,000 residents in Flint were affected by drinking water quality changes” resulting from their water source being switched from Lake Huron to the Flint River.³⁵ The resulting water crisis has been viewed as an example of structural and strategic racism, reflecting the residents’ lack of “power to influence decision making” within the Emergency Management regime.³⁶ It created “a public health catastrophe that disproportionately affected people of color and other historically marginalized communities” and has been considered “a clear case of environmental injustice.”³⁷

Affordability of basic water services is another issue affecting low-income communities across the U.S.³⁸ Because states regulate the price of water individually, there is a multitude of different regulatory structures and rules resulting in a wide divergence of water pricing across the U.S.³⁹ Generally, “from 1990 to 2006, costs for water and wastewater

31. *Id.* at 58.

32. Peter J. Hammer, *The Flint Water Crisis, the Karegnondi Water Authority and Strategic-Structural Racism*, CRITICAL SOC. 1, 4–5 (2017).

33. *Id.* at 8.

34. *Id.*

35. Nia Jeneé Heard-Garris et al., *Voices from Flint: Community Perceptions of the Flint Water Crisis*, 94 J. URBAN HEALTH 776, 776 (2017).

36. Hammer, *supra* note 32, at 10–11.

37. *Id.* at 11.

38. SANTA CLARA UNIV. SCH. OF L., *supra* note 26, at 13.

39. Isaac W. Wait & William Adam Petrie, *Comparison of Water Pricing for Publicly and Privately Owned Water Utilities in the United States*, 42 WATER INT’L 967, 977 (2017).

in the U.S. increased by 105.7 percent, and rates have become “particularly high in communities with a large proportion of racial minorities.”⁴⁰ Moreover, in recent years the number of houses whose water and wastewater bills exceeded the Environmental Protection Agency’s (EPA) designated affordability criteria has grown and the Congressional Budget Office has predicted that by 2019, “between 10 and 20 percent of households may be spending more than 4 percent of [their] income on water.”⁴¹

In fact, through water and sewer rates, American consumers pay ninety percent of the cost of maintaining and operating current water and sanitation infrastructure,⁴² much of which is “simultaneously coming to the end of its lifespan.”⁴³ The cost of maintaining current water distribution systems and replacing outdated infrastructure is estimated at between \$334.8 and \$504 billion over the next twenty years.⁴⁴ Yet these costs are generally financed locally, and such financing has “traditionally failed to address the underlying persistence of water problems” in vulnerable communities.⁴⁵ Moreover, there is no national program to assist low-income residents in covering their water bills.⁴⁶ Programs in states and municipalities are usually “ad hoc collections of practices that arose out of the politics of the moment, following bad economic times when disconnections rose to levels drawing negative attention.”⁴⁷ A 2004 survey of local utilities found that “only 8 percent had a subsidy, or ‘lifeline’ rate” as a safety net to protect users from water insecurity.⁴⁸ During her mission to the U.S. in 2011, the U.N. Special Rapporteur on the Human

40. Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C.J.L. & SOC. JUST. 159, 164–65 (2016).

41. Vanderwarker, *supra* note 2, at 63.

42. *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Mission to the United States of America*, *supra* note 25, ¶ 17.

43. GEORGETOWN L., HUMAN RIGHTS INST., TAPPED OUT: THREATS TO THE HUMAN RIGHT TO WATER IN THE URBAN UNITED STATES 20 (2013), <http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/upload/HumanRightsFinal2013.pdf> [<https://perma.cc/2G8M-UA28>].

44. Vanderwarker, *supra* note 2, at 59.

45. *Id.*

46. Murthy, *supra* note 40, at 167.

47. *Id.* (internal quotations and brackets omitted).

48. Vanderwarker, *supra* note 2, at 63.

Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, highlighted affordability as a key concern, particularly with regard to disadvantaged communities.⁴⁹ She noted that “securing water and sanitation must not compromise the ability to pay for other essential needs guaranteed by other human rights such as the rights to food, housing, education and health.”⁵⁰

There are also considerable barriers to achieving change in vulnerable communities with respect to access to water and sanitation. Ethnic and racial minorities have been historically underrepresented in government, law, and business in the U.S., which has resulted in their exclusion from environmental decision-making.⁵¹ Such disadvantaged communities also lack the privileges of more affluent communities that help ensure healthier environments, including “more political influence and resources to fight unwanted environmental hazards.”⁵² In some small, rural towns, African American residents lack basic services such as sewer systems whereas nearby white and affluent communities are being developed as tourist destinations.⁵³ This is the result of discriminatory zoning and land-use regulations that are used to deny African Americans “access to basic services and political voice in critical community and economic development decisions,” as well as access to water financing.⁵⁴

Such systemic barriers to the participation of disadvantaged communities in water-related decision-making is further exacerbated by a chronic lack of transparency and adequate access to information concerning water issues across the U.S. Community water systems are required to provide water quality reports to consumers under both the EPA and the Right-to-Know provisions in the 1996 Amendments to the Safe Drinking Water Act.⁵⁵ Research has shown, however, that

49. *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Mission to the United States of America*, *supra* note 25, ¶ 47.

50. *Id.*

51. Bullard, *supra* note 25, at 321.

52. Vanderwarker, *supra* note 2, at 56.

53. *Id.* at 58 (internal quotations omitted).

54. *Id.* at 59.

55. UNITED STATES OF AMERICA, VIEWS OF THE UNITED STATES OF AMERICA ON HUMAN RIGHTS AND ACCESS TO WATER ¶¶ 21–22 (June 2007) (submitted to the Office

“water utilities frequently fail to communicate with consumers in an understandable way, obstructing individuals’ attempts to seek out information and discouraging public input regarding water policy.”⁵⁶ Such practices are made worse by unclear rate-setting policies of utility companies, unpredictable and incomprehensible water bills, and inadequate notice of shutoffs.⁵⁷ In addition, “most individuals have no opportunity to participate in policy-making with regard to water issues”⁵⁸ as a result of logistical and legal hurdles.⁵⁹ Due to the exclusionary and vague nature of water decision-making at both the local and federal levels in the U.S., “many water developments fail to satisfy the basic distributional equity and environmental justice tenet that no groups, particularly the disadvantaged, should be made worse off. . . because of water policies.”⁶⁰

Finally, agricultural and industrial operations are often not held accountable for the impacts of their practices on local water resources, which include the flooding of rivers for the construction of dams for irrigation and the contamination of streams and drinking water wells in rural areas.⁶¹ “Even though the [U.S.] federal government spends billions on water, energy, and crop subsidies,” Vanderwarker notes, “it does not authorize enough money to help provide safe drinking water to small systems in the same agricultural areas.”⁶² In some rural areas of California, for instance, farms receive federally subsidized irrigation water piped from hundreds of miles away, while nearby low-income communities of color lack access to safe drinking water due to agricultural contamination.⁶³ “The costs of pollution” resulting from

of the United Nations High Commissioner for Human Rights), <http://www2.ohchr.org/english/issues/water/contributions/UnitedStatesofAmerica.pdf> [<https://perma.cc/XT7F-VCRC>].

56. GEORGETOWN L., *supra* note 43, at 40.

57. *Id.* at 40–43.

58. *Id.* at 45.

59. *Id.*

60. Vanderwarker, *supra* note 2, at 55.

61. *Id.* at 61.

62. *Id.*

63. *Id.*; SANTA CLARA UNIV. SCH. OF L., *supra* note 26, at 21; Francis & Firestone, *supra* note 2, at 498–500.

industrial discharge are also disproportionately borne by vulnerable communities, and “are not factored into traditional environmental decision-making.”⁶⁴

For instance, indigenous communities in New Mexico continue to “lack access to safe drinking water due to groundwater contamination caused by unremediated uranium mining waste.”⁶⁵ Both the federal government and the state of New Mexico have taken steps toward the approval of new uranium mining and processing operations without remediating the damage caused by previous mining operations and without assessing the risk to drinking water supplies that new operations would pose, particularly for local indigenous communities.⁶⁶ Similarly, many communities of color have some of the highest rates of fish consumption in the U.S. and many of these fish are contaminated by biological pollutants that accumulate in their flesh after being released into the water by private companies and government facilities.⁶⁷ The national policy response to fish contamination, however, “has been one of risk avoidance, which allocates the responsibility for addressing risks to those who bear the risks.”⁶⁸ This policy therefore fails when it comes to vulnerable communities, for many of which:

[T]here are no real alternatives to eating and using fish, aquatic plants, and wildlife. For many members of these groups it is entirely impractical to ‘switch’ to ‘substitutes’ when the fish and other resources on which they rely have become contaminated. There are numerous and often insurmountable obstacles to seeking alternatives.⁶⁹

C. Freshwater Regulation in the United States

Freshwater in the U.S. is regulated both at the federal and state levels. The existing framework is comprised of hundreds

64. Vanderwarker, *supra* note 2, at 65.

65. SANTA CLARA UNIV. SCH. OF L., *supra* note 26, at 25.

66. *Id.* at 26–27.

67. Vanderwarker, *supra* note 2, at 65.

68. *Id.* at 66 (internal quotations omitted).

69. *Id.* at 65–66.

of federal laws, regulations, and historical court rulings that artificially distribute authority over water between federal, tribal, state, and local governments. Such distribution is difficult to justify and maintain. For instance:

While [the EPA] has primary authority over point source pollution, nonpoint source pollution is primarily left to the states. While the [U.S. Army] Corps tackles wetlands, the [U.S.] Fish and Wildlife Service is responsible for protecting endangered and threatened aquatic species. While the states regulate the allocation of water from our lakes and streams, our local governments are generally responsible for regulating land use practices which often degrade the quality of our waters.⁷⁰

In light of this complex division of water-related powers between the federal and state governments, this section will examine each regulatory level separately.

1. *Federal regulation*

The federal government is responsible for regulating federal water development projects and overseeing water uses associated with federal lands and other property.⁷¹ While federal-level policy infrastructure has been established to incorporate environmental justice issues into decision making,⁷² water problems and management issues have rarely been the focal point of any comprehensive environmental justice analysis in the U.S. In 1994, President Clinton signed Executive Order 12898, directing agencies receiving federal

70. WILLIAM L. ANDREEN & SHANA CAMPBELL JONES, CTR. FOR PROGRESSIVE REFORM, *THE CLEAN WATER ACT: A BLUEPRINT FOR REFORM* 2, 49 (2008), http://www.progressivereform.org/articles/CW_Blueprint_802.pdf [<https://perma.cc/J7PT-JB47>].

71. Juliet Christian-Smith & Lucy Allen, *Legal and Institutional Framework of Water Management*, in *A TWENTY-FIRST CENTURY U.S. WATER POLICY*, *supra* note 2, at 23, 37.

72. "In 1992, the [EPA] created an Office of Environmental Justice and in 1993 established a National Environmental Justice Advisory Committee . . . to provide independent advice and analysis from stakeholders on [environmental justice] issues." Vanderwarker, *supra* note 2, at 54.

funding, including those with water jurisdiction, to “address the disproportionate environmental impacts of their policies and programs” on vulnerable communities.⁷³ Nonetheless, federal water policy has historically “prioritized use of water for economic purposes. . . through large-scale water developments. . . [and] has overlooked a range of impacts on specific communities and the environment.”⁷⁴

At the federal level, numerous laws relate in some way to water and give approximately thirty agencies in ten different departments authority over a “wide range of water-related activities, including construction of flood control and hydroelectric dams, irrigation projects, discharge of pollutants, and protection of habitat and ecosystems.”⁷⁵ However, there is insufficient compliance with such federal statutes,⁷⁶ and their implementation and execution do not necessarily serve to protect the right to water of vulnerable communities.

The federal Clean Water Act (CWA) is the EPA’s “main tool for keeping water bodies free of pollution.”⁷⁷ It is intended to regulate issues concerning, *inter alia*, “water pollution, coastal water impairment, ocean acidification, and harm to glaciers from melting sea ice.”⁷⁸ However, the CWA is not consistently enforced by the EPA, for instance with regard to the referral of civil violators to the Department of Justice.⁷⁹ Also, under the CWA’s “Total Maximum Daily Load program, the EPA can limit the total amount of contaminants in a particular water body”.⁸⁰ However, “instead of using these tools to create

73. *Id.*

74. *Id.* at 55.

75. Christian-Smith & Allen, *supra* note 71, at 25.

76. Howard, *supra* note 7, at 139.

77. Vanderwarker, *supra* note 2, at 71. The CWA “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.” *Summary of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-water-act> [<https://perma.cc/2AAH-BZJW>] (last visited May 18, 2018).

78. AM. SOC’Y INT’L L., *Environment*, in *BENCHBOOK ON INTERNATIONAL LAW* § III.G (Diane Marie Amann ed., 2014).

79. Christian-Smith & Allen, *supra* note 71, at 35 (noting that “enforcement of environmental statutes can vary considerably depending on the political environment,” which is “clearly evident in the irregular enforcement of . . . the CWA, administered by the EPA”).

80. Vanderwarker, *supra* note 2, at 66.

pollution limits in waterways with documented subsistence fishing” the EPA has placed the burden of such protection on vulnerable communities and other fish consumers.⁸¹ Therefore, illegal wastewater discharges continue to constitute a problem and enforcement of the CWA in disadvantaged communities “is not evenhanded.”⁸² Similarly, while the EPA sets health standards for drinking water that the federal Safe Drinking Water Act (SDWA) enforces, violations nonetheless regularly occur.⁸³ “In one year alone, the water of nearly one-third of all people drinking water from a public system had a health violation,” and over a period of five years, “more than 49 million people were served by water systems that reported instances of contaminants exceeding federal health limits.”⁸⁴

Another federal mechanism for protecting disadvantaged communities is the Office of Civil Rights under Title VI of the Civil Rights Act, which “prohibits any agency that receives federal funding from discriminating in services.”⁸⁵ However, the federal government has failed to respond to many environmental justice complaints filed pursuant to this mechanism.⁸⁶ Yet another example relates to protected water rights of native communities. The Bureau of Reclamation, operating pursuant to the Reclamation Act of 1902, “encouraged appropriation of water and development of water projects by non-Indians at the same time that it was supposed to be preserving such water for the needs of tribes.”⁸⁷ As a result, while Indian water rights are protected *de jure* and are occasionally enforced by the Department of Justice, tribes have historically had little support from the Bureau of Reclamation or Congress and are thus “largely unable to realize the same access to water as the non-Indian community.”⁸⁸

The injustices arising from federal water management in the U.S. are not only the result of inadequate enforcement of

81. *Id.*

82. *Id.* at 71.

83. *Id.* at 57.

84. *Id.*

85. *Id.* at 71.

86. *Id.*

87. Harold Shepherd, *Implementing the Human Right to Water in the Colorado River Basin*, 47 WILLAMETTE L. REV. 425, 432 (2011).

88. *Id.*

existing laws, but also emanate from the absence of policies or regulations that address the “chronic water issues” faced by disadvantaged communities.⁸⁹ For instance, “the EPA has a drinking water standard for nitrates, but its regulation of nutrients in both drinking water and surface water has been found to be inadequate at both a statewide and national scale.”⁹⁰ Similarly, weaknesses have been identified “in the EPA’s ability to protect drinking water supplies from contamination by pharmaceuticals.”⁹¹ While the majority of Americans rely on groundwater for some part of their drinking water, there is no “overarching federal vision for groundwater management” but rather “a fragmented array of federal laws that touch on some aspect of groundwater protection or cleanup.”⁹²

2. *State and local regulation*

While the federal government “has a stake in the national regulation of pollution and protection of natural resources,” rights to use water in the U.S. are generally allocated according to state and local laws.⁹³ Accordingly, “[s]tates tend to have wide-ranging power to determine surface and groundwater allocation and management structures” and legal frameworks governing water allocation differ among the fifty states,⁹⁴ making “generalizations about the capacity of the United States legal framework to reflect access to safe drinking water and sanitation as human rights particularly difficult.”⁹⁵

The common method in most eastern states is the system of

89. Vanderwarker, *supra* note 2, at 72.

90. *Id.* (internal citations omitted).

91. Howard, *supra* note 7, at 138–39 (citing a 2011 report of the United States Government Accountability Office referring to “[n]ational and regional studies . . . [that] have detected pharmaceuticals in source water, treated drinking water, and treated wastewater” and noting that “the EPA lacked ‘sufficient occurrence and health effects data on pharmaceuticals and other contaminants in drinking water to support analyses and decisions to identify which, if any, pharmaceuticals should be regulated under [the] SDWA.’”).

92. Vanderwarker, *supra* note 2, at 73.

93. Christian-Smith & Allen, *supra* note 71, at 37.

94. *Id.*

95. UNITED STATES OF AMERICA, *supra* note 55, ¶ 7.

riparian rights, which ties water rights to property ownership, allowing owners adjacent to a water course to use or divert water as they see fit so long as such usage does not harm those downstream.⁹⁶ These “are limited rights that are reduced proportionally in times of shortage.”⁹⁷ About half of eastern states, however, have adopted “water-use permitting systems” that allow nonriparian land owners to acquire water rights for reasonable use.⁹⁸ By contrast, the prior appropriation doctrine was adopted in most western states to meet the unique needs of water users in dry climates, particularly those of non-landowners to divert water for mining, industry, and agriculture.⁹⁹ “The prior appropriation doctrine typically allocates water rights on a first-come, first-serve basis.”¹⁰⁰ Three western states, namely California, Nebraska, and Oklahoma, allow “riparian landowners to assert new uses superior to those with appropriative rights under some circumstances.”¹⁰¹ These systems of private water rights, however, can conflict with public water rights.¹⁰² Their complexity, together with various other doctrines governing groundwater use, “makes it difficult to efficiently regulate water or to adapt to changing circumstances”¹⁰³ and can “serve as a disincentive to sustainable water management practices such as conservation and efficiency.”¹⁰⁴

In addition, existing state laws and regulations governing access to water and sanitation fail to account for, and can therefore exacerbate, inequalities and barriers to such access among disadvantaged communities. In Alabama’s Black Belt region, for instance, low-income households cannot afford adequate residential septic systems.¹⁰⁵ Alabama law requires

96. Christian-Smith & Allen, *supra* note 71, at 37–38; Emilie Blake, *Are Water Body Personhood Rights the Future of Water Management in the United States?*, 47 TEX. ENVTL. L.J. 197, 200 (2017).

97. Christian-Smith & Allen, *supra* note 71, at 37–38.

98. *Id.*

99. *Id.*

100. *Id.* at 37; Blake, *supra* note 96, at 202.

101. Christian-Smith & Allen, *supra* note 71, at 37.

102. Shepherd, *supra* note 87, at 426.

103. Christian-Smith & Allen, *supra* note 71, at 39.

104. *Id.* at 28.

105. SANTA CLARA UNIV. SCH. OF L., *supra* note 26, at 6–7.

such systems, but the state does not aid low-income households to meet this requirement.¹⁰⁶ As a result, in some counties in this region “half of the septic systems are failing or in poor condition.”¹⁰⁷ Moreover, residents who cannot afford to install or maintain septic systems can be arrested, which “criminalizes them for their lack of access to adequate sanitation.”¹⁰⁸

Yet another example of local laws and policies disproportionately affecting disadvantaged communities can be seen in municipalities that have disconnected residents from water services as a response to unpaid bills, such as Detroit, Baltimore, and Boston.¹⁰⁹ Such measures have been said to have “disproportionate effects on vulnerable people and low income African Americans.”¹¹⁰ In Detroit, community groups filed a complaint to the United Nations High Commissioner for Human Rights regarding the “widespread water disconnections. . . of households unable to pay water bills.”¹¹¹ In response, the United Nations Office of the High Commissioner issued a statement emphasizing that the “[d]isconnection of water services because of failure to pay due to lack of means constitutes a violation of the human right to water and other international human rights” and that “[a]ccording to international human rights law, it is the State’s obligation to provide urgent measures, including financial assistance, to ensure access to essential water and sanitation.”¹¹²

In sum, while there is a legislative framework in place in the U.S. to govern water-related programs and activities, “[w]hat is missing is a rational, consistent, comprehensive, and yet concise federal policy”¹¹³ that adequately accounts for the

106. *Id.*

107. *Id.*

108. *Id.* at 7–8.

109. *Id.* at 13–14.

110. *Id.* at 14; *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Mission to the United States of America*, *supra* note 25, ¶ 50.

111. *Detroit: Disconnecting Water from People Who Cannot Pay—An Affront to Human Rights, Say UN Experts*, UNITED NATIONS, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (June 25, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14777&LangID=E> [<https://perma.cc/X32C-23FC>].

112. *Id.*

113. Christian-Smith & Allen, *supra* note 71, at 2.

systemic disadvantages suffered by vulnerable communities. The human right to water and sanitation has the potential to assist in overcoming the existing deficiencies in U.S. water laws and policies, as well as in ensuring that vulnerable communities have equal access to safe and affordable water and sanitation.

III. THE INTERNATIONAL HUMAN RIGHT TO WATER

The human right to water and sanitation best conveys the fact that “without water, other human rights become meaningless.”¹¹⁴ Accordingly, water-related rights have been recognized as early as the 1970s in international conventions, non-binding declarations, and regional treaties,¹¹⁵ as well as in general principles of international water law.¹¹⁶ The right of access to water and sanitation has also been viewed as “indispensable” to the realization of an adequate standard of living protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹⁷

The human right to water should also be considered “an essential step in the process of meeting the needs of underserved communities.”¹¹⁸ Its recognition will prompt individual governments and the international community as a whole to renew their efforts to meet water and sanitation targets, thereby ‘transforming’ the right into concrete national and international legal obligations.¹¹⁹ Indeed, the human right to water and sanitation was recognized by the High

114. Stephen C. McCaffrey, *The Human Right to Water*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 95 (Edith Brown Weiss et al. eds., 2005).

115. See, e.g., U.N. Water Conference, *Mar Del Plata Action Plan*, U.N. DOC. E/CONF. 70/29 (Mar. 1977); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Convention of the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., 97th plen. mtg., U.N. Doc. A/41/53 (Dec. 4, 1986).

116. See, e.g., KNUT BOURQUAI, FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE 48 (2008).

117. U.N. ECON. & SOC. COUNCIL, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 15*, ¶ 3, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

118. Bates, *supra* note 3, at 283.

119. *Id.*

Commissioner for Human Rights in 2003,¹²⁰ the United Nations Economic and Social Council in 2010,¹²¹ the United Nations General Assembly in Resolutions 64/292 of 2010 and 68/157 of 2013, and the Human Rights Council in Resolutions 15/9 of 2010 and 27/7 of 2014, among other international resolutions and declarations.¹²²

The international human right to water and sanitation is chiefly understood as requiring states to “refrain from interfering directly or indirectly with the enjoyment of the right to water,”¹²³ take action to help secure the water for individuals and communities, and provide it where people are unable to do so by themselves “for reasons beyond their control.”¹²⁴ States must also ensure that an adequate supply of water is available to poor households who cannot afford market prices, while ensuring the right to water of future generations by managing key resources sustainably.¹²⁵ These obligations align with the World Health Organization’s guidelines requiring access to water of an acceptable color, odor, and taste, and in the amount and quality sufficient to meet vital human needs, including drinking, food production, and sanitation.¹²⁶ Such a right to access includes “physical accessibility” of having sufficient and continuous water for personal and domestic uses within safe physical reach,¹²⁷ “economic accessibility” of having water and water facilities and services affordable for all,¹²⁸ and a requirement of “non-discrimination,” protecting the most vulnerable or marginalized sections of the population “in law and fact.”¹²⁹ In

120. U.N. ECON. & SOC. COUNCIL, *supra* note 117.

121. U.N. ECON. & SOC. COUNCIL, *Statement on the Right to Sanitation*, ¶ 7, UN Doc E/C.12/2010/1 (Nov. 19, 2010).

122. For a complete list, see AMNESTY INT’L & WASH UNITED, *Recognition of the Human Rights to Water and Sanitation by UN Member States at the International Level* 10–32 (2014), <http://www.righttowater.info/wp-content/uploads/AI-and-WASH-United-States-Recognition-of-HRWS-2015.pdf> [<https://perma.cc/2NTE-DCPU>].

123. U.N. ECON. & SOC. COUNCIL, *supra* note 117, ¶ 21.

124. *Id.* ¶ 25.

125. *Id.* ¶ 27.

126. *Id.* ¶ 12(a), (b).

127. *Id.* ¶ 12(c)(i).

128. *Id.* ¶ 12(c)(ii).

129. *Id.* ¶ 12(c)(iii), (iv).

addition, the right to access water ensures people's right to "seek, receive and impart information concerning water issues."¹³⁰ Finally, due process requirements detailed under the human right to water and sanitation must be followed before a state shuts off or otherwise interferes with an individual's access to water.¹³¹ Additional rights that may be regarded as related to the human right to water and sanitation include the right to effective review mechanisms, including judicial review of decisions, and the right to remedies for the violation of these rights.¹³²

Ultimately, international human rights law requires states to "ensure that any form of service provision guarantees equal access to affordable, sufficient, safe and acceptable water."¹³³ These obligations have also been reinforced by decisions of international courts and tribunals,¹³⁴ as well as regional judicial and quasi-judicial bodies.¹³⁵ In terms of state practice, 178 countries have "recognised the right to water and sanitation at least once in an international resolution or declaration."¹³⁶ Many states have also implemented the right in "national constitutions, legislation and regional agreements, . . . subsidies and the establishment of environmental management regimes aimed at safeguarding and improving the levels of water services to consumers."¹³⁷ The right to access clean water has also been recognized by "national courts as entailed in the right to life or the right to

130. *Id.*

131. *Id.* ¶ 56.

132. UNITED NATIONS, *supra* note 5, at 40–42.

133. *Id.* at 35.

134. *E.g.*, Taskin and others v. Turkey, Eur. Ct. H.R., No. 46117/99 (2004); Giacomelli v. Italy, Eur. Ct. H.R., No. 59909/00 (2007); Dzemyuk v. Ukraine, Eur. Ct. H.R., No. 42488/08 (2014); Dubetska and others v. Ukraine, Eur. Ct. H.R., No. 30499/03 (2011); *see also* Benvenisti, *supra* note 4, ¶ 9.

135. *See* Benvenisti, *supra* note 4, ¶ 10; Pierre Thielborger, *The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 490 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009).

136. AMNESTY INT'L, UNITED NATIONS: HISTORIC RE-AFFIRMATION THAT RIGHTS TO WATER AND SANITATION ARE LEGALLY BINDING (Oct. 1, 2010), <https://www.amnesty.org/download/Documents/40000/ior400182010en.pdf> [<https://perma.cc/2JLC-DNWP>].

137. Bates, *supra* note 3, at 290–92.

healthy environment prescribed in the national constitutions or derived from international legal instruments.”¹³⁸

IV. THE HUMAN RIGHT TO WATER IN THE UNITED STATES

A. *Recognition at the International Level*

While the U.S. was a member of the Human Rights Council when it adopted several resolutions concerning the human right to water,¹³⁹ it has dissociated itself from preambular paragraph 21 of the Council’s most recent Resolution 27/7 of September 2014, which reaffirms that:

The human right to safe drinking water and sanitation entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use and to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity.¹⁴⁰

Moreover, while the U.S. co-sponsored General Assembly Resolution 68/157 of December 2013,¹⁴¹ it “firmly opposed the inclusion of a paragraph defining the human right to safe drinking water and sanitation [in the Resolution and]. . .[t]he paragraph was excluded as a result of this pressure.”¹⁴² The U.S. also has not ratified the ICESCR¹⁴³ and abstained from

138. Benvenisti, *supra* note 4, ¶ 14.

139. Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010); Human Rights Council Res. 18/1, A/HRC/RES/18/1 (Oct. 12, 2011); Human Rights Council Res. 21/2, A/HRC/RES/21/2 (Oct. 9, 2012); Human Rights Council Res. 24/18, A/HRC/RES/24/18 (Oct. 8, 2013); Human Rights Council Res. 27/7, A/HRC/RES/27/7 (Feb. 10, 2014).

140. AMNESTY INT’L & WASH UNITED, *supra* note 122, at 22.

141. *Id.*

142. *Id.* at 114.

143. *Status of Ratification*, UNITED NATIONS, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://indicators.ohchr.org/> [<https://perma.cc/A4HU-ZKK3>] (last visited May 3, 2018) (navigate to “International Covenant on Economic, Social, and Cultural Rights” in dropdown menu).

voting for United Nations General Assembly Resolution 64/292 in 2010.¹⁴⁴ This limited recognition of a human right to water by the U.S. at the international level reflects its repeated position that it is not obligated to implement such a human right as part of the right to an adequate standard of living. Although this latter right is enshrined in the ICESCR, the U.S. argues that it is not a party to the Convention and the rights contained therein are not justiciable in U.S. courts.¹⁴⁵ The U.S. therefore posits that its “commitments. . .in support of achieving universal access to safe drinking water and sanitation” do not include the advancement of a human right to water as such.¹⁴⁶ The U.S. has also expressed concerns that acceptance of Human Rights Council Resolution 27/7 of September 2014 would not align with its federal structure, for instance with regard to education and training, which “is primarily a state and local responsibility.”¹⁴⁷

B. Recognition at the Domestic Level

Domestically in the U.S., a human right to water is not recognized at all at the federal level,¹⁴⁸ and only to a very limited extent at the state level¹⁴⁹—in California,¹⁵⁰

144. *General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None Against, 41 Abstentions*, UNITED NATIONS (July 28, 2010), <https://www.un.org/press/en/2010/ga10967.doc.htm> [<https://perma.cc/88FA-2FA3>] (last visited May 3, 2018).

145. Keith Harper, *Explanation of Position: The Human Right to Safe Drinking Water and Sanitation*, MISSION OF THE UNITED STATES IN GENEVA (Sept. 25, 2014), <https://geneva.usmission.gov/2014/09/25/explanation-of-position-the-human-right-to-safe-drinking-water-and-sanitation/> [<https://perma.cc/8LZM-4FRN>] (statement to U.N. Human Rights Council, 27th sess.).

146. *Id.*

147. *Id.*

148. SANTA CLARA UNIV. SCH. OF L., *supra* note 26, at 3; Murthy, *supra* note 40, at 159–60.

149. The human right to water can also be seen as protected in other state constitutions, although such protection is dependent on the interpretation of the courts. Hawaii’s Constitution, for instance, provides that the “[s]tate has an obligation to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people.” HAW. CONST., art. XI, § 7. Montana’s Constitution provides that “[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” MONT. CONST., art. IX, § 3, cl. 3. Alaska’s Constitution provides that “except for public water supply, an appropriation

Massachusetts,¹⁵¹ and Pennsylvania.¹⁵² Moreover, existing legislation in these states has been incomplete or ineffective at times. While the California Water Code provides that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes,”¹⁵³ it goes on to note that “this section does not expand any obligation of the state to provide water or to require the expenditure of additional resources to develop water infrastructure.”¹⁵⁴ Massachusetts has included “an environmental right to water in an amendment to the state constitution, which allows the state to ensure that water resources are conserved for recreational and domestic uses, [but it] has been narrowly interpreted as a conservation easement [and] does not contain enumerated elements matching those of international standards.”¹⁵⁵ The Boston Water and Sewer Commission, the public utility serving greater Boston, has also adopted a “state-mandated . . . right of service policy” for private utilities, under which “service may not be terminated to a customer with a serious illness.”¹⁵⁶ Still, there are “discriminatory impacts” of Boston utility’s water shutoff policies, namely “a pattern of *de facto* discrimination [where] for every 1% increase in the population in a ward of ‘people of color,’ there is a 4% increase in threatened water shutoffs.”¹⁵⁷ Local communities in New Hampshire and Maine

of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation for fish and wildlife.” ALASKA CONST., art. VIII, § 13; Shepherd, *supra* note 87, at 450–52. Most recently, Senate Bill 466 was introduced in the Michigan Legislature, which would confer to all individuals in the state a right to “safe, clean, affordable, and accessible water for human consumption, cooking, and sanitary purposes.” *Michigan Lawmakers Regroup in Human Right to Water Effort*, CIRCLE OF BLUE (Sept. 14, 2017), <http://www.circleofblue.org/2017/world/michigan-lawmakers-regroup-human-right-water-effort/> [<https://perma.cc/M64G-WWKR>].

150. CAL. WATER CODE, § 106.3 (2013).

151. MASS. CONST., art. XCVII.

152. PENN. CONST., art. I, § 27.

153. CAL. WATER CODE, § 106.3(a) (2013).

154. *Id.* § 106.3(c).

155. Patricia A. Jones, *Complexity of Protections and Barriers in the Implementation of the Human Right to Water in the United States*, 106 AM. SOC’Y INT’L L. PROC. 46, 48 (2012) (internal quotations omitted).

156. *Id.*

157. *Id.* (internal quotations omitted).

have also passed “town ordinances enshrining a right to water for residents and nature,” but these local instruments do not define the right because they were largely “designed to protect drinking water resources from over-extraction by corporations bottling water for commercial purposes.”¹⁵⁸

C. Benefits of Recognizing the Human Right to Water

These attempts to codify a human right to water at the state and local levels, while lacking, do suggest that a legislated human right to water law is both “politically feasible and necessary” and that “implementing a human right to water is far from beyond our capabilities.”¹⁵⁹ Indeed, the recognition of a human right to water in the U.S. would carry considerable legal, political and humanitarian benefits. It could serve as a unifying concept that provides “the groundwork for a new ethic underlying water management across federal agencies and create an imperative for all federal government agencies to prioritize the provision of basic water resources for all Americans.”¹⁶⁰ A legislated human right to water could also provide the incentive needed for federal and state authorities to implement more water-just measures that protect the affordability, access, and use rights of disadvantaged communities.

The implementation of the U.N. Special Rapporteur’s legal and policy recommendations to the U.S. could also be guided by the human right to water. The Special Rapporteur’s 2011 recommendations included the development of “a national water policy and plan of action”; “new designs and approaches. . . that create more value in terms of public health improvements, community development, and global ecosystem protection”; and “a stronger regulatory system. . . to prevent pollution of surface and groundwater, and to ensure affordability.”¹⁶¹ The human right to water would inform the content of such domestic regulations and policies. Rather than placing the responsibility for ensuring adequate access to

158. *Id.*

159. *Id.* at 49.

160. Vanderwarker, *supra* note 2, at 79.

161. *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Mission to the United States of America*, *supra* note 25, ¶¶ 88–90.

water and sanitation on citizens—with its accompanying financial and potentially criminal consequences—legislation incorporating or reflecting the normative concept and content of the human right to water would ensure that public authorities comply with minimum standards and water justice principles. These include affordable access to basic water and sanitation services for vulnerable communities, basic due process guarantees and access to information—for instance when disconnecting residents from essential water services¹⁶²—and adequate protections from industrial and agricultural pollution.

Such positive impacts of the recognition of the human right to water can be seen, for instance, in California, where the human right to water has been explicitly recognized. The State Water Resources Control Board has adopted a resolution identifying the human right to water “as a top priority and core value”¹⁶³ and state agencies must now consider how each relevant agency decisions and activities will impact the human right to water, including its safety, accessibility, and affordability requirements.¹⁶⁴ In addition, California law now requires that “all employers with outdoor places of employment. . . provide one quart of water per employee per hour for their entire shift” and that “[s]choolchildren must. . . have access to free, fresh drinking water during meal times.”¹⁶⁵ According to state data, as of May 2018 the vast majority of public water systems in California were in compliance with the requirements of the amended Water Code and the Board’s resolution.¹⁶⁶

162. SANTA CLARA UNIV. SCH. OF L., *supra* note 26, at 19.

163. *Human Right to Water Portal*, CAL. WATER BD., https://www.waterboards.ca.gov/water_issues/programs/hr2w/index.shtml [https://perma.cc/Q3E5-Q23D] (last visited May 18, 2018).

164. CAL. WATER CODE § 106.3(b) (2013); UNIV. OF CAL., BERKELEY SCH. OF L., INT’L HUMAN RIGHTS LAW CLINIC, *THE HUMAN RIGHT TO WATER BILL: AN IMPLEMENTATION FRAMEWORK FOR STATE AGENCIES* 2 (2013), [https://www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL\(1\).pdf](https://www.law.berkeley.edu/files/Water_Report_2013_Interactive_FINAL(1).pdf) [https://perma.cc/RVL6-U9S5].

165. SAFE WATER ALLIANCE ET AL., *RACIAL DISCRIMINATION AND ACCESS TO SAFE, AFFORDABLE WATER FOR COMMUNITIES OF COLOR IN CALIFORNIA* 8 (2014) (A Report Submitted to the Committee on the Elimination of Racial Discrimination in its 85th Session United States’ Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination).

166. 3,063 public water systems out of 3,332 were in compliance. CAL. WATER BD.,

A human rights approach to water and sanitation could also guide the resolution of conflicts arising from the current fragmented framework governing water management in the U.S. Such conflicts may arise between competing water uses (e.g., industry and agriculture); “in disaster situations” (e.g., flood and drought); or “when the status quo is altered by individual pieces of legislation” (e.g., when existing water quality does not meet CWA-mandated levels).¹⁶⁷ In conflicts of this kind, “different federal, tribal, and local entities with water-related responsibilities may find themselves overlapping or even opposing one another,”¹⁶⁸ with no consistent and broadly accepted principles for their resolution. Such a conflict has recently unfolded with respect to the Clean Water Rule, which purports to broaden the definition of the “waters of the United States” (WOTUS) that are subject to the CWA, thereby “extending protection to the drinking sources of nearly a third of the U.S. population.”¹⁶⁹

The Clean Water Rule was introduced in 2015 by the Obama administration.¹⁷⁰ Many legal actions challenging the Rule were commenced in both appeals and district courts, and the

supra note 163 (navigate to “Compliance Status”). For additional legal and political milestones in California’s implementation of the amendment to the Water Code, see Brett Walton, *Timeline: California Human Right to Water*, CIRCLE OF BLUE (Sept. 13, 2017), <http://www.circleofblue.org/2017/world/timeline-california-human-right-water/> [<https://perma.cc/GRB2-DNGP>]. California’s work in this regard is far from done, however. See, e.g., Tara Lohan, *Systemic Failure: Why 1 Million Californians Lack Safe Drinking Water*, NEWS DEEPLY (July 5, 2017), <https://www.newsdeeply.com/water/articles/2017/07/05/systemic-failure-why-1-million-californians-lack-safe-drinking-water> [<https://perma.cc/RC4Y-2KC8>] (noting that small water districts in California still lack the financial, political, and technological resources to treat contaminated drinking water); Ezra David Romero & Kerry Klein, *Drinking Water Is a Human Right, But These Valley Residents Don’t Have It*, NPR FOR CENT. CAL. (May 2, 2017), <http://kvpr.org/post/drinking-water-human-right-these-valley-residents-don-t-have-it> [<https://perma.cc/G82P-6RZN>] (noting that 300 communities in the San Joaquin valley in California still do not have access to safe drinking water).

167. Christian-Smith & Allen, *supra* note 71, at 24.

168. *Id.*

169. Gloria Dickie, *What Exactly Is the Clean Water Rule?*, OUTSIDE (June 28, 2017), <https://www.outsideonline.com/2196742/what-exactly-clean-water-rule> [<https://perma.cc/842P-K52A>] (internal quotations omitted).

170. *About Waters of the United States*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/wotus-rule/about-waters-united-states> [<https://perma.cc/6RY4-PFML>] (last visited May 24, 2018).

appropriate forum to hear these claims became contested.¹⁷¹ Some posited that these lawsuits belong in district courts, while others argued that they fall within the purview of appeals courts.¹⁷² In 2015, the U.S. Court of Appeals for the Sixth Circuit granted a nationwide stay of the Rule pending a determination of its jurisdiction over the challenges.¹⁷³ In addition, in February 2017, President Trump issued an executive order instructing to rescind or revise the Rule.¹⁷⁴ The U.S. Supreme Court has since held that the courts of appeals do not have “exclusive jurisdiction to review the WOTUS rule,”¹⁷⁵ thereby reversing the stay issued by the Sixth Circuit.

This jurisdictional determination by the Supreme Court has implications beyond the mere choice of judicial forum because it potentially affects peoples’ access to and use of water resources and their ability to protect their rights in court. The Supreme Court’s decision that lawsuits over the Clean Water Rule belong in district courts “could make it easier for environmental groups and their state allies to fight whatever replacement comes out of the Trump administration,” since they could “shop around for a sympathetic judge who has the power to issue a nationwide injunction of the rule.”¹⁷⁶ At the same time, divergent interpretations of the Rule by multiple district courts may result in a “fractured application of the Rule across the 94 federal judicial districts” and frustrate consistent national application of the CWA.¹⁷⁷ In the meantime, the applicability date of the Rule has been stayed

171. Amanda Reilly, *I Am Rather Stuck: Justices Slog Through WOTUS Arguments*, E&E NEWS (Oct. 11, 2017), <https://www.eenews.net/stories/1060063351> [<https://perma.cc/AJW7-R77J>].

172. *Id.*

173. *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015), *vacated sub nom.* *In re United States Dep’t of Def.*, 713 Fed. Appx. 489 (6th Cir. 2018).

174. U.S. ENVTL. PROT. AGENCY, *supra* note 170.

175. *Nat’l Assoc. of Mfr.’s v. Dep’t of Def. et al.*, No. 16-299, slip op. at 20 (U.S. Jan. 22, 2018).

176. Amanda Reilly, *WOTUS Battle Heads to the Supreme Court*, E&E NEWS (Oct. 9, 2017), <https://www.eenews.net/stories/1060063053> [<https://perma.cc/96J7-P3EG>].

177. Robert J. Alessi et al., *Energy and Other Project Developers Take Note: Clean Water Act’s Reach Still Uncertain in Wake of Supreme Court Ruling on ‘Waters of the United States’*, DLA PIPER (Feb. 1, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/02/clean-water-acts-reach-still-uncertain-in-wake-of-supreme-court-ruling/> [<https://perma.cc/85F4-28P5>].

by the EPA until 2020 in order to “maintain the legal status quo of pre-2015 implementation.”¹⁷⁸

This legal and political uncertainty surrounding the content and application of the Clean Water Rule has created confusion concerning the precise contours of the CWA,¹⁷⁹ which in turn implicates citizens’ water rights. In this context, the human right to water could serve as a unifying, concrete, and consistent guiding principle or normative framework to inform the Clean Water Rule and resolve disputes arising from its implementation. The normative content of the human right to water and the legal obligations arising under it would facilitate the recognition of the rights of all Americans to safe and equal access to water, and provide uniformity in the interpretation and application of the CWA by legislators, administrators, and judges across the country.

Recognizing the human right to water could also guide public authorities in funding “critical water supply, water quality, and wastewater projects” for disadvantaged communities, as well as providing “adequate and meaningful public participation” to local communities in decision-making processes.¹⁸⁰ This includes “facilitating ongoing opportunities for direct interaction between agency heads and communities, allocating funding for staff positions trained and dedicated to community outreach, facilitating collaborations, and choosing arrangements for community interactions to maximize effective participation.”¹⁸¹

Including the human right to water in relevant legislation could also incentivize “sustainable water management practices such as conservation and efficiency.”¹⁸² For instance,

178. U.S. ENVTL. PROT. AGENCY, *supra* note 174; *Final Rule: Definition of ‘Waters of the United States’ – Addition of Applicability Date to 2015 Clean Water Rule*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/wotus-rule/final-rule-definition-waters-united-states-addition-applicability-date-2015-clean-water> [https://perma.cc/TGT8-AM9H] (last visited May 18, 2018).

179. Richard G. Leland, *Waters of the United States Rule: Posturing and Litigation Continue, But the Substance Has Yet to Be Addressed*, N.Y. LAW JOURNAL (Apr. 27, 2018, 2:15 PM), <https://www.law.com/newyorklawjournal/2018/04/27/waters-of-the-united-states-rule-posturing-and-litigation-continue-but-the-substance-has-yet-to-be-addressed/?slreturn=20180405135039> [https://perma.cc/QW9C-4654].

180. Vanderwarker, *supra* note 2, at 77.

181. *Id.* at 78.

182. Christian-Smith & Allen, *supra* note 71, at 42.

“legal hurdles to water conservation [are] embedded within the doctrine of prior appropriation” used in western states, including the risk of forfeiture or abandonment.¹⁸³ “Because not fully using a water right can be grounds for losing the right to the unused portion,” the doctrine of forfeiture encourages “use at historic levels and, thus, discourage[s] water conservation.”¹⁸⁴ Water conservation should instead be considered as an exception to forfeiture since it can serve as a tool for exercising the human right to water by contributing to the sustainability required for true water justice.¹⁸⁵ Similarly, the human right to water could promote “federal water-related climate change adaption and mitigation planning processes to identify and protect vulnerable communities.”¹⁸⁶ This would include assessing water and climate-related risks, particularly those related to “flooding, water scarcity, quality threats, and sea-level rise, and developing adaptation plans” with affected communities.¹⁸⁷

The significance of the human right to water goes beyond its legal and policy benefits and extends to its “symbolic power as a tool for raising community consciousness” that can empower communities to demand equal rights to water and sanitation.¹⁸⁸ Quite apart from the formal acknowledgement of the human right to water by domestic or international authorities, the concept itself can serve to empower impacted residents to “assert themselves in the water policymaking arena and to influence decisions about water resources and water services that impact their community.”¹⁸⁹ Engagement and involvement of affected vulnerable communities could assist to overcome the socioeconomic and political barriers discussed above that communities face in the U.S. and elsewhere and that result in water injustice. Such positive changes could be facilitated by promoting public participation from the ground up, in addition to incorporating it formally in

183. *Id.*

184. *Id.*

185. Francis & Firestone, *supra* note 2, at 519.

186. Vanderwarker, *supra* note 2, at 80.

187. *Id.*

188. Francis & Firestone, *supra* note 2, at 512.

189. *Id.* at 513, 519.

governmental decision-making processes. Public participation could be encouraged, for instance, by educating and engaging with local affected communities and connecting between different communities with shared or similar interests.¹⁹⁰ Moreover, the notion of a human right to water could facilitate “public participation by *all* relevant stakeholders,” some of whom are currently excluded from decision-making processes, such as low-income renters who are not entitled to voting rights in some districts and residents of “unincorporated communities in which no formal municipal governments exists.”¹⁹¹

Finally, recognizing the human right to water would also assist the U.S. in complying with its other international obligations. For instance, the U.S. is required “to prohibit and to eliminate racial discrimination” under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which it ratified in 1994.¹⁹² The ICERD Committee has recognized the human right to water,¹⁹³ and the U.S. government has acknowledged that “the intentional deprivation of water by a state based on prohibited grounds of discrimination (e.g., on the basis of race) may also involve violations of international human rights law.”¹⁹⁴ Yet the lack of access to clean drinking water and sanitation in the U.S. remains “strongly linked to race.”¹⁹⁵ As discussed above, Native American tribal areas and communities of color in agricultural regions and in urban centers are impacted as a result of challenges “in accessing clean and affordable water

190. *Id.* at 524–26.

191. UNIV. OF CAL., BERKELEY SCH. OF L., UNITED STATES GOVERNMENT CONSULTATION ON ENVIRONMENTAL ISSUES RELATING TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW: A SUMMARY 11 (2014), https://www.law.berkeley.edu/files/UPR_Enviro_Consultation_Outcome_Doc_141208.pdf [<https://perma.cc/A37H-UM6Z>].

192. SAFE WATER ALLIANCE ET AL., *supra* note 165, at 3; Neil A. F. Popovic, *Environmental Racism in the United States and the Convention on the Elimination of Racial Discrimination*, 14 NETH. Q. HUM. RTS. 277, 277 (1996) (noting that “the lack of effective protection against environmental racism and the absence of effective remedies in US law demonstrate a failure by the US Government to live up to its international legal responsibilities”).

193. SAFE WATER ALLIANCE ET AL., *supra* note 165, at 3, 6.

194. UNITED STATES OF AMERICA, *supra* note 55, at 5.

195. SAFE WATER ALLIANCE ET AL., *supra* note 165, at 3.

and the political barriers that prevent meaningful dialogue with government actors to address these problems.”¹⁹⁶

Similarly, the U.S. is obligated to ensure the right to life enshrined in the International Covenant on Civil and Political Rights, which it ratified in 1992;¹⁹⁷ in the Universal Declaration of Human Rights;¹⁹⁸ and in the American Convention on Human Rights.¹⁹⁹ The human right to water is closely linked with, and is in fact derived from, the right to life since “a minimum amount of water is so essential for life that withholding it amounts to a deprivation of life.”²⁰⁰ As the U.S. Supreme Court has found, “[u]tility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.”²⁰¹

In sum, certain federal and state laws in the U.S. protect, to a certain extent, access to water and sanitation. However, other than very few state laws, U.S. legislation does not explicitly recognize a human right to water and, as discussed above, the current domestic water-related legal framework is insufficient to protect the water rights of vulnerable communities. Moreover, with growing water scarcity in some parts of the country and the global recognition of the human right to water, the concerns that the U.S. has raised about the adoption of such a right should be reevaluated. Concerns such as recognizing the rights enshrined in the ICESCR and incompatibility with its federal structure seem increasingly

196. *Id.* at 3, 6.

197. International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, S. Exec. Doc. D, 95-2, 999 U.N.T.S. 171, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en [<https://perma.cc/7439-NJUY>] (ratified by the U.S. on June 8, 1992).

198. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 3, (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/C3SM-RTMQ>].

199. American Convention on Human Rights art. 23, Nov. 22, 1969, 1144 U.N.T.S. 123, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.htm [<https://perma.cc/D5YH-WPLV>] (entered into force July 18, 1978). While the U.S. has not ratified this convention, some have argued that it is nonetheless binding on it. *See, e.g.*, Kristen Marttila Gast, *Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 253, 276–277 (2004).

200. Murthy, *supra* note 40, at 197.

201. *Id.* (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978)).

without merit. This is particularly so in light of the potential benefits that this right would carry in terms of unifying policies, providing normative content for legislation, facilitating compliance with other international obligations, and preventing water inequality and injustice.

V. CONCLUSION

Water scarcity and quality problems are “poised to become one of the most prominent natural resource challenges of the twenty-first century for the [U.S.] and the world, with consequences for economic, social, and environmental interests.”²⁰² As a result, it is crucial to ensure safe and affordable access to water and sanitation for individuals and communities everywhere. The internationally-recognized human right to water and sanitation is designed to achieve precisely this objective. The notion that this right is superfluous in developed countries such as the U.S. is misguided. Increasing water shortages, the negative impacts of climate change, legislative fragmentation, and systemic discrimination have resulted in disadvantaged and vulnerable communities across the U.S. being deprived of the basic life necessities that the human right to water and sanitation guarantees. Moreover, “the inability of the U.S. government to recognize water as a fundamental human right [has] resulted in political divisions and competition for water” in some parts of the country.²⁰³

Both federal and state governments in the U.S. should therefore devise a “comprehensive polic[y] to ensure that . . . public water resources are adequately protected from pollution and overexploitation, used efficiently, and managed in a way to ensure continued national and economic security,”²⁰⁴ including for vulnerable communities. The basic framework for such a policy already exists in the form of established federal legislation such as the CWA and the SDWA; regulatory bodies such as the EPA; and numerous

202. Gleick, *supra* note 8, at 20.

203. Shepherd, *supra* note 87, at 426.

204. Christian-Smith & Allen, *supra* note 71, at 46 (internal quotations omitted).

state laws and regulations.²⁰⁵ However, this basic framework should be infused with the normative content and legal requirements of the human right to water, which could provide a much-needed unifying theme.²⁰⁶ As the EPA itself has recently noted:

Many communities have decided that each resident should have the same access to clean and safe water that everyone else in the community enjoys, even if paying for the service is beyond their immediate means. It is water's special status as essential to public health that makes ensuring access more than a charitable cause.²⁰⁷

It therefore seems clear that safe access to water and sanitation for all ought to be considered a basic human right and a matter of environmental justice in the U.S. as elsewhere. The question should thus be not “whether a human right to water exists, but whether our state and federal governments are fulfilling it.”²⁰⁸ For some disadvantaged and vulnerable communities in the U.S., the answer, sadly, remains negative.

205. Murthy, *supra* note 40, at 206.

206. *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Mission to the United States of America*, *supra* note 25, ¶¶ 88, 92. It has even been suggested that access to safe and affordable drinking water has evolved into a “constitutive commitment,” i.e., a “statutory right[] that [is] treated as if [it is] a constitutional right[] because [it has] gained a special status in our society.” Murthy, *supra* note 40, at 161.

207. Murthy, *supra* note 40, at 207 (citing U.S. ENVTL. PROT. AGENCY, DRINKING WATER AND WASTEWATER UTILITY CUSTOMER ASSISTANCE PROGRAMS 3 (2016), https://www.epa.gov/sites/production/files/2016-04/documents/dw-ww_utilities_cap_combined_508.pdf [<https://perma.cc/D9DM-EXZP>]).

208. Brian Palmer, *Is Water a Human Right?*, NAT. RES. DEF. COUNCIL (Mar. 3, 2016), <https://www.nrdc.org/onearth/water-human-right> [<https://perma.cc/3282-4HPU>].