

BOOK REVIEWS

*GOLDEN RULES:
The Origins of California Water Law in the Gold Rush*

BY MARK KANAZAWA

REVIEWED BY PETER L. REICH*

Chicago: University of Chicago Press, 2015. xvii+351pp.

Mark Kanazawa has written a thoroughly researched, highly focused study of the beginnings of the prior appropriation doctrine in California water law. He situates his examination within the considerable economic history literature on the Gold Rush, and expands our knowledge of the era with a detailed examination of miners' codes, trial and appellate court rulings, and water company records. Kanazawa's approach to the issue addressed makes his book more of an application of law and economics theory to aspects of the period than a history of how California water law developed.

Kanazawa introduces his subject by noting that the 1850s gold mining industry dramatically increased water demand, which in turn gave rise to

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“strong pressures to create legal rules to define and enforce property rights in water” (p. 4). He characterizes the water rights emerging from this period as appropriative, including rules that in order to be exclusive, claims had to have temporal priority over all others, be beneficial, have a quantified use, and be actually worked. The author surveys existing historical and economic literature on water in the Gold Rush, although he curiously omits the most comprehensive work on California water, Norris Hundley, Jr.’s *The Great Thirst* (1992/ 2001). Kanazawa finds that as a body, this literature fails to provide “a theoretical framework that permits sensible interpretation of the evidence in a coherent and consistent manner” (p. 8). He clearly identifies with the law and economics school of interpretation, asserting that common-law water doctrine incentivizes economic activity, reduces uncertainty, and was promulgated by judges “largely insulated from political pressures to rule in certain ways” (pp. 10–11).

Kanazawa’s substantive chapters elaborate on his theoretical perspective, the effects of technology, ditch company development, informal mining camp law, the common law of water rights, the origins of appropriation, and liability for water degradation and bursting dams. In Chapter 2, on economic theory, he studies various types of disputes that emerged between water users, and states that “the central interpretive question concerns how, and the extent to which, the law promotes economic efficiency” (p. 44). Chapter 3 documents how technological improvements over simple placer mining, including sluice boxes to catch gold flakes on riffles and, later, high-pressure hydraulic hoses, dramatically increased water demand and hence legal disputes. In Chapter 4 Kanazawa discusses the growth of the ditch industry into massive integrated companies with reservoirs and miles of flumes, or wooden aqueducts, whose investments were constantly under legal attack due to their diversions, venting tail waters, leaky ditches, and collapsed dams. The author’s minute examination of mining codes in the fifth chapter creates perhaps the most thorough description to date of mining camp self-governance, including provisions for unlimited claim purchases, permission for collaborative arrangements between miners, and requirements that claims actually be worked. The codes kept order and encouraged investment not only by miners but by companies as well.

When Kanazawa delves into the origins of common-law water rights, and specifically of prior appropriation, certain limitations of his paradigm

become apparent. In Chapter 6 he considers how the continuation of the Mexican system of local magistrates, or *alcaldes*, managed the doctrinal transition from the previous regime to American rule by allowing “fundamental changes in the application of the law” (p. 159) — that is, of the common law of water as informed by mining camp rules. The *alcaldes*, according to Kanazawa, “had little or no knowledge of Spanish law nor the ability to read what texts were available,” so they “naturally fell back on common-law principles” (pp. 159–60). Yet this assertion is at odds with surviving *alcalde* memoirs, such as those of Edwin Bryant, who consulted the *Recopilación de leyes de las Indias*, and of Walter Colton, who possessed the standard nineteenth-century Mexican code compilations of Alvarez and Febrero. Miners in fact relied on Hispanic law in arguing for public access to minerals, in the California Supreme Court cases of *Stoakes v. Barrett* (1855) and *Biddle Boggs v. Merced Mining* (1859). Post-Gold Rush, substantial litigation over communal water sharing as practiced in the Mexican period continued through the end of the century. Kanazawa tends to conceptualize Gold Rush-era legal doctrine as if it emerged *ab initio* rather than being repeatedly invoked by miners and farmers attempting to preserve aspects of the prior system. Certainly, Mexican mining and water law was eventually replaced, but not for lack of argument.

In his seventh chapter, Kanazawa traces the origins of California water law in a particular manner. After showing previously that the mining industry’s growth sparked numerous conflicts over usage, he now asserts that “the result was the creation of the basic doctrine of prior appropriation, which became the fundamental basis for water law not only in California but in much of the rest of the western United States” (p. 183). But as water historians Norris Hundley and Donald Pisani have shown, priority in right was only part of the story. Riparian (riverbank) land ownership, if acquired before appropriation by others, confers a water right, according to the California Supreme Court rulings in *Crandall v. Woods* (1857) and *Lux v. Haggin* (1886), both of which Kanazawa cites, thus making the state a mixed riparian and prior appropriation jurisdiction along with Oregon and Texas. Notwithstanding Kanazawa’s contention that these cases were really conditioned on “temporal priority” (p. 199), Hundley has demonstrated that by the time of *Lux* all farmable riverbank land in California had passed into private hands without having been subject to any significant appropriations, giving ripar-

ian owners a distinct legal advantage and solidifying the incontrovertibly hybrid nature of the state's water law.

Chapters 8 and 9 of *Golden Rules* are well-crafted, dealing with water quality and dam failures, respectively. The courts imposed strict liability (proof of fault unnecessary) on upstream users who degraded the condition of water, particularly when the parties had been informed about the cause and damages were larger. When dams burst, causing harm to those downstream, the courts applied a negligence rule (liability only if fault), reflecting the ability of water companies to prevent damages in advance. Both of these scenarios support Kanazawa's economic efficiency thesis, given the belief held during this period that water pollution was more destructive than dam collapse.

Kanazawa concludes *Golden Rules* by summarizing his argument that the prior appropriation doctrine became law in California because it was economically efficient: "secure water rights were necessary to support investments in water infrastructure" (p. 266). Further, he defends the doctrine against long-standing criticism of its rigidity and environmental unsustainability by saying that "there is nothing in appropriation law that necessarily imposes restrictions on the transfer, and therefore the reallocation to higher value uses, of water" (p. 270). These assertions that California's system is monolithic and neutral exemplify a conceptual problem in the book. By assuming that law develops and operates as though in a vacuum, Kanazawa ignores the weight of the prior legal tradition of public mineral access and water sharing. More crucially, to support his "coherent and consistent" theoretical framework, he mischaracterizes California water law as solely appropriative, and then defends his construction as the best possible contemporary regime. As Norris Hundley noted, riparianism remained doctrine because it was supported by established ownership patterns, and in practice prior appropriation depleted many watersheds, such as Mono Lake. These failures to explore historical context fully confine the usefulness of *Golden Rules* to the analysis of specific case rationales, such as those in the water quality and dam failure decisions. But the book is less valuable as an explanation of the multifaceted, on-the-ground development of California water law.

*FORGING RIVALS:
Race, Class, Law, and the Collapse of Postwar Liberalism*

BY REUEL SCHILLER

REVIEWED BY WILLIAM ISSEL*

New York: Cambridge University Press, 2015. xv+343pp.

Forging Rivals is a fascinating, and original, analysis of twentieth century United States political history. Reuel Schiller makes a compelling case for the role of legal history, specifically the history of the clash of two competing legal doctrines, in the rise and fall of Democratic Party liberalism from the early 1940s to the early 1970s. Liberalism's demise, often ascribed to the shortcomings, misjudgments, and failures of the Truman, Kennedy, Johnson, and Carter administrations' policies, and public rejection of federal government activism, was actually a far more complex phenomenon. The limited success of liberalism was also the product of a bitter divorce that ended what many imagined would be a happy marriage between the labor movement and the civil rights movement. The breakup was messy, and perhaps inevitable, with the two parties more often talking past one another than communicating effectively because they differed on how to use the law to achieve "the blessings of liberty." Their irreconcilable differences were rooted in what Schiller defines as "legal and institutional contradictions," which were in turn traceable to the conflicting "legal regimes" of labor law on the one hand and the law of employment discrimination on the other.

Schiller begins with a capsule history of how New Deal liberalism was "forged" in a way that would bedevil labor union and civil rights cooperation from the beginning. New Deal labor law reforms did not undo the right of white employees and employers to maintain, if they chose to do so, racial segregation and racial differentials in hiring, promotions, pay rates, and workplace conditions. Nonwhite workers challenged this feature of the New Deal Order as an egregious case of old racist wine in new administrative law bottles and demanded the addition of fair employment practices law to the liberal agenda. Predictably, white labor tended to regard the new fair employment rules to be as unwelcome an intrusion into their affairs as

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did business. From the early 1940s through the 1960s, the result was continuous conflict between white labor leaders and civil rights leaders and their respective memberships. A relationship that was rancorous from the start only got worse as the parties clashed in one after another episode of bickering, with the crackup following closely on the heels of the black nationalist turn in the civil rights movement in the mid-1960s.

Schiller ably develops his argument that postwar liberalism's legal infrastructure did more to forge rivals than to facilitate cooperation between the labor movement and the civil rights movement. His method is to provide "thick description" of the ways the two parties constructed incompatible legal regimes in cooperation with the executive, legislative, and judicial branches of federal, state, and local governments. His five vividly written vignettes from the San Francisco Bay Area nicely illustrate the complexities in the legal wrangling that developed in California and all across the nation. He shows how public officials, civil rights leaders, labor union bureaucrats, and ordinary employees with workplace grievances involved themselves in bitter disputes from the early years of World War II to the end of the Vietnam War. More often than not, the unanticipated consequences of their actions influenced the degree to which they could obtain justice under the law as much as, or even more than, their original intentions. By 1966, in one especially fraught San Francisco case, labor union officials forthrightly condemned a local civil rights ordinance as "intrusion into collective bargaining" that they were duty bound to "resist." The city's CORE president, unmoved, declared simply that "I don't give a damn about the labor unions." (p. 174)

Schiller uses a wide range of primary sources, including twenty-one archival collections and interviews, and synthesizes a fully up-to-date selection of local and national secondary sources that document the intersections of race, class, and law in the history of postwar liberalism. In its focus on legal history as integral to the origins, development, and demise of postwar liberalism, this book breaks new ground and makes a significant contribution to the fields of both legal history and political history. *Forging Rivals* will be of great value in undergraduate and graduate courses. Schiller's story of the complexities and contingencies of the liberal project beautifully weaves both "agency" and "structure," and most importantly law and institutional history, into the narrative of twentieth-century American politics and policy.