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REVISITING *HUDSON COUNTY WATER CO. V. MCCARTER*: REALISM, THE PUBLIC TRUST DOCTRINE, AND ENVIRONMENTAL CONSERVATION IN THE *LOCHNER* ERA

A Thesis
Presented to
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Western Kentucky University
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In Partial Fulfillment
Of the Requirements for the Degree of
Master of Arts in History

By
Steve Huffman

May 2021

REVISITING *HUDSON COUNTY WATER CO. V. MCCARTER*:
REALISM, THE PUBLIC TRUST DOCTRINE, AND
ENVIRONMENTAL CONSERVATION IN THE *LOCHNER* ERA

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Steve Huffman May 2021 53 Pages

Directed by: Kate Brown, David Lee, and Alexander Olson

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Legal histories of the Gilded Age and Progressive Era tend to focus inordinately on economic regulation within a doctrinal framework in which private rights, equal protection, and "substantive" due process guided judicial decision-making. Consequently, the overarching economic context in prevailing legal historiography obscures an important yet oft-overlooked development in the linkage between public rights, natural resource trusteeship, and the early-twentieth-century environmental conservation movement. This development is inextricably tied to the evolution of water law in the late nineteenth century and the expansion of the American commercial republic. A normative understanding of public water rights during this period is confined to an economic framework in which water functioned either as a highway for commerce or as a source of power.

This article argues that the 1908 Supreme Court decision in *Hudson County Water Co. v. McCarter*, in a departure from economic instrumentalism, inaugurated a novel reconceptualization of water as a natural resource in and of itself. The legal principles on which *Hudson County* rested—the sanctity of the broad interests and welfare of the people with regard to public waters—had been firmly established by 1908. However, the public interest and public rights in water were inherently economic; no doctrinal or legal interpretations of water prior to *Hudson County* recognized public waters in broad and

unconditional language that transcended economic pretexts. Furthermore, *Hudson County* signifies the confluence of three distinct historical currents: the development of a robust judicial public trust doctrine, the emergence of environmental conservation as a social and political imperative, and the beginning of a progressive shift in American constitutional jurisprudence. Each of these three strands was essential to the legal transcendence of water as a natural resource during the Progressive Era.

This reinterpretation of *Hudson County* places it within existing interpretive models of legal history as more of a paradigmatic signpost than any sort of abrupt intervention. *Hudson County* thus stands as a progressive antecedent to the later era of legal realism and the much later formulation of modern environmental law.

Introduction

Teddy Roosevelt recounted in his 1913 autobiography that, prior to his administration, America's "public resources were being handled and disposed of in accordance with the small considerations of petty legal formalities, instead of for the large purposes of constructive development." Echoing the great refrains of the Progressive Era, Roosevelt attributed the situation to widespread tendencies in governments at all levels to bend to the private interests of American corporations. He further maintained that America's "magnificent river system, with its superb possibilities for public usefulness," had been mismanaged and unduly influenced by special interests.[1]

Roosevelt's critical comments on corporate interests and laissez-faire governance through the turn of the century are representative of contemporary popular perceptions. Roosevelt, the champion of progressive reform, would almost certainly have been aware of these perceptions and perhaps drew upon them in an effort to inflate the heroic accomplishments of his previous administration on the heels of a presidential election defeat and Republican Party crisis in 1912. Moreover, Roosevelt—whose sole Supreme Court nominee, Justice Oliver Wendell Holmes, remained on the Supreme Court bench until 1932—must have been keenly aware of critical perceptions of the much-maligned Supreme Court. Popular criticism of the court in these years of the Progressive Era generally contended that "judicial power was being used to thwart the will of the people and to advance the interests of the propertied classes."[2]

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[1] *Theodore Roosevelt: An Autobiography* (New York: Charles Scribner's Sons, 1925), 395.

[2] Owen Fiss, *Troubled Beginnings of the Modern State*, vol. 8 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States*, ed. Stanley N. Katz (New York: Macmillan, 1993), 4.

Legal historians have come to refer to this period as the *Lochner* era for its eponymous 1905 working hours case *Lochner v. New York*, in which Justice Holmes issued a curt dissenting opinion that famously denounced his fellow justices for embracing laissez-faire "economic theory."[3] Owen Fiss has remarked that Holmes's dissent "provided the progressives with a critique of the Court from within," and later critiques from contemporary scholars such as Roscoe Pound and Charles Beard forged a strained conception of the federal judiciary during the Progressive Era.[4] Historians have since invoked *Lochner* generally to call upon the overarching jurisprudential trend toward "substantive" readings of the Due Process Clause of the Fourteenth Amendment, particularly in an economic context.[5] Howard Gillman accurately characterized this phenomenon as a "persistent neo-Holmesian conceptualization of the *Lochner* era."[6]

The conventional account of the *Lochner* era generally characterizes Supreme Court jurisprudence from 1877 to 1934 as the judicial manifestation of conservative economic activism—what Barry Cushman describes as the "complimentary factors of a commitment to laissez-faire economics, a devotion to the tenets of social Darwinism, and

[3] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[4] Fiss, *Troubled Beginnings*, 6. On contemporary progressive critiques, see Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Supreme Court Historical Society Yearbook* (1983): 53–72. See also Brad Snyder, "The House That Built Holmes," *Law and History Review* 30, no. 3 (August 2012): 661–721.

[5] "Substantive" due process generally indicates a broad or expansive reading of the Fourteenth Amendment's Due Process Clause in which "'due process' . . . could refer to 'substantive' as well as 'procedural' guarantees. . . . [Critical commentators] came to use the phrase 'substantive due process' as a pejorative term, designating cases in which courts had inappropriately injected 'individualism' and 'laissez-faire' views into their readings of 'liberty' in due process cases." G. Edward White, "Revisiting Substantive Due Process and Holmes's *Lochner* Dissent," *Brooklyn Law Review* 63, no. 1 (1997): 109–110. White notes that "Holmes and the great bulk of his juristic contemporaries . . . never used the term 'substantive due process' at all." White, "Revisiting Substantive Due Process," 87n2.

[6] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993), 6.

to a desire to shield businesses from legislation aimed at protecting workers and consumers."[7] As we have seen, the laissez-faire activist account began with one of America's most illustrious jurists, Oliver Wendell Holmes Jr., who famously chastised the judicial overreaching of his fellow Supreme Court justices as early as 1905.[8] However, *Lochner* era revisionists have shed new light on this important period and thoroughly debunked the conceptions of laissez-faire judicial activism and industrialist tycoon protectionism.[9] Instead, justices on the high court during this era operated as guardians of the "virtues of equality and generality" through the strict application of the constitutional principle of "neutrality."[10] Strict, or "formal," interpretation of the Constitution—especially the Fourteenth Amendment's Due Process and Equal Protection Clauses—marked this new account of *Lochner* era jurisprudence known as *legal formalism*.[11]

Although these new interpretive models provide a balanced and meaningful

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[7] Barry Cushman, "Teaching the *Lochner* Era," *Saint Louis University Law Journal* 62, no. 3 (2018): 540. *Lochner* era historiography conventionally begins with the 1877 case *Munn v. Illinois* and ends either with *Nebbia v. New York* (1934) or *West Coast Hotel Co. v. Parrish* (1937). *Nebbia* marks Cushman's revision of the *Lochner* era and the traditional account of the "constitutional revolution" of 1937; see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).

[8] *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting). See also White, "Revisiting Substantive Due Process."

[9] Authoritative *Lochner* era revisions are Gillman, *The Constitution Besieged*; and Cushman, *Rethinking the New Deal Court*; and Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3, no. 2 (1985): 293–332. See also William J. Novak, "Law and the Social Control of American Capitalism," *Emory Law Journal* 60, no. 2 (2010): 377–406; and James W. Ely Jr., *The Fuller Court: Justices, Rulings, Legacy* (Santa Barbara, CA: ABC-CLIO, 2003).

[10] Cushman, "Teaching the *Lochner* Era," 541–544; Gillman, *The Constitution Besieged*, 20.

[11] The historiographic phrase "*Lochner* era" is generally synonymous with the more descriptive phrases "era of substantive due process" and "legal formalism." See Richard A. Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," *Case Western Reserve Law Review* 37, no. 2 (1986–87): 179–217; and Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45, no. 1 (Fall 1983): 1–54.

account of the development of constitutional law in America, they do so manifestly within the economic context of a capitalist enterprise. The preponderance of *Lochner* era legal historiography presents law, society, and politics in inordinately economic terms and obscures the persistence of a long-standing and important aspect of American legal history: an unwavering jurisprudential commitment to the common-law maxim *salus populi suprema lex est* (the welfare of the people is the supreme law).[12] The seemingly inescapable legacy of the *Lochner* era—or, as some historians have referred to it, the "ghost" of *Lochner*[13]— is its status as the symbol of unrestrained judicial activism and the sanctity of economic liberty at the expense of public progress. This is both unfortunate and ironic given that the underlying doctrine in *Munn v. Illinois*—the "foundational case for the 'affected with a public interest doctrine'" that marks the beginning of the *Lochner* era—rested on the legal and philosophical tenets necessary for good governance in pursuit of the people's welfare.[14]

Despite this misleading legacy and the generally conservative trend favoring a large and robust private sphere, the public sphere and public rights did not disappear. In fact, in contravention to the broad sweep of *Lochner* era generalities, public rights flourished throughout the Progressive Era. One particular strand of public rights law bears this out: public rights in water. The nineteenth-century common law regulatory framework—set upon the hallowed republican ground of *salus populi*—paved the way for the development of a doctrinal set of principles that preserved state water resources for the public's benefit. These public trust principles established what would later

[12] Translation in William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 9.

[13] Fiss, *Troubled Beginnings*, 395.

[14] Cushman, "Teaching the *Lochner* Era," 537n1; Munn v. Illinois, 94 U.S. 113 (1877).

become known as the *public trust doctrine*.[15]

By 1908 public rights and public trust principles had developed fully enough that Justice Holmes, writing for the majority in *Hudson County Water Co. v. McCarter*, delivered an uncompromising declaration of public rights regarding a state's (New Jersey, in this case) water resources:

> [F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. . . . The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.[16]

Joseph Sax, a pioneer of environmental law in the 1970s and preeminent authority on the public trust doctrine, described Holmes's opinion as perhaps "the most important statement the Court has ever made about the constitutional status of water rights."[17] Still, *Hudson County* is rarely cited outside of specialized studies and its influence in subsequent water rights cases is hardly remarkable.[18] Given its supposed importance to

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[15] For authoritative accounts on the public trust doctrine, see Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68, no. 3 (January 1970): 471–566; Joseph L. Sax, "The Limits of Private Rights in Public Waters," *Environmental Law* 19, no. 3, (Spring 1989): 473–483; Molly Selvin, "The Public Trust Doctrine in American Law and Economic Policy, 1789–1920," *Wisconsin Law Review* 1980, no. 6 (1980): 1403–1442; and Charles F. Wilkinson, "The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine," *Environmental Law* 19, no. 3 (Spring 1989): 425–472.

[16] Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

[17] Sax, "The Limits of Private Rights," 480.

[18] See, for instance, Joseph Regalia and Noah D. Hall, "Waters of the State," *Natural Resources Journal* 59, no. 1 (Winter 2019): 59–89; and Catherine B. Stetson, "Do State Water Anti-Exportation Statutes Violate the Commerce Clause? or Will New Mexico's Embargo Law Hold Water," *Natural Resources Journal* 21 no. 3 (Summer 1981): 617–630.

the "constitutional status of water rights," as well as its central role in the litigative strategy of modern environmental activists, why is *Hudson County* so absent in the pages of legal history?[19] If *Hudson County* has no place in conventional accounts of Progressive Era America, what is its significance, if any? Moreover, if "few public interests are more obvious" than the rights of the public to state waters, as Justice Holmes asserted, how might these rights be construed outside of traditional economic contexts (as, for instance, in modern environmental law)?

An assessment of *Hudson County* in this regard is necessary precisely because Justice Holmes eschewed any economic "clothing," leaving instead the implication that water—transcending mere economic instrumentality—must be considered an essential natural resource. Holmes declared that a state need not specify how, why, or to what end it might seek to preserve its natural resources.[20] This new interpretation of public water rights had no precedent—prior to *Hudson County*, public trust jurisprudence rested predominately on economic ground. Yet historians have largely ignored its existence because it had no place within the economic context that pervades *Lochner* era historiography. Moreover, *Hudson County* runs afoul of traditional instrumentalist accounts of the nineteenth-century legal order, in which law functioned as a tool for the "release of [economic] energy."[21] In other words, it is unnecessary to invoke *Hudson County* where a substantial body of prominent water rights cases more-than-adequately supports the assertion that public rights in water were entrenched within an understanding

[19] On litigative strategy for modern environmental activists, see Sax, "The Public Trust Doctrine," and Elise L. Larson, "In Deep Water: A Common Law Solution to the Bulk Water Export Problem," *Michigan Law Review* 96, no. 2 (December 2011): 739–767.

[20] *Hudson County*, 209 U.S. at 357.

[21] James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956), 3.

of its economic function as either a highway for commerce or a source of production (as in a mill dam, for instance). The historical linkages between nineteenth-century American economic development and public water rights have been well established; *Hudson County* simply has no place in conventional accounts.[22]

In this article I argue that *Hudson County* is significant because, for the first time in US Supreme Court jurisprudence, it implicitly recasts the legal conceptualization of water from a predominately economic instrument to a natural resource in and of itself. To be clear, the term *natural resource* is itself ambiguous and somewhat anachronistic in a legal sense; I use the term here to connote a modernistic definition that considers natural resources as common, naturally occurring elements "existing in a state of ecological balance."[23] Prevailing accounts of this period in American legal history, entrenched in economic perspectives, obscure this realization. In revisiting this hitherto overlooked and underappreciated public water rights case, I show how Justice Holmes, the ideological forebear of *legal realism*, may have been inclined to move with the currents of social action within a milieu of progressive social, political, and philosophical ideology that undergirded the Progressive Era environmental conservation movement.[24] By the time

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[22] Excellent accounts in this regard include Donald J. Pisani, *To Reclaim a Divided West: Water, Law, and Public Policy, 1848–1902* (Albuquerque: University of New Mexico Press, 1992); Michael C. Blumm and Aurora Paulsen Moses, "The Public Trust as an Antimonopoly Doctrine," *Boston College Environmental Affairs Law Review* 44, no. 1 (2017): 1–54; and Harry N. Scheiber, "The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts," in *Perspectives in American History*, ed. Donald Fleming and Bernard Bailyn (Cambridge, MA: Charles Warren Center for Studies in American History, 1971), 5:329–402.

[23] I borrow this exceptional phrase from a modern case which thoroughly examined the legal definitional elements of the term *natural resource*: *Paige v. Town Plan Zoning Commission*, 35 Conn. App. 646, 671 (1994) (Schaller, J., dissenting). In regards to *Hudson County*, the term did not officially exist in contemporary legal lexicon; the first edition of Black's *Law Dictionary* (1891) does not define either *natural resource* or *public resource*.

[24] For my purposes here, I use the term *legal realism* to describe the modernist judicial philosophy in which jurisprudents look beyond the confines of orthodox rules, traditions, and deductive reasoning (that is, *legal formalism*), relying as well on sociological investigation,

Holmes drafted his 1908 *Hudson County* opinion, there was already a substantial intellectual framework throughout contemporary American society supporting environmental conservation.[25] And Holmes, the prototypical jurisprudential realist, possessed the uncanny intellectual ability to synthesize and refine such ideas into conspicuously transcendent judicial declarations.[26]

But, in crafting the majority opinion in *Hudson County*, Holmes first had to create the legal and intellectual space in which to do so. He did this by abrogating any precept on which economic substantive due process might prevail among his formalistic colleagues; the resultant status of water as a natural resource lacked the economic presupposition to which it was previously tied. Holmes then asserted, in plainly crafted philosophic language, that state waters were "natural advantages" and "a great public good" that ought to be protected and maintained "substantially undiminished."[27]

Furthermore, analysis of public water rights cases in the Progressive Era reaffirms the *Lochner* era jurisprudential commitment to American constitutional ideals,

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ethical principles, and so-called "extra-legal" methods of inquiry. David E. Ingersoll, "Karl Llewellyn, American Legal Realism, and Contemporary Legal Behaviorism," *Ethics* 76, no. 4 (July 1966): 264. See also Jerome Frank, *Law and the Modern Mind* (New York: Routledge, 2017). Frank's exposition of Oliver Wendell Holmes's judicial tendencies as a "completely adult jurist" is, perhaps, the definitive historical embodiment of legal realism:

> [Holmes's] judicial opinions and other writings . . . are a treasury of adult counsels, of balanced judgments as to the relation of the law to other social relations. There you will find a vast knowledge of legal history divorced from slavish veneration for the past, a keen sensitiveness to the needs of today with no irrational revolt against the conceptions of yesterday, a profound respect for the utility of syllogistic reasoning linked with an insistence upon recurrent revisions of premises based on patient studies of new facts and new desires. (p. 270)

[25] See Paul Russell Cutright, *Theodore Roosevelt: The Making of a Conservationist* (Chicago: University of Illinois Press, 1985); and Philip Shabecoff, *A Fierce Green Fire: The American Environmental Movement*, rev. ed. (Washington, DC: Island Press, 2003).

[26] Richard A. Posner, ed., *The Essential Holmes: Selections from Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: University of Chicago Press, 1992) xx–xxiii.

[27] *Hudson County*, 209 U.S. at 356, 357.

Jacksonian republicanism, and the common-law *salus populi* maxim. And, as Harry Scheiber reminds us, this commitment has been "entirely consistent with the formulation of *positive* notions of public rights."[28] My analysis of *Hudson County* and the public trust doctrine, then, is entirely consistent with *Lochner* era revisionists' characterization of Supreme Court jurisprudence, which hinged on "distinctions between legitimate promotions of the public interest and illegitimate efforts to impose special burdens and benefits."[29] With regard to water rights and public trust principles in the late nineteenth century, legitimate promotions of the public interest—tied directly to the promotion of the American commercial republic—led to the development of a robust public trust doctrine. In both a continuation of and a departure from these public trust principles, *Hudson County* shows how a commitment to public rights need not rely on economic precepts; the "publicness" of the water itself was good enough. In other words, water resources of the state may be preserved in trust for the public without being conditioned on or tied to an economic premise.

My aim is not to rewrite the history of the *Lochner* era, but to reveal the social and philosophical currents upon which postbellum America moved into the Progressive Era and how these currents informed modern American law and society. To borrow an exceptional line from another context, I intend "to restore the *scripto inferior*, the underlying content that has been obscured in a heavily overwritten palimpsest."[30] While

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[28] Harry N. Scheiber, "Public Rights and the Rule of Law in American Legal History," *California Law Review* 72, no. 2 (March 1984): 219 (emphasis in the original).

[29] Gillman, *The Constitution Besieged*, 9. See also Cushman, *Rethinking the New Deal Court*; and Les Benedict, "Laissez-Faire and Liberty."

[30] Isabella Ginor and Gideon Remez, *The Soviet-Israeli War, 1967–1973: The USSR's Military Intervention in the Egyptian-Israeli Conflict* (New York: Oxford University Press, 2017), xviii.

Lochner era historiography may not quite be heavily overwritten, a substantial number of articles and books on the subject points to its significance in the development of American constitutional law. If *Lochner* era historiography has obscured the legal-social-philosophical nexus represented in *Hudson County*, this study seeks to shed some light on the public rights *scripto inferior*.

Public Water Rights and the American Commercial Republic

Throughout the nineteenth and early twentieth centuries public water rights jurisprudence rested predominately on economic ground. The mercantile importance of unhindered trade and mobility on American waterways—that is, the expansion and promotion of the American commercial republic—fostered the development of public rights principles through which the legal and jurisprudential preservation of public waters advanced the general welfare of the people. Often, this was precisely because the best economic outcome was the best outcome for the public at large. This utilitarian legal doctrine, steeped in the principles of American republicanism and constitutional law, characterized the progressive relationship between law and economics in the nineteenth century—a relationship within which public water rights thrived.[31]

J. Willard Hurst eloquently explained these concepts in his seminal 1956 work *Law and the Conditions of Freedom in the Nineteenth-Century United States*. Hurst sweepingly asserted that nineteenth-century American jurisprudents used law as a tool to help "create a framework for change" through which the energies of private enterprise could be released, thus contributing to the national accumulation of capital (of which "we

[31] Hurst, "The Control of the Environment," chap. 2 in *Law and the Conditions*. See also Gillman, *The Constitution Besieged*, 20–38.

were scarce").[32] Hurst's assertion has since become synonymous with a school of thought known as *legal instrumentalism*. A key component of Hurst's thesis is a differentiation between "dynamic" and "static" property in terms of economic productive potential—that is, "property in motion or at risk rather than property secure and at rest."[33] Dynamic (productive) property was to be safeguarded not out of some obscure deference to vested rights, but in pursuit of the great common-law tenet that the welfare of the people runs supreme. In the nineteenth-century United States there was no greater public good than the national accumulation of capital through private enterprise and commercial expansion.

Hurst described instrumentalism as having a "high regard for keeping open the channels of change." The channels of change meant many things in nineteenth-century America, but here we must contend only with one: the American waterway.[34] The expansion of the American commercial republic—both geographically and economically—hinged on unbridled access to and use of these naturally occurring public highways. The early-nineteenth-century legal scholar and prolific author of water law treatises Joseph Angell commemorated the pivotal role of American waterways in his

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[32] Hurst, *Law and the Conditions*, 25. Hurst identified two "working principles" of legal instrumentalism:

> (1) The legal order should protect and promote the release of creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression. . . . (2) The legal order should mobilize the resources of the community to help shape an environment which would give men more liberty by increasing the practical range of choices open to them and minimizing the limiting force of circumstances. (p. 6)

[33] Hurst, 24.

[34] Hurst, 27. Hurst's "channels of change" refer to the ways in which nineteenth-century jurisprudents adhered to doctrinal concepts "in favor of freedom for creative change as against unyielding protection for existing commitments . . . to protect the community's authority to deal with shifting conditions affecting the functional integrity of the whole system . . . [and] to maintain the general framework of dealings."

1857 *Treatise on the Law of Highways*:

> To them [navigable rivers] has the public at large been extensively indebted for the easy and convenient communication by them afforded, between the maritime cities and the rapidly growing and productive regions of the interior. They have imparted energy to the enterprising genius of the people, and been the means of transforming deserts and forests into cultivated and fruitful fields, flourishing settlements, and opulent cities.[35]

It was within this context that the preservation of public waters undergirded the development of public rights, which paved the way for the establishment of a doctrinal set of principles that preserved state water resources *in trust* for the benefit of the public. These public trust principles established what would later become known as the *public trust doctrine*. We must first, however, understand how the "publicness" of nineteenth-century American waters drew upon a robust common-law heritage of riparian rights and "navigability."

Chancellor James Kent defined riparian rights in 1827 as the "right[s] of soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, [and which] extends to high water mark." Riparian rights did not extend to the submerged land underneath water; rather, the banks and beds below the high water mark belonged "to the state as trustee for the public . . . and [the people] have the absolute proprietary interest in the same."[36] In other words, riparian rights were (and still are) *property* rights incident to navigable waters. Moreover, riparian proprietors held "no property in the water itself, but a simple usufruct [*right to use without damaging or diminishing*] while it

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[35] Joseph K. Angell and Thomas Durfee, *A Treatise on the Law of Highways*, 3rd ed., ed. George F. Choate (Boston: Little, Brown, 1886), 43, quoted in Novak, *The People's Welfare*, 131.

[36] James Kent, *Commentaries on American Law*, 13th ed., eds. O. W. Holmes, Jr. and Charles M. Barnes (Boston: Little, Brown, 1884), 3:592.

passes along."[37]

Chancellor Kent's definition of riparian rights incorporated the English common-law determinant of *navigability*—or, "test of a river's publicness": Waters that moved with the "ebbs and flows" of the tides were considered navigable.[38] The most important development in water law during the nineteenth century was the "inland march" of public rights on American waterways, wherein the "ebbs and flows" determinant of navigability gave way to the broader—and more suitable to "our great rivers and inland seas"—doctrine of *navigable-in-fact* in *The Propeller Genesee Chief* (1851).[39] Charles Wilkinson points to the "classic definition" for navigable-in-fact waters, as given in *The Daniel Ball* (1870): "[P]ublic navigable rivers . . . are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce*, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[40] Thus, a "fundamental, redistributive shift" of inland waterway rights, from private to public, occurred gradually and incongruously in a handful of states during the first half of the nineteenth century—a shift predicated on the conceptualization of water as a public highway for commerce.[41] Riparian rights are, of course, subject to the common-law maxim *salus populi suprema lex est* (the welfare of the people is the supreme law). That is, where public (navigable) waters bound or bisect private property, the paramount rights of the public to commerce and navigation prevail;

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[37] Kent, *Commentaries*, 3:617.

[38] Novak, *The People's Welfare*, 132.

[39] Blumm and Moses, "The Public Trust," 14; Barney v. Keokuk, 94 U.S. 324, 338 (1876); The Propeller Genesee Chief, 53 U.S. 443 (1851).

[40] Wilkinson, "The Headwaters of the Public Trust," 447–448; The Daniel Ball, 77 U.S. 557, 563 (1870) (emphasis mine).

[41] Novak, *The People's Welfare*, 131–133; Blumm and Moses, "The Public Trust," 14–15.

any obstruction to navigation erected by a riparian proprietor (such as a mill dam, for instance) might constitute a public nuisance and thus put it at odds with the public interest.[42]

Hurst built into his model the presumption that liberty meant "liberty for individuals."[43] For the conventional legal instrumentalist, individual liberty was both an end in itself as well as the means through which the American commercial republic "progressed."[44] Yet others, such as Harry Scheiber, have refined this instrumentalist approach to show how jurisprudents operated within "the context of a *tension model* that embraces competing principles of law," i.e., vested rights, public rights, and economic growth. Scheiber maintains that such a methodology "can yield a more accurate historical understanding of 'rule' and 'policy' in American legal development."[45] It was indeed within this context that the adjudication of water rights disputes that hinged on public-private distinctions during the late nineteenth century contributed to the development of the public trust doctrine. Moreover, it is indicative of the instrumental role of the sovereign in promoting the general welfare, what Scheiber describes as a "quest for continuity and regularity in rules as being entirely consistent with the formulation of *positive* notions of public rights."[46]

We must remember, too, that public interest doctrine had been "sufficiently developed" by the mid-nineteenth century, well before the "startling intrusion" of *Munn*.[47] In one of his many excellent contributions to the historiography of public rights

[42] Blumm and Moses, "The Public Trust," 8–15.
[43] Hurst, *Law and the Conditions*, 37.
[44] Hurst, 32. Hurst defined progress as "increase of capital and consumable wealth."
[45] Scheiber, "Public Rights," 232 (emphasis mine).
[46] Scheiber, 219 (emphasis in the original).
[47] Scheiber, 231.

and constitutional law in America, Scheiber dismisses the "common view" that the decision in *Munn* was based on a "novel, or inexplicable, application" of an obscure seventeenth-century legal concept.[48] Instead, Scheiber argues, "the basic concept of 'public interest'" had been well established in American law by the mid-nineteenth century and undergirded the development of a robust public rights tradition.[49] What Justice Stephen Field and his colleagues did, then, was to build on this regulatory tradition through innovative applications of public rights jurisprudence in order to maintain an American economic order then at risk of being toppled by competing policy demands and external forces.

It is necessary now to differentiate between public interest doctrine—which defined *Munn* and the *Lochner* era—and the *public trust doctrine* upon which public water rights prevailed. First, public interest doctrine must not be confused with what Scheiber cogently refers to as the "affectation doctrine" that characterized the formalistic judicial policing of the boundary between "two kinds of business enterprises—those affected with the public interest and those not so affected."[50] Simply put, the *affectation doctrine* referred to the nature of *Lochner* era jurisprudence whereby the Supreme Court strictly distinguished between a public sphere and a private sphere. *Lochner* era formalists policed the boundaries of these spheres to determine what was public (and, thereby, subject to regulation) and what was private (and off limits to regulatory government intervention).[51] Outside of this retrospective interpretation of the Supreme

[48] Scheiber, "The Road to *Munn*," 402.
[49] Scheiber, 335.
[50] Scheiber, 330.
[51] The most fully developed accounts of formalist jurisprudence with regard to the public-private distinction are Gillman, *The Constitution Besieged*; Cushman, *Rethinking the New Deal Court*; and Cushman, "Teaching the *Lochner* Era."

Court from 1877 to 1934,[52] *public interest doctrine* may simply be understood as the jurisprudential tendency to promote the broad interests and welfare of the public over the rights of any individual.[53]

The *public trust doctrine*, on the other hand, refers to the jurisprudential commitment to secure, in trust for the people, common (or, public) property for the common good.[54] What distinguishes the public trust doctrine is its positivist legal role and requisite reliance on governmental authority to restrain private property when the general welfare demands it. When private rights begin to prevent, limit, or injure the rights of the public it is this sovereign power—the *police power*—that authorizes the government to restrain or regulate private rights for the benefit of the public.[55] Thus, the public trust doctrine inherently relies on two essential concepts: public interest and the police power.

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[52] That is, the *Lochner* era—from *Munn v. Illinois* (1877) to *Nebbia v. New York* (1934) (see note 7 above).

[53] For authoritative accounts on the origins of public interest doctrine, police powers, and eminent-domain, see Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, MA: Harvard University Press, 1957); and Scheiber, "The Road to *Munn*."

[54] Joseph Sax characterizes the doctrine as a state's trusteeship of public property wherein "certain uses [of the property] have a peculiarly public nature that makes their adaptation to private use inappropriate," premised on the exercise of the police power "to enlarge or diminish the public rights for some legitimate public purpose . . . within the legitimate scope of regulatory powers." Sax, "The Public Trust Doctrine," 485, 476, 478. See also Selvin, "The Public Trust Doctrine," 1403–1408; and Wilkinson, "The Headwaters of the Public Trust," 450–462.

[55] Massachusetts Chief Justice Lemuel Shaw provided the classic statement of the police power in *Commonwealth v. Alger*, 61 Mass. 53, 85 (1851):

> Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. . . . The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and the subjects of the same.

Development of the public trust doctrine can be traced through a few representative Supreme Court water rights cases in the late nineteenth century that, incidentally, upheld both public water rights and broad commercial interests.[56] These cases forged a doctrinal set of judicial principles that preserved state water resources in trust for the benefit of the public. It is important to understand here that these trust principles protected the submerged land (the common property of the people) beneath the water and *not* the water itself—recall that there can be "no property in the water itself, but a simple usufruct while it passes along."[57]

The first case to consider is *Barney v. Keokuk* (1876), in which the court determined that public improvements to the bed or bank of a navigable river that obstruct a riparian proprietor's access to the water do not constitute a taking.[58] In *Barney*, a riparian proprietor along the Mississippi River disputed the City of Keokuk's erection of a steamboat landing on "newly made ground below original high water."[59] The Supreme Court upheld the lower court ruling in favor of the city, finding that the steamboat landing is "a public use of the river bank, which is absolutely necessary to the use of the river as a navigable water."[60] Furthermore, the court clarified that "the shore between high and low water mark, as well as the bed of the river, belongs to the state."[61] Most importantly, the court affirmed that "public authorities ought to have entire control of the

[56] These cases are indicative of the broad development of the public trust doctrine, but by no means comprise the entirety of case law that contributed to its development. For comprehensive analysis of public trust case law, see Blumm and Moses, "The Public Trust"; Sax, "The Public Trust Doctrine"; and Selvin, "The Public Trust Doctrine."

[57] Kent, *Commentaries*, 3:617.

[58] Barney v. Keokuk, 94 U.S. 324 (1876).

[59] *Barney*, 94 U.S. at 328.

[60] *Barney*, 94 U.S. at 342.

[61] *Barney*, 94 U.S. at 336.

great passageways of commerce and navigation, to be exercised for the public advantage and convenience."[62] *Barney*, then, affirmed the proprietorship of a state in the beds and banks of its public waterways for the express purposes of "commerce and navigation." Moreover, *Barney* presents a straightforward precedent for public-private water rights disputes. In affirming that the "proprietorship of the beds and shores of such [navigable] waters . . . properly belongs to the States by their inherent sovereignty," the court paved the way for a more assertive affirmation of public trust principles.[63]

The justices in *Barney* asserted the paramount rights of the public to the beds and banks of the Mississippi River for the express purpose of protecting the vast commercial interests at stake. In Hurst's model, this public property was dynamic and productive, whereas the riparian claimant's static property contributed little to the American commercial republic. Furthermore, the justices established a firm boundary at the "high water mark" at which they could distinguish between the paramount public interest in commercial navigation and the subservient private rights of Barney. *Barney* was decided a year before *Munn v. Illinois* (1877), the "foundational case for the 'affected with a public interest doctrine'" that marks the beginning of the *Lochner* era.[64] In a scathing dissent in *Munn*, Justice Field decried the "clothing" of a private business with "magic" language intended to "change a private business into a public one."[65] Field's dissent ultimately set the tone for decades of substantive due process interpretation during the *Lochner* era. For Justice Field, the public-private distinction was inviolable, and he "refused to provide 'a harbor where refuge can be found' for the inconsistent claims of

[62] Barney v. Keokuk, 94 U.S. 324, 338 (1876).
[63] *Barney*, 94 U.S. at 338 (1876).
[64] Munn v. Illinois, 94 U.S. 113 (1877); Cushman, "Teaching the *Lochner* Era," 537n1.
[65] *Munn*, 94 U.S. at 138–139 (Field, J., dissenting).

any particularistic interest group."[66] This distinction can be seen in *Barney*, yet Field himself proved his willingness to uphold the public side of the public-private distinction fifteen years later.

In what would become the "central substantive thought in [twentieth-century] public trust litigation," Justice Field's majority opinion in *Illinois Central Railroad v. Illinois* (1892) firmly established the public trust doctrine as the juridical guardian of public waterways.[67] The justices in *Illinois Central* confronted the question whether the Illinois legislature's 1869 grant of a vast tract of submerged land along Chicago's waterfront to the Illinois Central Railroad Corporation could be revoked without compensation. In the original 1869 act authorizing the grant, the state legislature intended to grant the title and interests of the submerged lands in question to the city of Chicago. However, the final version that passed (over the governor's veto) ceded them instead to the railroad company; the legislature repealed the act in 1873, thus revoking the railroad's grant.[68] Nonetheless, Illinois Central Railroad continued to build on these since-revoked submerged lands and the state, in 1883, sought injunctive relief through the courts.[69]

The question, as Justice Field put it, was "whether the railroad corporation can hold the lands and control the waters by the grant against any future exercise of power

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[66] Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897," *Journal of American History* 61, no. 4 (March 1975): 1004 (citing *Missouri Pacific Railway. Co. v. Humes*, 115 U.S. 512, 521 [1885]).

[67] Sax, "The Public Trust Doctrine," 490; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). Others take issue with Justice Field's interpretation of public rights and the public trust doctrine's validity; but cf. Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property," *University of Chicago Law Review* 53, no. 3 (Summer 1986): 737–749.

[68] *Illinois Central*, 146 U.S. at 451.

[69] *Illinois Central*, 146 U.S. at 412, 414, 433, 434.

over them by the State."[70] He strongly rejected such an absolute derogation of the state's power as trustee for the public:

> Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time . . . [and] the power to resume the trust whenever the State judges best is, we think, incontrovertible.[71]

Field asserted that the "control of the State for the purposes of the [public] trust can never be lost."[72] One such purpose of the public trust, then, was ensuring that any conveyance—from the state to a private party, corporation, or municipality—of rights or title in submerged lands beneath navigable waters only occur "when that can be done without substantial impairment of the interest of the public in the waters."[73] In other words, any state grant of rights or title in trust property must remain subservient to the public interest and the common good.

More importantly, Justice Field integrated the two core tenets of the public trust doctrine: public interest and the police power. Field likened an alienation of a state's trust obligations to the preposterous concept of a state relinquishing its police powers: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[74] This link between public interest, trust obligations, and the police power validated the doctrinal integrity of "*positive* notions of public rights."[75] Here again, as in *Barney*, a

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[70] Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).
[71] *Illinois Central*, 146 U.S. at 455.
[72] *Illinois Central*, 146 U.S. at 453.
[73] *Illinois Central*, 146 U.S. at 387 (emphasis mine).
[74] *Illinois Central*, 146 U.S. at 453.
[75] Scheiber, "Public Rights," 219 (emphasis in the original).

Supreme Court decision significantly expanded the scope and intent of public trust principles in support of the common ideological tenet of securing the American commercial republic. Yet *Illinois Central* relied heavily on an 1856 Iowa state court decision of "signal importance" to public water rights jurisprudence.[76]

Scheiber asserts that "the Iowa court unequivocally asserted the public interest in a mighty river [the Mississippi] that ran its course through half the length of a continent, carrying the commerce of the American heartland."[77] Glaringly obvious in this statement is the underlying economic dimension in which the American public held a paramount interest. Where Justice Field declared in 1892 that submerged lands were held "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing,"[78] Iowa Justice William Woodward wrote some thirty-six years previously that the submerged lands and waters of the Mississippi River belonged to the sovereign "as a trust for the public use and benefit."[79]

Justice Field is often cast as a champion of legal conservatism and laissez-faire constitutionalism, but this betrays his important contributions to the development of the public trust doctrine.[80] As we have seen, Justice Field concurred in *Barney* and later authored the majority opinion in *Illinois Central*, two of the most important doctrinal cases in public trust jurisprudence. And, as Scheiber again reminds us, it was "Justice Field, the high priest of judicial conservatism and vested property rights, and former

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[76] Scheiber, "The Road to *Munn*," 348.

[77] Scheiber, 348.

[78] Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).

[79] McManus v. Carmichael, 3 Iowa 1, 29 (1856), quoted in Scheiber, "The Road to *Munn*," 347.

[80] Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence: University Press of Kansas, 1997), 6; and Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 174–175.

California judge, who wrote the decision upholding public policy and state discretion."[81] Thus, similar to the obfuscation of public rights and public trust doctrine during the *Lochner* era, to accept disparagingly reductionist accounts of Justice Field's jurisprudence obscures the true nature and significance of his contributions to American constitutional law.

Charles McCurdy and Harry Scheiber have pointed to the significance of Justice Field's "energetic" and "innovative" public rights jurisprudence in mid-nineteenth-century California—and later on the US Supreme Court—in contributing to the development of the public trust doctrine.[82] Contrary to prevailing (and misguided) accounts, Justice Field did not act simply as the judicial steward of big business and inviolable constitutional guarantees of economic liberty. Rather, Field's Jacksonian conception of law, liberty, public economy, and commercial republicanism undergirded his efforts to secure, in the public interests of general economic growth, a thriving private sphere in which unwarranted government regulation ought not interfere. As McCurdy explains, Field "believed that public and private institutions had diametrically opposed reasons for existence; legislation that vested public property in private corporations would invariably lead to situations in which the people would be subject to private greed."[83] Field thus sought to "proscribe virtually every form of special privilege. The result would be a harmonious system in which the public and private sectors pursued

[81] Scheiber, "Public Rights," 238 (citing *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701 [1884]).

[82] Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850–1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America," in "Law and Society in American History: Essays in Honor of J. Willard Hurst: Part II," special issue, *Law & Society Review* 10, no. 2 (Winter 1976): 239; McCurdy, "Justice Field"; and Scheiber, "Public Rights," 238–240.

[83] McCurdy, "Justice Field," 994–995.

appropriate goals within proper spheres of action." As far as Justice Field was concerned, private corporations could not and should not be "affected" with a public interest.

So, in contravention to the general confines of *Lochner* era public-sphere diminution, public rights in water underwent a doctrinal expansion through the development and innovative judicial application of public trust principles. By the turn of the century, a full-fledged public trust doctrine had been established—primarily through instrumentalist processes that contributed to the expansion of the American commercial republic. Before we proceed further, I must draw once more upon the preeminent authority on public trust doctrine, Joseph Sax, who characterized the doctrine in two important ways. First, drawing together basic principles from the classic case of *Commonwealth v. Alger* (1851) as well as the much later case *State v. Cleveland and Pittsburgh Railway* (1916), he articulated the following tenet:

> No grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses.[84]

And, more specific to the role of positive governance with regard to state police powers:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.[85]

Thus, when the New Jersey-based Hudson County Water Company contracted in 1905 to provide water from an inland diversion of New Jersey's Passaic River to a New York

[84] Sax, "The Public Trust Doctrine," 488–489.
[85] Sax, 490 (emphasis in the original).

City borough, both state and federal courts looked "with considerable skepticism" upon the proposed reallocation of New Jersey state waters.[86]

Transcending the Economic Dimension: Water as a Natural Resource

In *Hudson County Water Co. v. McCarter* (1908), the US Supreme Court invoked public trust principles to affirm the right of a state (New Jersey) "to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land."[87] Justice Oliver Wendell Holmes, the "enlightened apostle of judicial self-restraint," asserted in the majority opinion that state waters were "natural advantages" to be protected and maintained "substantially undiminished."[88] Justice Holmes's opinion was characteristically forthright and concise, and is indicative of his fully matured "philosophical views on sovereignty in a republic, as well as his jurisprudential views on the scope of judicial review . . . [and] legislative supremacy in the American constitutional republic."[89] Consider as well Holmes's unique intellectual ability to synthesize and refine social, philosophical, and legal ideas into succinct and universally applicable judicial opinions.[90] Among his many other contributions to the United States, *Hudson County* reveals the creative and innovative synthesis of progressive legal philosophy, environmental conservationism, and public

[86] "City Moves in War for New Jersey Water," *New York Times*, April 29, 1905; "Water Suit On: Attorney General McCarter Asks for An Injunction Against the Hudson Company," *Jersey City News*, June 14, 1905.

[87] Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

[88] G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 484; *Hudson County*, 209 U.S. at 356.

[89] G. Edward White, "Revisiting Substantive Due Process and Holmes's *Lochner* Dissent," *Brooklyn Law Review* 63, no. 1 (1997): 110.

[90] See Posner, *The Essential Holmes*, xiv–xxiv.

trust jurisprudence.

More importantly, and breaking with the economic instrumentalism inherent in previous public water rights cases, *Hudson County* reconceptualized the state's public trust obligations to the protection of water as a natural resource in and of itself. Justice Holmes, the preeminent progressive jurist and legal realist, characteristically cut through the formalistic claims on which the Hudson County Water Company sought relief and found the issue to be a question of a state's right to maintain its natural water resources—decoupled from any economic presupposition—for the common good. In weighing this question Holmes resorted to well-established and validated public trust principles. However, recall that the public trust doctrine at the turn of the century protected submerged lands beneath the water as public property in trust for the people—it did not protect the water itself. Furthermore, the public trust doctrine developed within a decidedly economic instrumentalist framework and, consequently, economic interests undergirded the legal principles through which the doctrine could be applied.

Thus, Holmes faced a quandary: Decide the case upon the well-established, yet economically imbued, public trust doctrine; or, transcend the economic dimension altogether and reconceptualize the rights of the public to preserve the state's natural water resources. Holmes could have cited even just a few prominent public trust case precedents—*Illinois Central*, *Barney*, or *Shively v. Bowlby*,[91] for instance—to affirm the right of New Jersey to restrain the Hudson County Water Company from artificially transporting Passaic River waters outside of the state. Such an interpretation would itself have been a novel expansion of the public trust doctrine beyond its standard proprietary

[91] Shively v. Bowlby, 152 U.S. 1 (1894).

interest in the land beneath the Passaic River and into the realm of protecting the water itself. However, invocation of the public trust doctrine in this manner would carry with it the affirmation that "[w]ater when reduced to possession is a commodity, which may be sold, like any other."[92] Holmes would then have to contend both with the constitutional issue of interstate commerce and the formalistic tendencies of his colleagues toward substantive readings of the Due Process Clause.[93] As we shall see, however, Holmes indeed relied on public trust principles but cited instead *Geer v. Connecticut* (1896), seemingly placing authority for his *Hudson County* opinion upon the tenuous concept of *public ownership*.[94]

We shall return to the public ownership theory in more detail momentarily; first, we must examine the case itself and the ways in which Justice Holmes interpreted it on behalf of the majority court. The *Hudson County* case hinged on a June 1905 New Jersey state injunction against the Hudson County Water Company seeking to prevent the diversion and sale "without limitation as to quantity" of Passaic River waters from an

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[92] Hudson County Water Co. v. McCarter, 209 U.S. 349, 350 (1908) (counsel for plaintiff in error).

[93] The Hudson County Water Company claimed deprivation of property without due process, denial of equal privileges to citizens of another state, impairment of obligation of contracts, and interfere with interstate commerce. *Hudson County*, 209 U.S. at 350–351. The New Jersey statute prohibiting out-of-state transportation of New Jersey water clearly interfered with interstate commerce, which violated the supremacy and exclusivity of the federal power to regulate interstate commerce enumerated in the Commerce Clause of the Constitution under Article I, Section 8. However, the New Jersey statute could only have violated the Commerce Clause *if* such water was considered an article of commerce—a recognition that would be carried over with the public trust doctrine (as we have seen). Moreover, the Hudson County Water Company's contract with customers in Staten Island, according to *Lochner* era formalist interpretations, could not be impaired or abridged; the liberty to make contracts was generally protected by the Fourteenth Amendment's Due Process Clause during the *Lochner* era. See Cushman, *Rethinking the New Deal Court*, 139–176; *Sporhase v. Nebraska*, 458 U.S. 941 (1982); and Cushman, "Teaching the *Lochner* Era," 552–562.

[94] Geer v. Connecticut, 161 U.S. 519 (1896).

upstream facility in Little Falls, New Jersey, to customers in Staten Island, New York.[95] At the time, fresh water on Staten Island was sourced from seven wells throughout the island, which a sub-committee report to the New York City Board of Estimate and Apportionment asserted "are clearly incapable of supplying enough water for the whole island" and "will not permanently supply the needs of the growing population."[96] Following the 1898 consolidation of Greater New York and subsequent establishment in 1905 of the State Water Supply Commission, efforts began on construction of a city-wide municipal water supply system linking the boroughs to the upstate Croton and Catskill mountain aqueduct systems.[97] However, these projects would take years to complete and the contract with Hudson County Water was a temporary measure intended to provide "immediate relief" to the strained water supply system on Staten Island.[98]

New Jersey, facing its own water supply crisis, determined not to go along with this plan. The *New York Times* reported that New Jersey state officials "became exercised over the proposition of the East Jersey Company to furnish water to any borough of New York City, seeming to fear that the city has designs on all of the watersheds of the adjoining State."[99] This account seems well attenuated to the political circumstances at the time, especially considering the long-standing animosity between the two states over

[95] McCarter v. Hudson County Water Co., 70 N.J. Eq. 525, 526 (1905).

[96] "Minutes of Meeting of Board of Estimate and Apportionment, City of New York, Held in Room 16, City Hall, Friday, February 16, 1906," *The City Record: Official Journal of the City of New York*, March 3, 1906, 2067.

[97] Edwin G. Burrows and Mike Wallace, *Gotham: A History of New York City to 1898* (New York: Oxford University Press, 1999), 1229–1235; "Report of the Board of Water Supply of the City of New York, From June 9, 1905, to April 9, 1906," app. A to *First Annual Report of the Board of Water Supply of the City of New York* (New York: J. W. Pratt Company, 1906), 71.

[98] "S.I. Board of Trade: Five-Cent Fare, Water Supply, Music in the Parks, and Other Matters Discussed," *Richmond County Advance*, May 13, 1905.

[99] "City Moves in War for New Jersey Water," *New York Times*, April 29, 1905.

waterway rights as well as the jurisdiction of Staten Island itself.[100] The injunction brought by New Jersey Attorney General Robert McCarter carried with it the authority of the state's 1905 Batcheller Act, which made it "unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this state [New Jersey] into any other state, for use therein." Legislative officials in New Jersey thus sought, in the face of rapid urbanization and growing demand for fresh water on both sides of the state boundary, to "preserve and maintain" the waters of New Jersey for the "health and prosperity of all citizens of this state."[101]

In the first state case, *McCarter v. Hudson County Water Co.* (N.J. 1905) (hereinafter *McCarter I*), Vice Chancellor James Bergen affirmed the state's assertion of its inherent right to preserve its natural supply of water despite the fact "that the present available supply of water in the Passaic river is largely in excess of the present consumption by New Jersey inhabitants, as now supplied."[102] Bergen asserted, in clear and efficient prose, that the state's justification of perceived future demand outweighed the Hudson County Water Company's claims to present excesses of supply.[103] More

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[100] The Van Buren settlement in 1833 ended the dispute between New Jersey and New York over jurisdiction and ownership of Staten Island, ceding the island itself to New York. See Michael J. Birkner, "The New York-New Jersey Boundary Controversy, John Marshall and the Nullification Crisis," *Journal of the Early Republic* 12, no. 2 (Summer 1992): 195–212.

[101] N.J. Pub. L. of 1905, chap. 238, p. 461.

[102] McCarter v. Hudson County Water Co., 70 N.J. Eq. 525, 527 (1905). McCarter filed the original injunction in June 1905 with the New Jersey State Court of Chancery, which issued its decision August 22, 1905; this is the case cited here. On appeal, the case was heard before the state's Court of Errors and Appeals on December 7, 1905, and decided November 19, 1906. Both cases appear in volume 70, New Jersey Equity Reports, with the same title but on different pages. To avoid confusion, I will hereinafter refer to the 1905 Chancery case (70 N.J. Eq. 525) as *McCarter I* and to the 1906 Appeals case (70 N.J. Eq. 695) as *McCarter II*; the final 1908 US Supreme Court case (209 U.S. 349) retains its original inverted title *Hudson County Water Co. v. McCarter*.

[103] *McCarter I*, 70 N.J. Eq. at 533. Vice Chancellor Bergen declared:

importantly, Bergen expanded the application of public trust principles beyond conventional proprietary interests in submerged lands by reasoning that "the state in its sovereign right, as owner of the bed of all tidal streams, becomes the owner of all fresh water flowing upon its land."[104] And the state, furthermore, "being the last riparian owner[,] . . . should be considered as the ultimate owner of such unused common property, to be held in trust for the use of all its subjects." The "unused common property" Bergen referred to was the running water that remained after it had "already served the proper purposes of [upstream] private riparian owners."[105]

The concept of public ownership—that is, state ownership of public waters (as "common property")—that Bergen asserted in *McCarter I* seems remarkably similar to the public trust doctrine, which I described above as the jurisprudential commitment to secure, in trust for the people, public property for the common good. Yet the public trust doctrine at the time pertained strictly to the title of submerged lands beneath navigable waters—not the water itself—and the question in *McCarter I* (as it did in later iterations) dealt squarely with the water itself. Vice Chancellor Bergen took the view that the

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> The constant increase in our population, considered in connection with the unchanging extent of our watershed and the consequent limit of the natural supply of water necessary for domestic and healthful purposes, may justly alarm the state with regard to the future . . . and justifies the restriction of the appropriation of its property. It is admitted that the Passaic river is the most important of the available sources of water supply for the people of New Jersey, and that their necessity, therefore, is constantly increasing.

[104] *McCarter I*, 70 N.J. Eq. at 535.

[105] *McCarter I*, 70 N.J. Eq. at 531–533. Bergen declared:

> Thus it appears from immemorial times running water . . . has been esteemed common property, subject to usufructuary use by the owners of land over which it passed . . . If diverted, it must be returned undiminished, except as to the incidental waste made necessary by the personal private use, for domestic and other recognized lawful purposes."

Recall as well that riparian proprietors held "no property in the water itself, but a simple usufruct [*right to use without damaging or diminishing*] while it passes along." (see note 36 above)

Hudson County Water Company's purported right to divert water from the Passaic River "without limitation as to quantity" could "only be sustained upon the ground of *ownership*."[106] Thus Bergen relied on common-law authorities as well as an earlier New Jersey water rights case to assert that the water company held absolutely no such "exclusive ownership in running water," whereas the state, as "ultimate owner," could freely restrain any interference, diversion, or abstraction of its water.[107]

In *McCarter II* (N.J. 1906), the superior New Jersey Court of Errors and Appeals affirmed the lower court's findings against private ownership and rights of diversion.[108] *McCarter II* seemed to reaffirm the significance of state trusteeship with regard to public waters: Vice Chancellor Bergen's "unused common property . . . held in trust for the use of all its subjects" became, in *McCarter II*, a "*residuum* of common or public ownership that under our system rests in the state as a trustee for all the people."[109] However the superior court, citing *Geer v. Connecticut*, distinguished the concept of public ownership as an absolute, sovereign "right of control."[110] This interpretation grossly misconstrued *Geer* and the concept of public ownership, imbuing the state with ultimate authority "subject to no constraints, not even to constitutional restrictions."[111] Not surprisingly,

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[106] *McCarter I*, 70 N.J. Eq. at 526, 528.

[107] *McCarter I*, 70 N.J. Eq. at 530, 535.

[108] *McCarter II*, 70 N.J. Eq. at 708. "[R]iparian owners, as such, have not any such right in or ownership of the waters that flow upon or past their lands as will entitle them to divert a portion of the flow and convey it elsewhere for the use of others than riparian owners."

[109] *McCarter I*, 70 N.J. Eq. at 533; *McCarter II*, 70 N.J. Eq. at 711 (emphasis in the original).

[110] *McCarter II*, 70 N.J. Eq. at 712. In *Geer*, the Supreme Court affirmed Connecticut's right to prohibit out-of-state transportation of lawfully killed wild birds on the grounds that the wild birds belonged "in common to all the people of the state" and could never, therefore, "be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good." Geer v. Connecticut, 161 U.S. 519, 535 (1896).

[111] George Cameron Coggins, "Wildlife and the Constitution: The Walls Come Tumbling Down," *Washington Law Review* 55, no. 2 (1980): 306. The obvious and dire implications for

Geer and the public ownership theory were later "progressively cut back until *Geer* itself was overruled in 1979."[112]

While the state may be said to hold common property in trust (as the justices in both *McCarter I* and *II* did), the underlying presumption was that the state, as "ultimate owner," could regulate such common property solely through its authority as the sovereign owner. In other words, such regulation need not be premised on that cardinal concept of *public interest*—sovereign ownership carried with it an absolute and unconditional right of control. The patent absurdity of such a doctrine did not go unnoticed; the Supreme Court itself repeatedly derided the "whole ownership theory" in subsequent wildlife management cases, characterizing it as "a weak prop," "pure fantasy," and "legal fiction."[113] More importantly, the court's assertion in *Toomer v. Witsell* (1948) highlights the fallacy of public ownership theory as "but a fiction expressive in legal shorthand of the importance to its people [*that is, the paramount public interest*] that a State have power to preserve and regulate the exploitation of an important resource."[114]

Here, then, is the distinction between public ownership—with its faulty presumption of absolute and unconditional right of control—and public trust, which is

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dual federalism never materialized; *Geer* and the public ownership theory were "progressively cut back until *Geer* itself was overruled in 1979." (p. 314)

[112] Coggins, "Wildlife and the Constitution," 314. The Supreme Court blatantly referred to public ownership as "theory" in *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

[113] Toomer v. Witsell, 334 U.S. 385, 401 (1948); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

[114] *Toomer*, 334 U.S. at 402. Holmes himself used remarkably similar language to dismiss the *Lochner* era affectation doctrine: "[T]he notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers." Tyson v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting). See Scheiber, "The Road to *Munn*," 355.

undergirded by the core tenets of public interest and state police power. The state indeed retains a "right of control" with the public trust doctrine, but control resides in the police power of the state—not as proprietor but as trustee for the public—to be exercised only in pursuit of a valid public interest. Ownership theory amounts to a tacit recognition that the state may regulate common property or restrain private or qualified rights in public property freely and solely on the basis that it is the absolute, or "ultimate," owner—without a concomitantly sufficient public interest justification. Thus, when the case came before the US Supreme Court in 1908, Justice Holmes must have understood this fallibility of the public ownership theory and steered clear of invoking it.

In *Hudson County Water Co. v. McCarter*, Justice Holmes asserted that his decision rested "upon broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess."[115] Broader ground it was indeed, for Holmes imbued his opinion with public trust principles while simultaneously separating it from the economic instrumentalist framework within which the public trust doctrine typically operated. To accomplish this, Holmes cited *Geer v. Connecticut* to uphold the state court's finding that the illegally diverted waters of the Passaic River could not enter into interstate commerce.[116] Even further, he borrowed from Vice Chancellor Bergen the expansion of public trust principles beyond the standard beds-and-banks application, yet he refused to subscribe to anything resembling the ownership theory. Instead, Justice Holmes recast the

[115] Hudson County Water Co. v. McCarter, 209 U.S. 349, 354–355 (1908).

[116] Just as the wild birds in *Geer* could never enter into commerce without the consent of the state, so too did the New Jersey Court of Errors determine that the waters of the Passaic River, "abstracted" without the consent of the state—the "ultimate owner"—"cannot legitimately enter into interstate commerce." *McCarter II*, 70 N.J. Eq. at 719 (see note 109 above).

public trust doctrine into a more universal proposition of public rights in which water existed as a natural resource in and of itself.

Justice Holmes's reliance on *Geer* is both remarkably deceptive and strikingly simple. Holmes cited *Geer* not to invoke the potentially troublesome ownership theory, but rather to invoke the *public trust doctrine*. Holmes's first citation to *Geer* appears at the end of the following passage:

> [T]he State, as *quasi*-sovereign and representative of the interests of the public . . . may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, [and] one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. *Geer v. Connecticut*, 161 U.S. 519, 534.[117]

Here, Justice Holmes at once props up the principles of the public trust (*"On this principle of public interest and the police power . . ."*), evades the public ownership theory (*". . . and not merely as the inheritor of a royal prerogative . . ."* [from which the "residuum of public ownership" conveys]), and then affirms both *Geer* and *Hudson County* on the basis of the public trust doctrine (*". . . the State may make laws for the preservation of game, which seems a stronger case."*). In fact, Holmes's citation to *Geer* points specifically to the concluding section of Justice White's *Geer* opinion in which he turns from ownership concepts to public interest and police power, asserting "the undoubted existence in the State of a police power . . . [which] flows from the duty of the State to preserve for its people a valuable food supply."[118] This indisputable state police power, Justice Holmes declared, superseded any claims of deprivation of property

[117] Hudson County Water Co. v. McCarter, 209 U.S. 349, 355–356 (1908) (citing *Kansas v. Colorado*, 185 U.S. 125 [1902], and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 [1907]).

[118] Geer v. Connecticut, 161 U.S. 519, 534 (1896).

without due process, and so "[t]he defense under the Fourteenth Amendment is disposed of by what we have said."[119]

Justice Holmes further dispensed with the Hudson County Water Company's remaining claims rather curtly. Of the supposed impairment of the obligation of contracts: "One whose rights . . . are subject to state restriction cannot remove them from the power of the State by making a contract about them." Citing *Geer* one more time to deny any interference with interstate commerce: "A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end." And, lastly, of the supposed denial of equal privileges: "Within the boundary [of New Jersey], citizens of New York are as free to purchase as citizens of New Jersey."[120]

Thus, Holmes applied public trust principles to *Hudson County* without ever explicitly doing so. He refused to ground his opinion on an economic presupposition in which New Jersey water functioned either as a highway for commerce, as a source of power or production, or as an article of commerce. Rather, he relied on simple, self-evident assertions to establish his "broader ground":

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.[121]

And, more plainly:

> The legal conception of the necessary [potential use cases of water] is apt to be confined to somewhat rudimentary wants, and there are benefits

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[119] Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908).
[120] *Hudson County*, 209 U.S. at 357–358.
[121] *Hudson County*, 209 U.S. at 356.

> from a great river that might escape a lawyer's view. . . . [The state] finds itself in possession of what all admit to be a great public good.[122]

Holmes further declared that a state need not specify how, why, or to what end it might seek to preserve its natural resources: "[W]hat it has it may keep and give no one a reason for its will."[123] *Hudson County* thus underscores the inherent and indisputable public interest duty of a state, as "guardian of the public welfare," to protect and maintain public waters, no matter to what end.[124] It becomes clear, then, that public waters of the state—lacking any real or supposed economic purpose or private interest—ought to be considered a natural resource.

The question remains, then, as to why Holmes's majority colleagues—except lone dissenter Justice McKenna, who did not pen a dissenting opinion—concurred with his decision. The most likely answer stems from the fact that the water company's contract "was illegal when it was made," thus abrogating any grounds for a formalist "liberty of contract" interpretation; Holmes's colleagues had no choice but to concur in favor of public rights.[125] The implicit recognition of water as a natural resource may be seen as especially novel given that the term *natural resource* is itself ambiguous and somewhat anachronistic in a legal sense. Holmes may not have felt inclined to use the term because it did not officially exist in legal lexicon. For instance, the first edition of Black's *Law Dictionary* (1891) does not define either *natural resource* or *public resource*.[126] The

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[122] Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908).
[123] *Hudson County*, 209 U.S. at 357.
[124] *Hudson County*, 209 U.S. at 356.
[125] *Hudson County*, 209 U.S. at 357.
[126] Henry Campbell Black, *A Dictionary of Law: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* [. . .] (St. Paul, Minn.: West Publishing Co., 1891). However, Black's definition of *publici juris* describes water in a conspicuously naturalist context:

> This term, as applied to a thing or right, means that it is open to or exercisable by all persons. When a thing is common property, so that any one can make use of it

superior state court judgment he affirmed, however, freely used the term in its contemporary conservationist context:

> The act of 1905 [prohibiting the transportation of water outside the state of New Jersey] looks not only to the present, but to the future. It recognizes that the growth and prosperity of the state depend not alone upon the advantages that it presently affords, but upon the assurance that the like advantages, to the extent of our natural resources, properly conserved, will remain for posterity. This policy of foresight, and the desire to fore-close in advance any claim of a vested right to transport the waters of our lakes and streams beyond the borders of the state, doubtless entered into the motive of the legislature in imposing a present prohibition."[127]

Holmes may also have avoided the term, moreover, because of the economic pretext associated with it. As with the economic instrumentalist component of late-nineteenth-century American law, environmental conservationism was steeped in American capitalist and republican ideology—to many Americans, conservation meant the preservation of forests, rivers, and soil for continued economic exploitation, but through more responsible and sustainable programs.[128] Later editions of *Black's Law Dictionary*—even as late as the ninth edition in 2009—presume this economic basis, defining *natural resource* as "[a]ny material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wildlife."[129] Holmes thus used plain terms such as "natural advantages" and "great public

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> who likes, it is said to be *"publici juris;"* as in the case of light, air, and public water. Or it designates things which are owned by 'the public;' that is, the entire state or community, and not by any private person." (p. 965; emphasis in the original)

The second edition (1910) defines *water-course* as a "natural stream of water fed from permanent or periodically natural sources." (p. 1223)

[127] *McCarter II*, 70 N.J. Eq. at 721.

[128] See Cutright, *Theodore Roosevelt*; and Shabecoff, *A Fierce Green Fire*.

[129] Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul, MN: Thomson Reuters, 2009), 1127. A second, more "modern" definition is given as well: "Environmental features that serve a community's well-being or recreational interests, such as parks."

good" to imbue his opinion—and the constitutional status of water rights—with public trust principles and the progressive, non-exploitative ideals of environmental conservation.[130]

Realism and Environmental Conservation: The Holmes-Roosevelt Nexus

How, then, can we explain Holmes's *Hudson County* opinion and its significance? It is difficult to assess Holmes's reasoning outside of the reported Supreme Court opinion. Despite being a prolific writer and expositor in both public and private correspondence throughout his lifetime, Holmes hardly ever mentioned the *Hudson County* case.[131] Nor has Holmes's judicial legacy ever been assessed within the context of environmental conservationism, one of the great philosophical and political movements of the early twentieth century.

We have seen how easy it was for Holmes to undercut his formalistic colleagues by disqualifying the case for consideration on a "liberty of contract" premise. Relying on public trust principles to affirm New Jersey's right to regulate its natural water resources would have been difficult without reckoning as well with the constitutional issue of interstate commerce. In order to avoid this problem, as we have seen, Holmes reconceptualized public trust principles while simultaneously separating them from the economic instrumentalist framework within which the public trust doctrine typically

[130] Hudson County Water Co. v. McCarter, 209 U.S. 349, 356, 357 (1908).

[131] Notwithstanding the May 30, 1908, letter to Nina Gray (see note 132 below), Holmes's only reference to *Hudson County* appears in a letter to John Henry Wigmore—in response to a query for some of Holmes's published court opinions—in which Holmes cites *Hudson County* as a case on "rights of State v. State etc." Holmes to Wigmore, December 4, 1910, General Correspondence, Mark Dewolfe Howe Research Materials, Oliver Wendell Holmes Jr. Digital Suite, Harvard Law School Library.

operated. Yet this does not answer the question of *how* or *why* water needed to be "reconceptualized." If Holmes imbued his opinion with the progressive, non-exploitative ideals of environmental conservation, how did he do so? In considering *Hudson County* as a question of a state's right to maintain its natural water resources for the perpetual common good, Holmes must have shifted perspectives, looking not to "a study of [law] as an anthropological document from the outside," but rather to the "establishment of [legal] postulates from within upon accurately measured social desires."[132] To find these contemporary social and political imperatives, we need look no further than May 1908, little more than a month after the *Hudson County* decision.

One of Holmes's few written references—an indirect reference, no less—to his *Hudson County* opinion appears in a May 30, 1908, letter to Nina Gray. Holmes wrote of a White House dinner reception he attended on May 12, the night prior to a "meeting of the Governors," and that "[t]he next day in his opening address the Presd't . . . [illegible] . . . with a quotation from an opinion of mine."[133] The opinion, of course, was *Hudson*

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[132] Oliver Wendell Holmes, "Law in Science and Science in Law," in *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), 225–226.

[133] Holmes to Nina Gray, May 30, 1908, John G. Palfrey Collection of Oliver Wendell Holmes Jr. Papers, Oliver Wendell Holmes Jr. Digital Suite, Harvard Law School Library. In the letter, Holmes seems amenable to Roosevelt's *Hudson County* comments, but several illegible sections preclude a thorough transcription of his words:

> . . . a quotation from an opinion of mine which a little before the . . . [illegible] . . . of an attack. Which squared things. That night I went to a private dinner . . . and had a very nice talk with the Presdt (in which coincidentally we said our last words about the old No. Securities Case & that matter is finished)." (see note 142 below)

The illegible portions of Holmes's letter are characteristic of his awful handwritten prose, as described in one-time Holmes law clerk Chauncey Belknap's October 8, 1915, diary entry:

> I chuckled when he [Holmes] complimented my handwriting. Dean Thayer [Harvard Dean of Law] is the only other person who has been equally generous, and these two have the worst hands ever man attempted to decipher. The justice tells the story on himself of Chief Justice Field, of Mass., who exclaimed in despair, "Holmes, you are indictable as a fraud at common law, because your handwriting looks legible but isn't." (Todd C. Peppers, et al., "Clerking for

County, which Roosevelt lauded in his opening address to the 1908 Conference of the Governors on natural resource management and environmental conservation as the "root of the idea of conservation of our resources in the interests of our people."[134] Here, at the Conference of the Governors, we find the social and political imperatives that undergirded the "accurately measured social desires" upon which Holmes must have leaned.

The 1908 Conference of the Governors may rightly be understood as "the beginning of a true national conservation movement."[135] Paul Russell Cutright wrote in 1985 that

> the results of the conference were immediate and far reaching[,] . . . [and] gave the conservation movement a prestige and momentum previously unknown and raised it to a plane that enabled it to survive the various reversals it later suffered as a consequence of periodic shifts in the political climate.[136]

A contemporary reporter wrote favorably of the conference in Harper's Weekly:

> It is very rare for so much to be said that was worth hearing, recalling, thinking about, and acting upon as was said at the conference of Governors. The great value of the conference was educational. To teach the people to appreciate, develop, and conserve the wealth of the nation is a duty of enormous importance, and none too soon undertaken.[137]

Still, such accounts of the conference and of the conservation movement at large recognize only Roosevelt's energetic executive administration in "formulating,

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'God's Grandfather': Chauncey Belknap's Year with Justice Oliver Wendell Holmes, Jr.," *Journal of Supreme Court History* 43, no. 3 [November 2018]: 264)

[134] Theodore Roosevelt, in *Conference of the Governors of the United States: Proceedings of a Conference of Governors in the White House, Washington, D.C., May 13–15, 1908* (Washington, DC: Government Printing Office, 1909), 12.

[135] Shabecoff, *A Fierce Green Fire*, 62.

[136] Cutright, *Theodore Roosevelt*, 229.

[137] George Harvey, ed., "Addresses That Should be Studied," *Harper's Weekly*, May 30, 1908, 4.

implementing, and executing his wide-ranging conservation program."[138] Characteristic of these hagiographic accounts are references to executive actions, the creation of administrative agencies, and Roosevelt's many impassioned speeches on conservation.[139] Absent from these accounts is the instrumental role of the American judiciary in applying innovative judicial doctrine to uphold the rights of the public to natural resources—water chief among them.

Recall, for a moment, Teddy Roosevelt's claim that America's "public resources were being handled and disposed of in accordance with the small considerations of petty legal formalities, instead of for the large purposes of constructive development."[140] We now know, thanks to the outstanding historical work of legal historians, that Roosevelt's characterization misrepresents the legal order of the Progressive Era. Consider as well the oft-overlooked fact that seven Supreme Court justices attended the 1908 Conference of the Governors—a decidedly meaningful and symbolic representation of the federal judiciary at a first-of-its-kind conservation conference. Nowhere else might the early-twentieth-century confluence of jurisprudential progressiveness and environmental conservationism be more apparent.

We should be careful, however, to malign the former president, whose recollection is perhaps an accurate representation of the social context in which the

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[138] Cutright, *Theodore Roosevelt*, 213.

[139] See, for instance Douglas Brinkley, *The Wilderness Warrior: Theodore Roosevelt and the Crusade for America* (New York: HarperCollins, 2009), 21 ("It was Roosevelt—not Muir or Pinchot—who set the nation's environmental mechanisms in place and turned conservationism into a universalist endeavor."); and Douglas Trevor Kuzmiak, "America's Economic Future and the Environment: Shaping Tomorrow Through an Awareness of Yesterday," *Managerial Auditing Journal* 10, no. 8 (1995): 7 ("Leading Federal involvement in the environment was Theodore Roosevelt . . .).

[140] *Theodore Roosevelt: An Autobiography*, 395.

Figure 1. Conference attendees assembled at the North Portico of the White House, May 13, 1908. President Roosevelt is seated, front row, in the center of the group (seventh from the left); Vice President Fairbanks is to his left, followed in order of seniority by Supreme Court Justices Harlan, Brewer, White, McKenna, Holmes, Day, and Moody. Reproduced from *Harper's Weekly*, May 30, 1908, 13.[141]

contemporary American judiciary was perceived in less-than-ideal terms. But if we dig a little deeper, we find a former president unwilling to concede, in 1913 at least, that the American judiciary virtually created the public trust doctrine. Here, too, Roosevelt misrepresents the facts. Roosevelt claimed that Herbert Knox Smith (of the Inland Waterways Commission and National Conservation Commission) "helped to develop and drive into the public conscience the idea that the people ought to retain title to our natural resources and handle them by the leasing system."[142] As we have seen, the "idea" that the people ought to retain title to natural resources was already firmly established judicial doctrine by the end of the nineteenth century. And, just five years previously, Roosevelt

[141] A similar photo from a different vantage point (presumably of the official photographer) appears in the official proceedings with the caption "GOVERNORS IN ATTENDANCE." *Conference of the Governors*, xxxvi.

[142] *Theodore Roosevelt: An Autobiography*, 419.

commended the "learned justice" at the opening address of this Conference of the Governors on a Supreme Court case that rested firmly on public trust principles.[143]

Taken together, *Hudson County* and the Conference of the Governors mark the confluence of an as-yet-undeveloped undercurrent of *realist* judicial doctrine with the social and cultural currents that undergirded Progressive Era environmental conservationism. Just as Holmes's opinion at once repudiated the constitutional excesses of *Lochner* era legal formalism and reconceptualized the legal status of water, so too did environmental conservationism repudiate the nineteenth-century notion that natural resources were inexhaustible and predestined for reckless human exploitation.[144] Holmes, on a personal level, understood this basic tenet of conservation philosophy:

> Civilization is the reduction of the infinite to the finite. The realizing that there is so much forest, coal, etc. so much even atmosphere—and no more. I wonder if it might not be possible that those who are withdrawing nitrogen from the latter might in time be found to be doing a deadly thing.[145]

Indeed, Holmes was as much a philosopher as he was a jurist, and his ability to encapsulate deep-seated philosophical and legal ideas into neat, succinct judicial opinions contributed to his celebrity and modern image as a great American jurist. His greatest

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[143] *Conference of the Governors*, 12. This should be considered as well in the context of the fraught relationship between the President and his Supreme Court appointee. Roosevelt appointed Holmes to the Supreme Court because he believed Holmes to be a party-loyal Republican who might be relied upon for Roosevelt's own ambitions in the executive branch. But Holmes was no tool of the President; Holmes's dissent in *Northern Securities Co. v. United States* (1904) clearly departed from Roosevelt's trust-busting interests. Roosevelt thereafter harbored deep-seated animosity toward his "spineless" judge. Holmes later wrote that he had "no doubt that later he [Roosevelt] heartily repented over his choice when I didn't do what he wanted in the Northern Securities Case." Holmes to Lewis Einstein, April 1, 1928, General Correspondence, Mark Dewolfe Howe Research Materials, Oliver Wendell Holmes Jr. Digital Suite, Harvard Law School Library. See Richard H. Wagner, "A Falling Out: The Relationship Between Oliver Wendell Holmes and Theodore Roosevelt," *Journal of Supreme Court History* 27, no. 2 (July 2002): 114–137.

[144] Shabecoff, *A Fierce Green Fire*, 16–38.

[145] Holmes to [Harold Laski], February 28, 1919, in Posner, *The Essential Holmes*,143.

intellectual ability may have been his faculty for refining and synthesizing disparate ideas into singularly conspicuous judicial declarations, in a way that biographer Richard Posner likened to Shakespeare, "though on a much smaller scale. . . . He enriched where he borrowed; his creative imitation was a species of greatness[,] . . . [and] he helped to make American thought cosmopolitan and (paradoxically) to liberate American jurisprudential thought from slavish adherence to English models."[146]

Hudson County also shows Holmes's distinctly versatile nature as the quintessential American soldier-scholar-statesman, the Yankee from Olympus.[147] Holmes, the jurist, was a common-law jurisprudent, ethical skeptic, and law-as-power *tautologist*.[148] But Holmes, above all, was a philosophic realist and preeminent modernist legal scholar. Biographer G. Edward White formed a remarkably comprehensive characterization of Holmes by compiling recurring descriptors from contemporary reviews of Holmes's legal treatise *The Common Law*, noting that "'science,' 'philosophy,' 'history,' and an 'analytic' orientation, and 'progress' were mutually self-reinforcing concepts. Holmes could serve as a historian, a scientist, and a progressively oriented jurist at the same time."[149] These qualities manifested in Oliver Wendell Holmes as the prototypical jurisprudential realist who was occasionally inclined to move with the currents of positive social action. Thus, among his many other contributions to the United

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[146] Posner, *The Essential Holmes*, xx.

[147] Catherine Drinker Bowen, *Yankee From Olympus: Justice Holmes and His Family* (Boston: Little, Brown, 1944).

[148] Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000), 59–62. See also H. L. Pohlman, *Justice Oliver Wendell Holmes & Utilitarian Jurisprudence* (Cambridge, MA: Harvard University Press, 1984); and Max Lerner, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions* (New York: The Modern Library, 1943).

[149] White, *Justice Oliver Wendell Holmes*, 191.

States is Holmes's "creative" synthesis of nineteenth-century progressive philosophy and public trust doctrine in *Hudson County*—he borrowed, he enriched, and he reaffirmed the sanctity of the maxim *salus populi suprema lex est*.

And Holmes, in 1908, must have sensed the forward momentum of environmental conservationism; he may even have been informed by it. And he must have known that the romanticist language he used in his *Hudson County* opinion would appeal directly to conservationists. *Hudson County* represents, then, the remarkably fortuitous confluence of judicial doctrine, environmental conservationism, and the beginning of a progressive shift in American constitutional jurisprudence.

Conclusion

Donald Pisani noted in 1987 that "Frederick Haynes Newell, first director of the United States Reclamation Service (now Bureau), prophesied in 1902 that 'there must come a time when water must be apportioned with justice to all, and a century or more hence we will have it distributed not upon priority rights, but upon technical rights. . . . Water must ultimately be conserved in the most just manner for the general welfare of all citizens.'" Pisani continued: "That time did not come. The pursuit of wealth took precedence. Enterprise triumphed over equity."[150] Revealing an all-too-common tendency in legal historiography, Pisani fails to account for the significance of *Hudson County* as a progressive antecedent of legal realism and the much later formulation of modern environmental law. Equity and public rights, it seems, did not retreat in the Progressive Era.

[150] Donald J. Pisani, "Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century," *Western Historical Quarterly* 18, no. 1 (January 1987): 37.

Holmes was no environmental activist, and his personal views were decidedly more libertarian than his early court opinions might indicate. Much as *Lochner* era jurisprudence suggests the "progressiveness" of the Supreme Court at the beginning of the twentieth century—quite at odds with earlier interpretations of an activist court, à la the "persistent neo-Holmesian conceptualization of the *Lochner* era"—*Hudson County* reveals how the Court's progressive ideology both drew from and influenced environmental conservation philosophy.[151] In this sense, *Hudson County* may be best understood as a paradigmatic signpost on the road to the "settlement of 1937" and the era of legal realism.[152] Ultimately, as Cushman explains, "in a series of responses prompted both by external pressures and the internal dynamics produced by this interdependence [of constitutional doctrines], this integrated body of [*Lochner* era] jurisprudence eroded and ultimately collapsed."[153]

And while judicial panels contended with a range of "complexity and tension" from a "welter of doctrine, ideology, interest group and geographic conflict, and claims of 'consensus' and 'public interest' . . . [as well as] 'public rights' theory in the light of political realities," the adjudication and transformation of the public trust doctrine facilitated the refinement and enhanced the significance of public rights jurisprudence in American law.[154] Where *Lochner* era jurisprudence generally diminished the scope of public interest and seemingly prioritized vested rights, "*positive* notions of public rights" experienced a correspondingly progressive expansion and affirmation.[155]

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[151] Charles Warren, "The Progressiveness of the United States Supreme Court," *Columbia Law Review* 13, no. 4 (April 1913): 294–313; Gillman, *The Constitution Besieged*, 6.
[152] Fiss, *Troubled Beginnings*, 11.
[153] Cushman, *Rethinking the New Deal Court*, 6.
[154] Scheiber, "Public Rights," 250.
[155] Scheiber, 219 (emphasis in the original).

If *Hudson County* was ahead of its time with its reconceptualization of water strictly as a natural resource, it legitimated the late-twentieth-century development of an "emerging holistic paradigm" in environmental law and the expansion of the public trust doctrine "beyond the confines of navigable waters."[156] And, to borrow quote once more Teddy Roosevelt: "All this is simply good common sense. The underlying principle of conservation has been described as the application of common sense to common problems for the common good."[157]

[156] Myrl L. Duncan, "Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis," *Environmental Law* 26, no. 4 (Winter 1996): 1129; Michael C. Blumm and Thea Schwartz, "Mono Lake and the Evolving Public Trust in Western Water," *Arizona Law Review* 37, no. 3 (Fall 1995): 707.

[157] Theodore Roosevelt, "Special Message of the President," in *Report of the National Conservation Commission*, ed. Henry Gannet (Washington, DC: Government Printing Office, 1909), 1:3.

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