Public Rights and the Rule of Law in American Legal History

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No concept is so much honored in American law and jurisprudence as what we call "rule of law." In terms of judicial power and its uses, rule of law means the making of judicial decisions not by fiat or whim but instead by "principles which bind the judges as well as the litigants and which apply consistently among all [persons] today, and also yesterday and tomorrow."[1] Paradoxically, it is adherence to rule of law by courts, Professor Cox has argued, that makes it possible for the judiciary to make those "occasional great leaps forward,"[2] without loss of legitimacy, when "the felt necessities of the time"[3] require doctrinal innovation.

What follows, in this study, is an exploration of how in American legal history the courts have struggled with rule of law issues. I am concerned with examining in particular the question of how courts have reconciled considerations of public policy with the necessity of maintaining consistency both in the development of authoritative legal rules and in the rulemaking process itself. The first Part deals with the concept of "public rights"[4] as an element of nineteenth century legal

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1. A. Cox, The Warren Court 21-22 (1968).

2. *Id.* at 21.

3. O. W. Holmes, The Common Law *1. *See also* Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 62-63 (1965).

4. As I have used the phrases "public rights" and "rights of the public" in this study, they are consistent with jurisprudential usage in the nineteenth century. It is not the same usage, however, as courts have made of the term "public rights" in a line of cases concerning matters that Congress has discretion to bring or not bring within the cognizance of the constitutional courts. This latter, technical usage, deriving from Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855), was apparently not much employed by the Supreme Court until it made its way into *Ex parte* Bakelite Corp., 279 U.S. 438, 451-53 (1929). More recently, the phrase "public rights" has gained new prominence in administrative law and constitutional law. *See* Northern Pipeline Coustr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-73 (1982); Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 11-19 (1983).

doctrine and the relevance of this concept to the dynamics of institutional development. Part II considers the various models of historical change in relation to judicial doctrine as those models have been advanced in recent scholarship on legal history. An alternative interpretation will be offered based on the concept of tension among competing principles of law. Part III is a case study, examining a century of California law for purposes of illustrating the interplay of "public rights" doctrine with other doctrines (and also with concern for policy goals) in American legal history.

My title, "Public Rights and the Rule of Law," would have a more familiar ring if it read instead: "Vested Rights and the Rule of Law." An emphasis on "vested rights" would seem more fitting because so many leading commentators on American constitutional law—and certainly most legal historians, at least until very recently—have squarely associated the rule of law problem with the protection of property rights.[5] The late Edward S. Corwin, for example, placed at the very center of his great studies of due process the judicial quest for rules that would protect property rights; indeed, he referred to the vested rights doctrine as "the basic doctrine of American constitutional law."[6] More recently, Professor Haskins has invoked the same nexus between vested rights and rule of law—an image of the Supreme Court acting heroically to place judicial authority athwart the path of any who would have used governmental power in derogation of private rights—in explaining the greatness of the Marshall Court. It was Chief Justice Marshall's great achievement, Haskins asserts, that he established a "set of fixed principles—a rule of law—that would be binding . . . as generally accepted ideals."[7]

I have no quarrel with a view such as that of Corwin and Haskins, emphasizing vested rights concerns as a major theme in American constitutional adjudication. Along with individual (personal) rights, such as those protected by the Bill of Rights, vested property rights were *claims against government*; they defined a zone of private action and uses of property into which governmental authority could not be allowed to penetrate. Derived from natural law concepts and from the

5. Certainly this is the tendency, even today, in the writing of constitutional history textbooks and synthetic works. For the classic view, see C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS: A STUDY OF THE ESTABLISHMENT AND OF THE INTERPRETATION OF LIMITS ON LEGISLATURES WITH SPECIAL REFERENCE TO THE DEVELOPMENT OF CERTAIN PHASES OF AMERICAN CONSTITUTIONAL LAW *passim* (1930).

6. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

7. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 24 (1981). *See also* Nelson, Book Review, 131 U. PA. L. REV. 489, 489 (1982) (reviewing 2 G. HASKINS & H. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 (P. Freund ed. 1981)).

heritage of seventeenth century English political debate—and then encapsulated in the contract clause—the vested rights doctrine was an absorbing concern for the Supreme Court in the early history of the Republic. In the state courts, moreover, both natural law ideas and constitutional provisions protecting individual rights (provisions that generally embodied fifth amendment protections, and even the language of that amendment in the national Constitution), lent importance and vitality to judicial concern with vested rights.[8] The notion of rights enforceable against government itself was elaborated in arguments and opinions whenever political passions, the greed for power of government itself, or considerations of "mere policy" threatened to abridge rights that had formerly been established by law and recognized as requiring protection from capricious or unprincipled governmental action.[9]

I think it is mistaken, however, to limit our understanding of rule of law in our constitutional and legal history so as to confine it altogether to notions of private claims against government. In fact, I would contend that American judges and legal commentators have given sustained, explicit, and systematic attention to the notion that the public, and not only private parties, have "rights" that must be recognized and honored if there is to be true rule of law. Courts and writers in jurisprudence have not been content to define the legitimate stock of governmental powers as merely a residuum—what is left over, in effect, after vested rights and constitutional limits on state action have been accounted for. Instead, many American jurists have seen the quest for continuity and regularity in rules as being entirely consistent with the formulation of *positive* notions of public rights. These rights of the public are claims that run in the other direction from vested rights, across the boundary that separates private claims from public authority. Indeed, American courts have been concerned, historically, to forge a set of precepts that would introduce regularity and predictability of rules and that would take account of what the public (that is, the community) has a right to claim of its government.[10] Not only did courts frequently apply a public rights standard both to uphold legisla-

8. R. MOTT, DUE PROCESS OF LAW (1926); Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135; Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

9. H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 21-23 (1982).

10. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Scheiber, *Law and the Imperatives of Progress: Private Rights and Public Values in American Legal History*, 24 NOMOS: ETHICS, ECONOMICS, AND THE LAW 303 (1982) [hereinafter cited as Scheiber, *Imperatives of Progress*]; Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, in 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 327 (B. Bailyn & D. Fleming eds. 1971) [hereinafter

tive actions and, on occasion, to place limits on the other branches of government; courts also invoked this standard to justify highly significant modifications of authoritative rules of law in the common law tradition.

Judges' efforts to establish rules and principles that embodied the idea of public rights took a variety of forms. To be sure, there was no single, accepted view of the rights of the public; and application of the concept was not always uniform or even based on purity of motive. This does not mean, however, that the phrase was empty. It would be a mistake to relegate public rights rhetoric to the category that Judge Learned Hand reserved for "due process": the class of phrases "cast in such sweeping terms that history does not elucidate their contents."[11] The sources of law to which lawyers and judges appealed were several; the applications were diverse; and certainly there was opportunity to pervert or cynically manipulate public rights standards, no less than was done with vested rights or rule of law itself. In my view, however, judges seem to have done about as well with public rights concepts as they did with these others. This is a doctrinal history that deserves our attention; and the doctrine had results that were important.

Professor Dworkin has contended that when courts base decisions on principle, they do so for the recognition and protection of rights of individuals and groups; this is the common mode, and it is a justifiable use of judicial power. To ground decisions on notions of the collective good, however, is (in Dworkin's view) to make new law on the basis merely of "policy"; such is neither the usual mode nor a justifiable one, he argues.[12] This Article will illustrate, however, that in American legal history jurists often advanced under the rubric "rights of the public" a variety of concepts of the "collective good" or the "public interest." Transcending mere considerations of policy—choices as to the uses of governmental resources and power, for purposes of achieving specific results that have nothing to do with rights—were considerations of obligations that government owed the public. This notion of positive rights—that is, rights which legitimate collective claims by the community—colored judicial opinion and the course of legal change in ways that are obscured if we cling too closely to Dworkin's view of the matter.

The history of public rights in American jurisprudence, both in its

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cited as Scheiber, *The Road to* Munn]; Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 WIS. L. REV. 1403.

11. L. HAND, THE BILL OF RIGHTS 30 (1958).

12. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1204 (1977); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060-62 (1975); *see also* Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 985-86 (1977); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 171-72 (1971).

doctrinal development and in its relationship to uses of governmental power for resource allocation and for the regulation of private interests, is, then, the subject of what follows.

I
THE SOURCES AND VARIANTS OF PUBLIC RIGHTS DOCTRINE

The legitimate authority of government to act for the common good was at the heart of the police power; and so the common law's definition of "public police"—what Blackstone termed "the due regulation and domestic order of the kingdom"[13]—provided courts with essential material for a positive doctrine of public rights. Capturing the essence of this idea, and perhaps even presaging too the modern notion of affirmative obligations of government,[14] was Justice Story's statement, in an essay published in 1836, that "the promotion of the peace, health and good order of the society" was among the fundamental duties of government.[15] Similarly, Justice Woodworth of New York declared that the state's police power "rest[s] on the implied right and duty of the supreme power to protect all by statutory regulations, so that . . . the benefit of all is promoted."[16] In *Charles River Bridge v. Warren Bridge*,[17] Chief Justice Taney rested his holding on the proposition that "the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[18]

Despite such general assertions regarding governmental duties and public rights, no enduring or even serviceable definition of the police power emerged from American adjudication in the early nineteenth century. A blunt instrument indeed was Taney's formulation of the police power as "nothing more or less than the powers of government

13. 4 W. BLACKSTONE, COMMENTARIES *163.

14. I have reference here to the scholarly studies by Frank Michelman and by Laurence Tribe inspired by the decision of National League of Cities v. Usery, 426 U.S. 833 (1976). Michelman and Tribe argue that because the Court's decision (which invalidated cougressional regulation of wages and hours for municipal employees engaged in the essential functions of the "states as states") recognized certain functions as vital, it follows that there is an affirmative obligation on the state to perform such functions at a reasonable level. This seems to me, I should add, something like discovering that some lethal and volatile chemical compound contains a trace of oxygen. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

15. J. STORY, NATURAL LAW (1836), *reprinted in* J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 313, 322 (1971).

16. Vanderbilt v. Adams, 7 Cow. 349, 352 (N.Y. 1827).

17. 36 U.S. (11 Pet.) 420 (1837).

18. *Id.* at 547; *see* S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE ch. 7 & *passim* (1971).

inherent in every sovereignty to the extent of its dominions."[19] Such a definition gave not even nodding recognition to the fundamental distinctions among the powers of police, taxation, and eminent domain.

The challenge was taken up by the great chief justice of the Massachusetts court, Lemuel Shaw, who in 1851 provided a brilliant new juridical formulation of police power doctrine. In the landmark decision of *Commonwealth v. Alger*,[20] the Massachusetts court upheld the constitutionality of a statute that prohibited construction of any wharf or other structure in Boston harbor beyond boundaries on the shoreline specified by the legislature. Shaw's opinion represented a profound advancement over previous doctrinal efforts. First, it found the way out of a cul-de-sac into which Taney had driven the Supreme Court when he defined the police power as coterminous with the powers of government;[21] in *Alger*, Shaw provided carefully etched doctrinal boundaries for the police power. Second, Shaw provided a fully developed rationale for public rights, not only placing the concept within the common law tradition but also locating it with new authority within the constitutional and public law realm in American law.

In *Alger* Shaw derived from the common law's riparian doctrines a set of long-accepted, well-demarcated distinctions as to the character of property rights in lands under navigable waters and bordering such waters (in this case, Boston harbor waters). The riparian doctrine had traditionally distinguished "strictly public" property from property that was "strictly private"; more important, for Chief Justice Shaw's purposes, it also distinguished both public and private waters from waters that were *publici juris*—that is, property private in ownership *yet subject to public use*, as for navigation, fisheries, or wharf or ferry facilities.[22] Shaw grafted this doctrine, with its tripartite categories of property in waters, onto an analysis that claimed for the Massachusetts legislature the same powers over riparian rights as had been exercised by both king and parliament in England.

In effect, Shaw then imposed on the map of Boston harbor—its waters and its shoreline—lines that represented the jurisdictional boundaries of riparian property doctrine.[23] Then he went further, however, and defined boundaries of general significance that in an analo-

19. License Cases, 46 U.S. (5 How.) 504, 582 (1847).

20. 61 Mass. (7 Cush.) 53 (1851).

21. *See supra* text accompanying note 19.

22. This classification was presented circa 1670 by Lord Chief Justice Matthew Hale in *De Jure Maris et Brachiorum ejusdem*, part one of a three-part treatise that gained significant attention after publication in 1 COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND (F. Hargrave ed. 1787). For the history of these riparian categories in American law, see Scheiber, *The Road to* Munn, *supra* note 10.

23. 61 Mass. (7 Cush.) at 80-81.

gous manner defined property rights. By this process, he reached the conclusion that public rights—such as those the common law had long protected through validation of regulations of "ports, harbors, and tide waters"[24]—were under the obligatory protection of government in ways akin to the protection that the law extended to vested private rights. Like the king and parliament, the legislature was the trustee "for the best interest of the public" with regard to the uses of such special categories of property *publici juris*.[25]

The reach of Shaw's opinion went even beyond such property under a special servitude to the public; it embraced private property in general. Here again, he reached into the common law for an established rule of doctrine—in this instance, the *sic utere* doctrine, requiring private property owners to use their property in ways not harmful to others[26]—that represented public rights. His opinion declared:

> [I]t is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, *nor injurious to the rights of the community*.[27]

The uses made of private property must be free of harm to other private owners—but also free of harm to the public itself. On that concept of public rights rested the traditional doctrine of public nuisance. In Shaw's formulation, the absorption of nuisance concepts into American public law meant that property rights, "like all other social and conventional rights," must be "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."[28] The police power (as Shaw defined it) was not, however, to be restricted to the abatement or regulation of what the common law considered nuisances. On the contrary, for the sake of having "a definite, known, and authoritative rule which all can understand and obey,"[29] the legislature could legitimately extend the range of prohibited noxious or dangerous uses beyond the bounds customarily recognized in the common law. Indeed, Shaw explicitly asserted that all real property "is subject to some re-

24. *Id.* at 83.

25. *Id.*

26. *Sic utere tuo ut alienum non laedas*: "Use your own property in such manner as not to injure that of another."

27. 61 Mass. (7 Cush.) at 84-85 (emphasis added).

28. *Id.* at 85.

29. *Id.* at 96.

straint for the general good";[30] and the opinion was interlaced with references not only to the traditional public rights in common law (as in shorelands and highways under public servitude) *but also to the much more open-ended concept of "rights of the community."*[31] Here was the full development, in Shaw's hands, of a positive doctrine of public rights expressed in leaner form by his court five years earlier: "All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, *or to destroy or greatly impair the public rights and interests of the community . . . .*"[32] It is possible, of course, to view Shaw's public rights doctrine as an elaborate rhetorical smokescreen for what amounts to merely the validation of legislative power and policy determination; that is to say, the court based its decision, in the last analysis, upon "policy" and not upon "principle." All the analysis of "rights" was beside the point. In my own view, however, the significance of Shaw's police power doctrine lies in the positive concept of public rights as a validating canon for use of the state's regulatory powers; and in the linkage he forged through both *publici juris* and *sic utere* principles with the common law's doctrinal heritage. With stunning sweep, Shaw's opinion went beyond a judge's notion of what specific policy was best in the circumstances; it dealt with the foundations of legitimacy for positive governmental authority. The group whose rights were invoked to warrant regulation was the political community as a collective entity.[33]

Another doctrine relied upon by judges in the ante-bellum Republic to validate claims of public rights was the doctrine of "public trust." It was an important variant of public rights jurisprudence, in some measure derivative from the *publici juris* tradition in riparian law but also built on precedent and doctrine (especially in Lousiana, Texas, and California) in the civil law tradition. In the thirteen original states, it was related as well to doctrines relating to "commons," with their provisions for public use or easements.[34] The public trust doctrine pro-

30. *Id.* at 95.

31. *Id.* at 85 (emphasis added). This discussion of *Commonwealth v. Alger* owes much to the pathbreaking analysis in L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 229, 241-54 (1957) (recognizing the importance of the decision as a doctrinal foundation for modern economic regulation). *See also* Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 863-65 (1973).

32. Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 57 (1846) (emphasis added).

33. As Professor Greenawalt has pointed out, Dworkin's argument that government interests and power should be subordinated in judicial decisionmaking to individual rights omits from consideration the principle of public rights—the principle by which government's claims are made on behalf of rights of other individuals or groups, or the community as a whole, against the individuals whose rights are abridged. *See* Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 375-76 (1975).

34. Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 WM. &

vided that certain resources were held by government "as a trust for the public use and benefit"—so that courts properly could place limits on government's discretionary power in regulating or alienating such resources. Several times the United States Supreme Court ruled that tidewaters and navigable waters constituted resources in this category.[35] And in the former Mexican and Spanish jurisdictions, the state courts relied upon public trust doctrine to protect the rights of the public—claims of the community, against individuals' claims or against the authority of government itself—with regard to alluvial lands, pueblo lands, navigable waters, mineral lands, and other resources that had been designated under predecessor legal regimes as "trusts" held for the public good.[36]

Similar notions of public rights inhered, moreover, in the doctrines of "public purpose" and "public use" that American courts enunciated in the early development of both eminent domain and taxation law.[37] In 1848, the Supreme Court ruled in its first major eminent domain decision that every state had "the right and duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large" through the power to take private property.[38] This decision validated more than two decades of doctrinal contributions by state courts, which generally had upheld the view that upon payment of compensation (though not always truly fair compensation, as I have contended elsewhere[39]) property could be taken either by government itself or by private instrumentalities such as bridge or railroad corporations—businesses considered to have a special public character although they were private in ownership.[40] Closely related to

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MARY L. REV. 835, 840-46, 867-84 (1982); Scheiber, *The Road to* Munn, *supra* note 10, at 342-50; Selvin, *supra* note 10, at 1403-08.

35. Barney v. Keokuk, 94 U.S. 324 (1877); Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212 (1844); Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367 (1842).

36. Hart v. Burnett, 15 Cal. 530 (1860); Cowan v. Hardeman, 26 Tex. 217 (1862); Lewis v. San Antonio, 7 Tex. 288 (1851). *See* Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C.D. L. REV. 185 (1980); Selvin, *supra* note 10, at 1408-18.

37. *See* Scheiber, *Imperatives of Progress*, *supra* note 10. *See also* McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 137 (1930); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 617-26 (1940); Scheiber, *The Road to* Munn, *supra* note 10, at 360-81.

38. West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 531 (1848).

39. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 132-41 (L. Friedman & H. Scheiber eds. 1978).

40. *Id.*; *see, e.g.*, Hazen v. Essex, 12 Mass. (1 Cush.) 475 (1851); Ryerson v. Brown, 35 Mich. 333 (1877); Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 726 (1832) (an early decision that declared the "public use" concept to extend to more than those corporations "whose primary object is, to promote the public good"). *See also* C. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 98-159 (1954).

this concept was the "public purpose" standard that became the touchstone for determining the legitimacy of taxation measures, as in the railroad bond-aid cases of the 1850's and 1860's.[41]

We would be mistaken to regard such doctrines of public rights as being of little real-life importance in the nineteenth century simply because government in that era did not have the great share of income or national product, the massive bureaucracies and expertise, and the elaborate regulatory apparatus that it does in our own day. In fact, the state governments, operating in a decentralized federal system that largely conformed to the theoretical model of "dual federalism,"[42] had enormous influence in shaping the rules of the economic marketplace and of the social order. In the ante-bellum era, the states exercised virtually exclusive control over a great range of social and economic relationships and institutions that have become subject to national law in the modern period. The states regulated waterways, both for fisheries and navigation; supervised drainage of wetlands and development of bay waters such as Boston harbor for urban expansion; played the leading role in transportation development, both through public enterprises (especially canal construction and operation) and through chartering of private corporations that in many states were given large public subsidies; and had nearly exclusive control over labor relations, including slavery, and over corporations, banking, education, criminal justice, and family law.[43]

Because dual federalism was a functional reality, the validation by courts of positive state initiatives through emergent doctrines of public rights was of special significance. So too was invocation of public rights notions as a limitation—as in the public trust property cases[44]—

41. C. JACOBS, *supra* note 40; McAllister, *supra* note 37. Among the leading railroad bond-aid decisions were Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863); Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853). *See also* 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 PART ONE 918-1116 (P. Freund ed. 1971).

42. The following have been defined as the axioms of dual federalism:

> 1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4. The relation of the two centers with each other is one of tension rather than collaboration.

Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

43. For the argument, *in extenso*, that the ante-bellum American constitutional system, as a working entity, conformed in large part to the model of dual federalism, see Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 628-36 (1978) [hereinafter cited as Scheiber, *American Federalism and the Diffusion of Power*]; Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOC'Y REV. 57, 72-100 (1975) [hereinafter cited as Scheiber, *Federalism and the American Economic Order*].

44. *See* cases cited *supra* notes 35-36. *See also* Jawetz, *The Public Trust Totem in Public Land Law: Ineffective—and Undesirable—Judicial Intervention*, 10 ECOLOGY L.Q. 455, 464-69 (1982).

upon what government might do.

II
TAKING DOCTRINE SERIOUSLY

What I have been doing here is taking public rights seriously—that is to say, giving public rights the same sort of attention as scholars traditionally have given to doctrines of vested rights. In the quest to produce rule of law through doctrines of public rights, the courts sought to advance the cause of uniformity and consistency in the exercise of governmental powers; and, as they did with vested rights doctrines, which they derived from natural law and fused with the contract clause jurisprudence developed by the Marshall Court, the courts attempted to balance the claims of the public against both individual and governmental claims.

Many legal historians would object to giving *any* such rule of law doctrinal issues the sort of credence upon which the foregoing discussion of public rights is based. They might contend that common law and public law doctrines alike were shaped by judges mainly to advance specific policy goals, especially before 1861 when the goal of fostering economic development was a strong concern not only of legislatures but of courts as well.[45]

At the root of this emphasis on policy as the animating force behind doctrine is the monumental historical research of Professor Hurst.[46] Although Hurst's own studies certainly do not fail to take doctrines seriously, their most influential contribution to our interpretation of nineteenth century American law is the view that "the release of energy" (by which he means entrepreneurial energy in the economic marketplace) was a policy objective and a validating canon applied by courts in reviewing legislation and settling disputes.[47] Hurst has laid to rest Corwin's view that the doctrine of vested rights was the central

45. For discussion of the historical models that contend for this view, see Holt, *Now and Then: The Uncertain State of Nineteenth-Century American Legal History*, 7 IND. L. REV. 615 (1974); Hurst, *Old and New Dimensions of Research in United States Legal History*, 23 AM. J. LEGAL HIST. 1, 5-20 (1979); Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 WIS. L. REV. 1159; McClain, Book Review, 68 CALIF. L. REV. 382 (1980) (reviewing M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977)).

46. J.W. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES (1977) [hereinafter cited as J.W. HURST, LAW AND SOCIAL ORDER]; J.W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915 (1964) [hereinafter cited as J.W. HURST, LAW AND ECONOMIC GROWTH]; *see* J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956) [hereinafter cited as J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM].

47. *See* J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM, *supra* note 46, at 3-32. For analysis of Hurst's contributions, see Current, *Willard Hurst as a Wisconsin Historian*, 1980 WIS. L. REV. 1215; Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 44-45 (1975); Scheiber, *At the Borderland of Law and Economic*

element of American constitutional law;[48] for he has established that when courts confronted issues in property, torts, and public law, they tended to give preference to "dynamic" over "static" property rights. Courts helped clear the channels for entrepreneurial activity and innovation; they boldly took on the job of establishing priorities, in the allocation of legal privileges and immunities, among different types of property claims; and through various "expediting" doctrines such as those produced in eminent domain and corporation law, they made intangible but strategically vital contributions to the process of capital formation in the American economy.[49] They extended tort immunity to public officials once the states became active enterprisers, in the canal era, on grounds that great projects such as the Erie Canal—a project, in Chancellor Kent's words, "calculated to intimidate by its novelty, its expense, and its magnitude"[50]—should not be hampered by excessive solicitude for vested private rights. In the eminent domain cases, the courts also turned the compensation and "public purpose" doctrines into subsidizing instruments for both governmental and private enterprise.[51] And, most dramatically in early Anglo-American California, the state courts undertook the vital task of determining how the costs and benefits of a mining economy should fall upon various elements of society, with sweeping impact on received legal doctrines of trespass, waste, and riparian immunities.[52]

What emerges from this emphasis in historical interpretation is a focus on the pragmatism—also commonly termed "instrumentalism"—of American courts in the early nineteenth century. Judges bent and shaped the law in response to the widely held belief that material growth should be expedited. Far from giving vested rights an unassailable place in the citadel of American law, the courts regularly abridged and subordinated the claims of private rights when, as a New York court said in 1831, "the interest or even the expediency of the state"[53]

History: The Contributions of Willard Hurst, 75 AM. HIST. REV. 744 (1970); Tushnet, *Lumber and the Legal Process*, 1972 WIS. L. REV. 114.

48. *See* Corwin, *supra* note 6.

49. *See generally* L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM, *supra* note 46, at 3-32; Scheiber, *Federalism and the American Economic Order*, *supra* note 43, at 63-67.

50. Rodgers v. Bradshaw, 20 Johns. 735, 740 (N.Y. 1823).

51. Scheiber, *supra* note 39.

52. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 LAW & SOC'Y REV. 235 (1976); Scheiber & McCurdy, *Eminent-Domain Law and Western Agriculture, 1849-1900*, 49 AGRIC. HIST. 112 (1975).

53. Beekman v. Saratoga & S.R.R., 3 Paige Ch. 45, 73 (N.Y. Ch. 1831). *But see* Bloodgood v. Mohawk & H.R.R., 18 Wend. 9, 61-63 (N.Y. 1837) (disputing *Beekman*'s construction of legislative power to exercise the right of eminent domain as "inconsistent with the secure possession and enjoyment of private property"). *See also* Boston & Roxbury Mill Corp. v. Newman, 29

was at issue. They also modified the law, pragmatically, by resort to a style of judicial reasoning that reflected the premises of the *Charles River Bridge* decision, with its preference for dynamic enterprise: a view that "[t]he ever varying condition of society" must be considered as it "constantly present[ed] new objects of public importance and utility."[54] Of high importance, in the hierarchy of values that such judicial reasoning honored, was "the situation and wants of the community for the time being."[55] Flexibility in dealing with inherited law could hardly have been nurtured more effectively than on this premise. The pragmatic bias was reinforced by the sense of rivalry in the competitive quest for immigrants, capital, and entrepreneurial talent that was fostered by the decentralized system of federalism. This bias left ample room for validating canons, in property law, such as that expressed by the Connecticut high court just after the Civil War when it upheld an act permitting a taking for milldam purposes: "It is of incalculable importance to this state," the court said, "to keep pace with others in the progress of improvements, and to render to its citizens the fullest opportunity for success in an industrial competition."[56]

Some historians who stress the importance of pragmatic strains in American jurisprudence will be skeptical about taking very seriously the concept of public rights—or any other doctrinal formulation. Reinforcing this sort of skepticism is another strain in modern legal scholarship, a view that portrays *social exploitation* (and not merely pragmatism) as the dominant theme of the working legal system. When courts gave preference to "dynamic" over "static" property rights, it is argued, it was generally with a redistributive and exploitative intent (or certainly an awareness of exploitative results). Courts shifted resources in favor of the already powerful, the already wealthy, dominant elements in American society—at the expense of the deprived and already powerless.[57]

The best known presentation of this exploitative model of nineteenth century legal process, that of Professor Horwitz, may be said to portray three dominant themes as constants:[58] First, the cause of industrialization, with its modern capitalistic institutional structure, was consistently given priority by courts over agricultural interests that represented the economic and social *ancien regime*. Second, judges con-

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Mass. (12 Pick.) 467 (1832) (eminent domain may be exercised for "necessary and useful purposes"). For a contemporary view expressing alarm at the rapid expansion of "public use" concepts, see *The Security of Private Property*, 1 AM. L. MAG. 318, 333-47 (1843).

54. Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 729 (1832).

55. *Id.*

56. Olmstead v. Camp, 33 Conn. 532, 551 (1866).

57. For a critique of this view, see Hurst, *supra* note 45, at 14-20.

58. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

sistently gave the new entrepreneurial elements what they needed through the shaping and reshaping of legal rules, as old wine was poured into new bottles, new wine into old, and some bottles discarded altogether. And third, all this was done in the name of policy over law, and in the interest of a privileged minority at the top stratum of American society. A corollary, in this particular model of legal change, is that whereas courts relied on instrumental (pragmatic) styles of reasoning prior to the Civil War, they shifted after 1865 to a dominantly "formalistic" style—the "mechanical jurisprudence" of the conservative judicial era that was attacked by Roscoe Pound, Justice Holmes and others[59]—but with precisely the same exploitative motives and results as before the War.[60]

In my own view, there are several objections of considerable substance that challenge the exploitation model. These objections are summarized only in bare outline here, but they form an essential part of the conclusions of this study.[61] They are as follows:

First, to dichotomize American legal history so neatly, contending that one judicial style (instrumentalism) prevailed before the Civil War, whereas another (formalism) suddenly took over after 1865, is not supported by the evidence from judicial rhetoric and decision—and misleads us as to how courts worked in relation to rule and policy.[62]

Second, to postulate that "industrialization" and its claims on the law triumphed—in a sort of uniform, linear, and monolithic pattern—in confrontations with agricultural interests, always with the effect of subordinating and throwing costs upon the agrarian protagonists, both distorts the realities of class divisions in American society and seriously misrepresents the lineup of winners and losers in the courts.[63]

Finally, to stress, as is done by historians of the "exploitation" school, the courts' pragmatism and devotion to economic development, without giving attention to police power and other doctrines that rested

59. *See, e.g.*, R. POUND, INTERPRETATIONS OF LEGAL HISTORY (1923); Pound, *The Law in Books and Law in Action*, 44 AM. L. REV. 12, 15-20 (1910). Rumble, *Law as the Effective Decisions of Officials: A "New Look" at Legal Realism*, 20 J. PUB. LAW 215, 237-41, 245-71 (1971), offers full analysis of the Realist critique of mechanistic (formalist) reasoning, or what Pound termed "mechanical jurisprudence."

60. M. HORWITZ, *supra* note 58, at 265-66; Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

61. *See infra* Part III.

62. I have argued, *in extenso*, the case for this critique in Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1, 12-18. *See also* Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7, 211-14 (1979).

63. *See* Scheiber, *Law and American Agricultural Development*, 52 AGRIC. HIST. 439 (1978); Scheiber, *Regulation, Property Rights, and Definition of "The Market": Law and the American Economy*, 41 J. ECON. HIST. 103, 106-09 (1981).

upon public rights notions, is to give a partial and therefore incorrect picture of legal doctrine and its consequences in the nineteenth century.[64] In fact, public rights doctrine was not an invention of the court in *Munn v. Illinois*.[65] The doctrine was sufficiently developed by midcentury to support the proliferation of governmental interventions that occurred later in the century. The Granger Laws of the 1870's, for example, together with the doctrine of "affectation with a public interest" by which the Supreme Court upheld that legislation in 1877, were built solidly on legal concepts that long had been under development in American state courts.[66] The Granger decisions were not a startling intrusion into the nation's law, some *deus ex machina*.

Instead of either a simplistic "developmental" model of American law that crowds out doctrine altogether, or an "exploitative" model that postulates a linear movement toward bestowing advantages upon industrial interests and harming the poor and the powerless, another historical model ought to be considered: it is a model of tension.[67] There was tension between vested rights and entrepreneurial imperatives, as well as further tension between these imperatives and the principle that rights of the public must also be defined and given play by the courts. Public rights, like vested rights and related concepts in constitutional law, were sometimes invoked in ways that supported entrepreneurial needs and harmed established property claims. But public rights were also invoked in ways that regulated and constrained the very same "dynamic" or "dominant" interests that the exploitation model's champions would claim were uniformly the beneficiaries of judge-made rules.

Finally, the model that will be advanced in Part III is one in which

64. Scheiber, *Imperatives of Progress*, *supra* note 10; Scheiber, *Back to "The Legal Mind"? Doctrinal Analysis and the History of Law*, 5 REVS. IN AM. HIST. 458 (1977). For a rejection of the criticisms argued at length in these works and others of mine, *see supra* notes 62-63, together with a reaffirmation of the exploitation model's usefulness and accuracy, see Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663 (1982). An illuminating commentary is provided by Stephen Diamond, in his review essay, Diamond, *Legal Realism and Historical Method: J. Willard Hurst and American Legal History*, 77 MICH. L. REV. 784 (1979). For a shrewd critique of the instrumentalism-formalism distinction, see Paine, *Instrumentalism v. Formalism: Dissolving the Dichotomy*, 1978 WIS. L. REV. 997.

65. 94 U.S. 113 (1877).

66. *Id.* at 124-35. *See* Fairman, *The So-called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587 (1953) (contending that the affectation doctrine was without substantial precedent in American law). For a very different view, stressing the continuity and frequency of citations upholding the affectation doctrine through the public purpose concept, see Scheiber, *The Road to* Munn, *supra* note 10, at 334-60. On the Granger Laws in the states, and their state constitutional foundations in the early 1870's, see G. MILLER, RAILROADS AND THE GRANGER LAWS 161-71 (1971); Scheiber, *Public Policy, Constitutional Principle, and the Granger Laws: A Revised Historical Perspective*, 23 STAN. L. REV. 1029 (1971).

67. Scheiber, *Imperatives of Progress*, *supra* note 10. *See also* S. KUTLER, *supra* note 18; McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

neither the chronological dichotomy (pre- and post-Civil War) allegedly marking the shift from instrumentalism to formalism, nor the monolithic pattern of alleged judicial preference for industrial interests, is found to have prevailed in fact in the operation of courts or in legal process more generally.[68]

I will contend that often courts mobilized both public rights and vested rights doctrines—and not merely pragmatic rationalizations—to support the policy goals of economic growth and support modern sector industrial interests. In other instances, courts validated *regulation* of modern sector interests by invoking the public rights concept. I will argue, too, that historians' implications of conspiracy in the workings of the courts—that is, the notion of conspiratorial, or at least class-oriented and manipulative, uses of judicial power that is expressed in studies arguing for the exploitation model[69]—must be appraised by examining legal process as a whole, including legislative and plebiscitary processes. Without subscribing to a simplistic notion of "consensus," for example,[70] we can be alert to historical situations in which constitutional conventions, elected legislatures, and courts all seem to be in substantial agreement on important questions of policy and law. Even more to the point, before subscribing to a model in which courts mechanistically allocated rights and privileges to entrepreneurial elements, enhancing the privileges of the already wealthy and powerful, we need to consider what happened when the people themselves decided—through the plebiscitary processes of the referendum and initiative. If the plebiscitary process yielded the very results that an exploitative model postulates must have come from narrowly class-based or conspiratorial decisions by judges, then it seems premature, at best, to discard the notion of rule of law as nothing more than cynically contrived rhetoric, mobilized to obscure the real workings of the legal system.

In fact, taking doctrine seriously—and analyzing its importance by viewing it in the context of a tension model that embraces competing principles of law—can yield a more accurate historical understanding of "rule" and "policy" in American legal development.

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68. It is important to note that it is *legal process* as a whole—including the state constitutional conventions, statutory law, and the referenda and initiatives that generated positive law, along with the role of courts, all in the context of political structure and dynamics—that provides data for what follows, even though courts are the main concern. On recognizing that "legal system" and "governmental system" must often be treated as virtually synonymous in the analysis of law and its impact, see J.W. HURST, LAW AND SOCIAL ORDER, *supra* note 46, at 25 & *passim*.

69. *See* sources cited *supra* notes 58 & 60.

70. On the vexed subject of "consensus," see Diamond, *supra* note 64 at 789-94; Hurst, *supra* note 45, at 9-18; Scheiber, *American Constitutional History and the New Legal History: Complementary Themes in Two Modes*, 68 J. AM. HIST. 337, 342-43 (1981).

III
LEGAL PROCESS IN CALIFORNIA: A CASE STUDY

Evidence from the history of California law is appropriate, in the illustration of these themes, not only because of this occasion—the centenary of law teaching at Berkeley—but also because the history of the Pacific Coast region has been badly neglected in nearly all the major studies in which contemporary scholars have debated our legal past.[71] Moreover, California is interesting because of its "late start" (in terms of Anglo-American occupation and law) and because the pattern of economic activity in California was so radically different from patterns in the eastern states.[72] What follows in this Part is not a comprehensive overview of California's legal development but, instead, an investigation of selected cases and episodes that will illustrate the tension involving pragmatism, rule of law, and public rights concepts. The focus will be upon resource law and regulatory law, with a view toward illustrating both legal process generally and the relationship between changing policy goals and the mobilization of rules and principles by courts.

An extraordinary feature of the state's constitutional and private law from the Gold Rush days to the early twentieth century was the very great extent to which California courts were left without explicit guidance from the legislature (or from the state constitution's framers) on the critical matter of water law. Hence a judge-made law of water rights appeared in the 1850's and 1860's—law that was startling in its complexity and that amounted to a delicate, brittle legal structure that incorporated elements of traditional riparian doctrine, injections of robust appropriation doctrine, and some unique California doctrinal innovations in the rules of water ownership and allocation.[73] Even while holding tenaciously to the forms of the common law (e.g., notice, reasonable use, *disseisin*), the state's supreme court yielded to practical concerns—geographical necessity, the requirements of developing industrial technology, and population growth—by altering rules from the common law when they simply could not meet a pragmatic (or "instrumentalist") standard.[74]

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71. Prominent exceptions are found in several articles, McCurdy, *supra* note 52; Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981), and the historical essays on California law by Gordon Bakken, *see, e.g.*, G. BAKKEN, THE DEVELOPMENT OF LAW ON THE ROCKY MOUNTAIN FRONTIER: CIVIL LAW AND SOCIETY, 1850-1912 (1983).

72. *See, e.g.*, R. PAUL, MINING FRONTIERS OF THE FAR WEST 1848-1880 (1963).

73. Miller, *Shaping California Water Law, 1781 to 1928*, 55 S. CAL. Q. 9 (1973); *see also* Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252 (1936).

74. Scheiber & McCurdy, *supra* note 52, at 122-27. *See* Conger v. Weaver, 6 Cal. 548, 556-57 (1856); Wiel, *Public Policy in Western Water Decisions*, 1 CALIF. L. REV. 11, 13-16 (1912).

Similarly, the state courts exercised broad discretion in validating or modifying the miners' codes that had been adopted in the early mining camps—codes that stood as the framework of property claims and vested rights as the mining areas underwent a hectic process of growth and expansion, then often precipitous decline.[75] Moreover, the California courts found themselves adjudicating the basic issues of property rights generated by a policy that gave primacy to prospecting miners, who were given license to invade the holdings of agriculturalists on public lands. In this, as in other roles, judges sought to preserve the rudiments of vested rights; yet they balanced this concern against the desirability of recognizing the legislature's designation of mining interests as "paramount to all others."[76]

The supreme court did not engage in rules innovation or adaptation without concern for formal justification. Perhaps it did not conform to the high standard that Professor Lyons advocates that courts honor.[77] When they did innovate, however, the California judges articulated—often eloquently—both their concern about rule of law and their premises about its requirements. Ambivalence frequently was evident; in some areas of law, especially water rights, ambiguity and a troublesome confusion resulted. In one of its earliest decisions on resource law, the supreme court declared that "[c]ourts are bound to take notice of the political and social condition of the country, which they judicially rule."[78] In subsequent decisions, the imperatives of geography and social needs were never far from the forefront of judicial rationalization. In 1860, the court said that jurisprudence in the field of mining law "must necessarily be controlled and modified by the peculiar nature of the subject and by surrounding circumstances."[79] This view was expressed in a decision on fencing law in which the common law heritage requiring an investment in fences to keep out cattle as a condition of "possession" was brusquely swept aside by the court as a slavish commitment to a technicality: "The custom of the country," the

75. *See* Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198 (1862); Roach v. Gray, 16 Cal. 383 (1860); Dutch Flat Water Co. v. Mooney, 12 Cal. 534 (1859). Act of Apr. 29, 1851, ch. 5, § 621, 1851 Cal. Stat. 51, 149, provided for review and regularization of miners' codes by the state courts. In 1864, Chief Justice Sanderson declared: "These [local] customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the State." Morton v. Solambo Copper Mining Co., 26 Cal. 527, 533 (1864). *See generally*, R. PAUL, CALIFORNIA GOLD: THE BEGINNING OF MINING IN THE FAR WEST 213-26 (1947).

76. Boggs v. Merced Mining Co., 14 Cal. 279, 379 (1859); *see also* C. SHINN, MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT 99-116 (1948); Scheiber & McCurdy, *supra* note 52, at 118-21.

77. See Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178 (1984).

78. Irwin v. Phillips, 5 Cal. 140, 146 (1855).

79. English v. Johnson, 17 Cal. 108, 117 (1860).

court ruled, "does not require so useless a formality."[80] Four years later, the supreme court emphasized its willingness to set aside common law claims based upon "remote analogies of doubtful application and unsatisfactory results"; Chief Justice Sanderson deplored lawyers and judges "who seem to have been too long tied down to the treadmill of the common law to readily escape its thraldom."[81]

Despite such result-oriented, pragmatic rationalization for rules innovation, this same court became a bastion of loyalty to the received heritage of common law in the field of water law. This was true especially in the landmark *Lux v. Haggin* case of 1886.[82] The court upheld a strict riparianism, despite the forceful argument that reflected precisely the sort of rationale for escaping the "treadmill of the common law"[83] that the court itself had previously endorsed, and despite the pressures from entrepreneurial interests seeking to break up water "monopolies" founded on traditional riparian rights. Neither "instrumentalism" nor "developmental" requirements moved the court in this vital instance, and the *Haggin* decision became the vortex of political and legal storms in California for the next thirty years.[84]

A close look at *Katz v. Walkinshaw*,[85] decided in 1903, will illustrate the perplexities of rules innovation—and will also illustrate the way in which California courts sometimes captured ingeniously the essence of the rule/principle distinction that is dealt with by Dworkin, Lon Fuller, and others in modern jurisprudential theory.[86] Embarrassed that the English common law rules as to percolating waters could not possibly be applied fairly in California, the court took pains to explain how in arid localities underground water could be tapped by

80. *Id.*

81. Morton v. Solambo Copper Mining Co., 26 Cal. 527, 533 (1864). This decision upheld local custom and usage with regard to technicalities of notice, against the common law rules contended for (as the court declared) by counsel who seemed bent on going "back to the time when Abraham dug his well, or . . . [on exploring] the law of agency or the Statute of Frauds in order to solve a simple question affecting a mining right." *Id.*

82. 69 Cal. 255, 10 P. 674 (1886). For diseussion of this pivotal case, see Wiel, *supra* note 73, at 256-59; M. Miller, Law and Entrepreneurship in California: Miller & Lux and California Water Law, 1879-1928, 30-78 (Univ. of Cal., San Diego Ph.D. dissertation 1982) (on file with the *California Law Review*).

83. *See* Morton v. Solambo Copper Mining Co., 26 Cal. 527, 533 (1864).

84. Miller, *supra* note 73, at 12-14.

85. 141 Cal. 116, 74 P. 766 (1903).

86. For example, Dworkin provides an example of how a court overruling an established common law rule will choose between a "set of principles calling for the overruling of the established rule, including the principle of justice" and the principles (*stare decisis* among them) that work in favor of maintaining the existing rule. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855, 888 (1972). This is precisely the process of reasoning engaged in by the courts in many of the instances considered in this Article. What I seek to emphasize here, however, is that "the principle of justice" to which courts resorted included a concept of "public rights" expressive of public good.

more powerful pumps or deeper wells than people of less wealth could control; hence inequities would result, and those without the necessary capital could be deprived of their fair share of the water. Diversion was too easy—and, given the shortage of water in some districts, too profitable and tempting. "[W]e do not believe that public policy or a regard for the general welfare demands the [common law] doctrine," the court asserted.[87] The judges admitted that rule innovation so fundamental as they contemplated would not ordinarily be justified. Where geographical differences "are so radical as in this case," as between California and England, however—and where those differences "would tend to cause so great a subversion of justice"—then "a different rule is imperative."[88] To this degree, the decision, like many before it in California's jurisprudence of resource law, seemed to enshrine pragmatic reasoning and a faith in judicial determination of good policy.

The court chose not to leave the matter so, however, and went on to find in the common law itself both an overarching logic and specific maxims that justified such rule innovations. The decision quoted a Connecticut decision of two decades earlier, stating: "It is a well settled rule that the law varies with the varying reasons on which it is founded."[89] To look at the original relationship between real-life conditions and the rule was at least as important, then, as comprehension or parsing of the rule itself. The California judges found additional authority in an 1858 New York case: "We are not bound," the New York court had said,

> to follow the letter of the common law, forgetful of its spirit; its *rule* instead of its principle . . . . [T]he common law modifies its rules upon its own principles, and conforms them to the wants of the community, [and to] the nature, character and capacity of the subject to which they are to be applied.[90]

Turning its decision on these pivotal premises, the California court in *Katz*—the same court that held with tenacious faith to riparian common law doctrines despite practical consequences that were widely deplored as prejudicial to development of the country—abrogated with stunning suddenness the right of owners of the soil to drill without limit for underground water.[91]

One is reminded by all this of a dazzling double-feint, backhanded

87. 141 Cal. at 133, 74 P. at 771.

88. *Id.* at 134, 74 P. at 771.

89. Beardsley v. Hartford, 50 Conn. 529, 541-42 (1883).

90. Morgan v. King, 30 Barb. 9, 16 (N.Y. App. Div. 1858).

91. 141 Cal. at 133-34, 74 P. at 767. Compare the tenacity of the court in adhering to riparian doctrine, even to the point of gutting a sweeping water law reform statute, in its decision of Miller & Lux Corp. v. Madera Canal Co., 155 Cal. 59, 99 P. 502 (1909).

flying layup shot by a basketball immortal. Only in slow-motion replay does one comprehend the whole move; and only then does one realize that defiance of gravity is an essential component of it! There is, of course, an important difference between the basketball immortal and the appellate court: Another basketball player cannot replicate the move unless he or she, too, can defy gravity. After *Katz* and its rules-changing premises, all that other courts had to do to duplicate the move was cite the precedent. The amazing trick had to be performed only once.

The language and logic of *Katz* made adaptation and flexibility itself a validating norm. Squaring a legal rule with geographic realities, to make the end contemplated by the old rule attainable under new conditions, seems at first glance a rule of law maneuver. But it was not without its policy dimension. The court itself had, first, to determine when objective differences were "radical" enough to justify rules innovation. This element of subjectivity was linked, second, to the policy consideration that gross injustice—in this instance, to people of lesser means, not the rich and powerful who could afford the deeper wells and better drills—would be done by adhering to the old rule. It would be disingenuous to contend, with the Connecticut court, that a rule that is manifestly inappropriate or unjust simply "abrogates itself" in the common law.[92]

To their credit, the judges in *Katz* attempted a fully articulated rationale for rule adaptation and innovation:

> Whenever it is found that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and productions, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong . . . then the fundamental principles of right and justice on which that law is founded . . . require that a different rule should be adopted, one which is calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures.[93]

Here in a single passage, then, are commingled the doctrine of vested rights, the concern for release of entrepreneurial energies and just economic rewards, and the insistence that it was consistent with rule of law to innovate when "justice" demanded it.

Over several decades, the California courts built on the doctrine that special conditions required innovation and merged that doctrine

92. *Katz*, 141 Cal. at 123, 74 P. at 767 (" 'It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim: *"Cessante ratione, cessat ipsa lex."* This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself.' ") (quoting Beardsley v. Hartford, 50 Conn. 529, 541-42 (1883)).

93. 141 Cal. at 124, 74 P. at 767-68.

with a correlative doctrine of public rights. As we have seen above, the record belies simplistic or monolithic theories. In 1874, for example, the state's supreme court confronted a question of basic importance to the future of the agricultural economy: whether reclamation should be declared a public-purpose activity, thus justifying the legislature's devolution of the taxing power on instrumentalities created to promote reclamation. In *Hagar v. Board of Supervisors*,[94] the court balanced the imperatives of geography (and policy) against the claims of vested rights, against principled arguments for "uniformity" of legislation, and against due process claims. In this confrontation between newer and older entrepreneurial forces in agriculture, the court ruled in favor of the innovators. Reclamation, the court found, was "a public improvement of great magnitude, and of the utmost importance to the community. If left wholly to individual enterprise, it probably never would be accomplished."[95]

When the United States Supreme Court came a decade later to review California's policy on reclamation, however, it was Justice Field, the high priest of judicial conservatism and vested property rights, and former California judge, who wrote the decision upholding public policy and state discretion. Plaintiffs in the suit had contended in the trial court that special-district taxation, instituted when more than half the owners of wetlands in a designated locality petitioned for creation of a district, was an unfair charge on those opposing the plan—an effective taking without compensation.[96] "It is not open to doubt," Field wrote, "that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders."[97] The legislature must have discretion, Field declared, to apportion costs in "some just and reasonable mode" through either general taxation or special district assessments.[98] In a later opinion, Justice Field declared flatly that such "special burdens," which fall hard on vested rights in property, "are often necessary for general benefits."[99] In Field's jurisprudence, then, public rights and claims were placed in the balance in ways that confound any simplistic explanation of judicial behavior or monocausal theories that enshrine either instrumental or formalistic styles of reasoning.[100]

94. 47 Cal. 222 (1874).

95. *Id.* at 234-35.

96. Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1884).

97. *Id.* at 704. *See also* Field's strong statement on the scope of the police power in Barbier v. Connolly, 113 U.S. 27, 31 (1885).

98. 111 U.S. at 705.

99. Barbier v. Connolly, 113 U.S. 27, 31 (1885).

100. *See* McCurdy, *supra* note 52 (reappraising Justice Field's judicial thought); McCurdy,

Judicial realism and rhetoric about public rights intermingled again in an important 1891 opinion in which the state supreme court upheld the 1886 Wright Act for creation of irrigation districts.[101] Responding to the argument that benefits fell unevenly upon residents of the districts, with loss of uniformity of law in the state as a whole since only arid areas were affected, the court declared: "In a state as diversified in character as in California, it is impossible [to frame] legislation . . . applicable to [all] of its parts. . . . The power of the legislature to adapt its laws to the peculiar wants of [dry and wetland] districts rests upon the . . . principle . . . that it is acting for the public good . . . ."[102] Later, on similar grounds, the court validated the legislature's innovations in creating special-district structures with governmental powers and immunities for such purposes as sanitation and harbor development.[103]

At about the time law teaching was commencing at Berkeley, a case was working its way through the federal courts in California, with parallel litigation in the state courts, that concerned another issue of vested rights, policy, and public rights in a situation of three-way tension. These cases, the famous Mining Debris Cases, were decided in 1884.[104] They concerned the dumping of mining waste in the Sacramento River and its tributary streams. Since the Gold Rush days, the legislature and courts of California had given priority to the miner over other interests; and as hydraulic technology—which involved washing down of mountains—began to be employed, enormous quantities of debris began to be dumped into the streams of the Sacramento River system. Flood damage that threatened growing market towns, together with thousands of farms and homes, inspired a wave of litigation.[105]

All the standard arguments from the common law, together with claims of vested rights, were brought forth by counsel for the mining companies when litigants called upon the courts to provide injunctive relief. The miners had long prevailed, in fact, in similar suits; the rule

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101. *In re* Madera Irrigation Dist., 92 Cal. 296, 311, 28 P. 272, 274 (1891). *See also* Turlock Irrigation Dist. v. Williams, 76 Cal. 360, 18 P. 379 (1888).

102. *In re* Madera Irrigation Dist., 92 Cal. 296, 311, 28 P. 272, 274 (1891).

103. Pixley v. Saunders, 168 Cal. 152, 141 P. 815 (1914) (sewage disposal); City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630 (1928) (metropolitan water district); Ventura County Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 295 P. 6 (1930) (harbor district governance).

104. Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (9th Cir. 1884); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884).

105. The story is told to good effect in the detailed and thorough study by R. KELLEY, GOLD VS. GRAIN: THE HYDRAULIC MINING CONTROVERSY IN CALIFORNIA'S SACRAMENTO VALLEY (1959). *See also* Kelley, *Taming the Sacramento: Hamiltonianism in Action*, 34 PAC. HIST. REV. 21 (1965); Thompson, *Historic Flooding in the Sacramento Valley*, 29 PAC. HIST. REV. 349 (1960).

of law on this matter was well settled, and the contention that a vested right—the right to pollute—was at issue could hardly have been stronger. But the federal court, soon followed by the state courts, executed a complete turnabout, invoking the doctrine that navigable waters are a public trust which the state cannot properly permit to be abused and damaged in this manner. The injunction was granted, and one of the state's greatest industries was shut down and placed under federal supervision.[106] So far as interpretive historical models are concerned, the Mining Debris Cases provide little evidence to support either the view that the "modern" sector predictably triumphs over agricultural interests or the alternative view that large-scale corporate capital consistently prevails over small capitalists in the agrarian or commercial sector.

In other applications of the public trust doctrine—the concept of public rights as requiring protection—the courts compiled a mixed record. The trust doctrine was applied in expediting provision of urban water supplies, through invocation of pueblo rights;[107] and the rule was maintained that trust property was subject to special obligations on the part of government as trustee. Over the years, the court also proved ready, however, to permit alienation of trust property and to stretch the definition of what constituted uses consistent with the trust.[108] In a more traditional application of trust doctrine, the fish and game of the state came under a conservationist legal regime that was validated by the courts. In *Ex parte Maier*,[109] the California Supreme Court in 1894 reaffirmed that wild game "[belong] to the people in their collective, sovereign capacity . . . ."[110] The court mobilized the police power doctrine to uphold initiatives by the legislature to protect fish;[111] it deployed common law riparian and wild-game doctrines to enjoin activities that polluted a stream;[112] and, in 1918, it even upheld a stringent marketing-regulation act that imposed control over the uses made of commercial offshore fisheries catches.[113] The rhetoric employed by the court to support these rulings must have been startling indeed to an

106. Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (9th Cir. 1884).

107. Selvin, *supra* note 10, at 1431-34.

108. *See* Jawetz, *supra* note 44, at 476-80.

109. 103 Cal. 476, 37 P. 402 (1894) (upholding legislation, under the police power, to ban sale of Texas-killed deer within California). For a direct application of the public trust doctrine to California resources, see *In re* Phoedovius, 177 Cal. 238, 170 P. 412 (1918); People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897).

110. 103 Cal. at 483, 37 P. at 404.

111. *Ex parte* Bailey, 155 Cal. 472, 101 P. 441 (1909).

112. People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897) (stream pollution).

113. Paladini v. Superior Court, 178 Cal. 369, 173 P. 588 (1918) (fish marketing act). *See also* People *ex rel.* Ricks Water Co. v. Elk River Mill & Lumber Co., 107 Cal. 221, 40 P. 531 (1895); People *ex rel.* Ricks Water Co. v. Elk River Mill & Lumber Co., 107 Cal. 214, 40 P. 486 (1895).

electorate well accustomed, by then, to substantive economic due process. "Such fish," the court said, "can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose."[114]

The evidence here is adverse, again, to simplistic notions of agrarian interests versus modern industrial-sector interests. Consider the lineup of political forces involved in the 1918 fish marketing case.[115] The issue pitted the highly competitive fishing industry and its agricultural allies, who wanted cheap fish-meal fertilizer, on the one side, against consumer-oriented "public interest" proponents who, on the other side, sought to protect the fisheries from depopulation and to prevent the marketing of fish for human consumption from being "distorted" by competition from the fish-meal manufacturers.[116]

Only a few years later, the California court again dealt with the issue of what vested rights meant in the face of policy pressures and concepts of public rights—and the related question of what constituted a legitimate basis for departure from authoritative rules. This time the issue was urban zoning. Imposition of zoning that affected construction and uses of urban residential property in California's cities represented a quantum increase in the reach and intensity of public regulation. For the state's supreme court in 1925, in *Miller v. Board of Public Works*,[117] the challenge was not unlike what Chief Justice Shaw's court had confronted in Massachusetts three-quarters of a century earlier when the scope of public rights in Boston harbor was at issue. In a pathbreaking decision that presaged action by the United States Supreme Court a year later,[118] the California court upheld the new zoning statutes. "[T]he police power, as such," the court declared, "is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions . . . ."[119] Just as their predecessors in the mining era and the following decades of new irrigation and reclamation projects had made geographic realities a justification for departure from established common law rules, now the judges treated changing residential con-

114. People v. Monterey Fish Prods. Co., 195 Cal. 548, 563, 234 P. 398, 404 (1925). *See also* Paladini v. Superior Court, 178 Cal. 369, 371, 173 P. 588, 589 (1918); *In re* Phoedovius, 177 Cal. 238, 245, 170 P. 412, 414-15 (1918).

115. Paladini v. Superior Court, 178 Cal. 369, 173 P. 588 (1918).

116. This view of the politics of the fish marketing case is based on research in progress in collaboration with Arthur McEvoy and Berta Schweinberger. For the history of California fisheries law, see A. McEvoy, Economy, Law, and Ecology in the California Fisheries to 1925 (Univ. of Cal., San Diego Ph.D. dissertation 1979) (on file with the *California Law Review*).

117. 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed*, 273 U.S. 781 (1926).

118. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

119. 195 Cal. at 484-85, 234 P. at 383.

figurations, urban density, and technology as rationales for mobilizing the principle of necessary adaptation of constitutional law. The police power, the court declared, "is elastic and, in keeping with the growth of knowledge."[120] To this justification, however, the court also added "prevailing and preponderating sentiment" in favor of broadening regulation—"belief in . . . the need for [it]"—as a weight placed on the balance.[121] Individual rights needed to be protected, the court said; but in making a commitment to defend vested rights, "society did not part with the power to protect itself or to promote its general well-being."[122] So dawned the age of the "elastic police power," with California's court leading as it would do in later years when other features of property rights came under new regulatory measures.

The events of only a few years ago, in Tiburon, leading to the controversial decision in *Agins v. City of Tiburon*,[123] in which the United States Supreme Court reaffirmed a California local zoning ordinance, remind us of the line of continuity that comes down from that 1925 case and from its doctrinal foundations in nineteenth century public rights doctrine. In the same way as Chief Justice Taney, in the *Charles River Bridge* opinion, rejected a doctrine of vested rights that would freeze technological innovation and such public improvements as the construction of new bridges[124]—and in permutations also of Shaw's *Alger* doctrine concerning uses of private property injurious to public rights[125]—so do the modern courts assert that the channels of change must be kept open for innovations in the regulatory realm. That the public trust, too, and not only the police power may be "elastic" and "evolve" is brought home by another recent decision that echoes courts' concerns and rhetoric of a century ago—the Mono Lake decision.[126] The majority opinion in that California case rested upon the history of public trust doctrines, including the "venerable" Mining Debris decision that we have discussed here,[127] as did its conclusions that change, adaptation, and flexibility in the name of public rights were themselves inherent in the trust doctrine of California; "current

120. *Id.* at 485, 234 P. at 383.

121. *Id.* (referring to sentiment in many parts of the nation in favor of "necessary and reasonable zoning").

122. *Id.* at 488, 234 P. at 385 (quoting State *ex rel.* Carter v. Harper, 182 Wis. 148, 153, 196 N.W. 451, 453 (1923)).

123. 447 U.S. 255 (1980), *aff'g* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

124. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

125. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851), *discussed at supra* notes 20-33.

126. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

127. *See id.* at 436, 658 P.2d at 720, 189 Cal. Rptr. at 357 (citing People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884)).

knowledge" and "current needs" of the people,[128] must be given play in the law; and the "scope" of public trust—already having undergone expansion over the decades, at the hands of the courts—must be defined in a manner consistent with changing technologies, environmental realities, and notions of the public good.[129]

To an ear not attuned to the venerable decisions that we have been considering here, such rhetoric—like that of *Agins*—might cause one to despair that rule of law had come to an end. The skeptic might conclude, with Judge Oakes, that we are witnessing another episode in "a time of expanding social legislation when property rights [have been] essentially confined to a legal dust bin"![130] These modern rulings do not seem so alien or novel, however, when viewed in the perspective of the public rights tradition in California law or American law generally.

I do not mean to leave the impression that the courts of California from the Gold Rush to this Centenary day have consistently expanded public authority, or invoked public rights and police power doctrines in feckless derogation of vested rights. On the contrary, the state's high court has had its "economic due process" moments; and in the days of prevailing conservativism in the courts (the 1880's to the New Deal era), the California judges invalidated early legislative efforts to control private burning as a forest protection measure,[131] overturned rudimentary controls over oil and gas extraction,[132] and constrained the state regulatory powers over railroads.[133] The court also rejected the notion that the public trust requirement militated against oil leasing in the tidelands.[134]

Given the foregoing record, it is difficult to understand fully—but certainly essential to confront—a case that packed as much high drama into a judicial moment as any other in the history of American state law. It was the water rights case of *Herminghaus v. Southern California Edison Co.*, decided in 1926.[135]

The issue in the 1926 case concerned natural runoffs on the San

128. "In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

129. *Id.* at 433-41, 658 P.2d at 718-24, 189 Cal. Rptr. at 355-61; *see also* Sax, *supra* note 10, at 524-46.

130. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 608 (1981).

131. *In re* McCapes, 157 Cal. 26, 106 P. 229 (1909).

132. Associated Pipe Line Co. v. Railroad Comm'n, 176 Cal. 518, 169 P. 62 (1917).

133. *See* McAfee, *A Constitutional History of Railroad Rate Regulation in California, 1879-1911*, 37 PAC. HIST. REV. 265 (1968); Nash, *The California Railroad Commission, 1876-1911*, 44 S. CAL. Q. 287 (1962).

134. Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928).

135. 200 Cal. 81, 252 P. 607 (1926).

Joaquin River, where lands owned by Herminghaus extended over 18,000 acres fronting on twenty miles of the river's course. These lands had been irrigated by natural overflow, and Herminghaus claimed under riparian doctrine full vested rights to the overflow—the volume of which constituted only one percent, it was estimated, of the total flow.[136] Against Herminghaus was one of the state's most powerful corporate interests, the Southern California Edison Company. Upstream from the Herminghaus lands, the power company had signed contracts with other riparian claimants permitting the company to build dams for reservoirs that would serve for hydroelectric power production and that would also release specified amounts of flow for irrigation in the dry months. In one of the great ironies of California's legal-economic history, the Edison Company's contracts included several with the Miller & Lux Company. The Miller & Lux firm had been the successful litigant forty years earlier in *Lux v. Haggin*,[137] the decision that decisively fastened riparian rules of extraordinarily wide scope on water law in California. Now, in the *Herminghaus* litigation, the Miller & Lux interests were aligned with Southern California Edison's arguments *against* a strict, continuing adherence to riparianism.[138]

Against the power company's plan to expand its storage facilities upstream, the Herminghaus interests brought suit, demanding a stop to interference with the flow upon which they relied for their seasonal irrigation by natural flooding.

The uncertainties surrounding California's hybrid system of water law gave hope to the power company and its allies. After all, in the fabulous basketball-style move in *Katz*,[139] some twenty-three years earlier, the supreme court had demonstrated its concern for adjusting legal rules to square with social realities and the public welfare. A few years later, in another case involving Miller & Lux (at that time still in its old role of championing riparian rights),[140] the court had indicated that it would not adhere blindly to riparianism. Riparian doctrine would be subject to reappraisal, the court declared, if it was shown to "work wrong and hardship rather than betterment and good."[141] Now in *Herminghaus*, Southern California Edison attorneys and their courtroom allies were arguing that such a doctrine should easily validate

136. *Id.* at 86, 252 P. at 609; *id.* at 123, 252 P. at 624 (Shenk, J., dissenting).

137. *See supra* note 82.

138. *See* M. Miller, *supra* note 82, at 277-78 (discussing the role of the Miller & Lux Corp. in this litigation).

139. *See supra* text accompanying note 91.

140. San Joaquin & Kings River Canal & Irrigation Co. v. Fresno Flume & Irrigation Co., 158 Cal. 626, 112 P. 182 (1910).

141. *Id.* at 629, 112 P. at 183.

claims of a reservoir construction project that would produce cheap electrical power, would tame the overflow of a river some ninety-eight percent of whose waters ran without productive use to the sea each year, and would permit systematic irrigation by farming operatives willing to invest in up-to-date facilities.[142]

On the other side, however, was the shadow of *Lux v. Haggin*—and, for that matter, the legacy of the legislature's implied adoption in 1850, and the courts' explicit adoption, of the common law of riparianism.[143] The supreme court had later revealed a heightened intransigence in its posture on the water rights question. In 1909, in *Miller & Lux Corp. v. Madera Canal and Irrigation Co.*,[144] the justices had turned back an effort to impose a reasonableness standard on a riparian claimant with vested rights, as against an appropriator who had sought to divert waters adversely to the riparian. The riparian claimant is "not limited by any measure of reasonableness," the court asserted flatly.[145] Of even more significance was the fact that the court did not indicate much willingness to back down even when the legislature, during the reform era of Hiram Johnson's governorship, enacted in 1913 a comprehensive water law reform statute. This statute declared all unappropriated waters, and also riparian waters not "reasonably needed for useful, and beneficial purposes," to be "public waters" of the state and under administrative control of officers of a newly created Water Commission.[146] In a series of decisions, the court chipped away at the commission's authority and jurisdiction.[147] Underlining the court's determination to stand firm was an address made in 1922 by the chief justice, Lucien Shaw, declaring:

> The obvious answer on the question of policy is that the objection comes too late, that it should have been made to the Legislature in 1850, prior to the enactment of the statute adopting the common law. When that was done, the riparian rights became vested, and thereupon the much more important policy of protecting the right of private prop-

142. 200 Cal. at 110-11, 252 P. at 619. *See* Miller, *supra* note 73, at 27-30.

143. "The Common Law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stat. 219.

144. 155 Cal. 59, 99 P. 502 (1909). *See* discussion *supra* note 91.

145. 155 Cal. at 64, 99 P. at 511-12. *But cf.* Gallatin v. Corning Irrigation Co., 163 Cal. 405, 413, 126 P. 864, 867 (1912) (apparently contra).

146. Act of June 16, 1913, ch. 586, § 11, 1913 Cal. Stat. 1017, 1018. Underground waters were not affected.

147. *E.g.*, Department of Pub. Works v. Superior Court, 197 Cal. 215, 239 P. 1076 (1925). *See also* Miller, *supra* note 73, at 27-29; Pisani, *Water Law Reform in California, 1900-1913*, 54 AGRIC. HIST. 295, 314-15 (1980).

erty became paramount and controlling.[148]

The *Herminghaus* case provided the court with its chance to invalidate the crucial provision of the 1913 Water Commission Act that required riparian claims to be based on "beneficial" use of the water. What "public rights" meant now—and how far the legislature might be permitted to abridge rights that the court had allocated to riparian proprietors—was now before the bench. How far might the legislature go in the interest of meeting perceived social needs, adjusting the law to the availability of new technologies, and spreading the benefits of both irrigation and electrification?

The court stood by its guns. In a split decision, it reaffirmed the principles of ripariamism it had defined years earlier. The majority opinion declared that "[n]either a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them."[149]

What was the "rule" here? Was it the continuity and protection of vested property rights (in this case rights to water, less than one percent of which was said to be constructively used, and the rest running off to the sea)? Or was the "rule" in question one that the court would continue to apply (as it already had done) in fisheries cases and also in the urban zoning cases, that the public good justified an "elastic" police power and abrogation of existing property rights when public rights were asserted? The most intriguing question, in a way, concerned judicial reasoning: What happened to the terrific basketball maneuver demonstrated with true all-star agility years before in *Katz*?[150] Why was it no longer a "principle" that when a mere "rule" became inconsistent with changing technology or conditions, the right of the public to a new rule (reaching the goals of the old principle by a new interpretation) could be invoked?

The court's majority in *Herminghaus* tried to slip at least one knot by asserting that the power company itself was not "public" either in ownership or in purpose, and so could not qualify for special standing when abrogation of the vested rights of others was concerned.[151] This view flew in the face of 150 years of public-purpose doctrine in American law; it can hardly be taken seriously. On another judgmental matter the majority took a similar stand, asserting that use of water for natural-overflow irrigation of pastoral land—however inefficient it

148. Miller, *supra* note 73, at 29 (quoting L. Shaw, The Development of the Law of Waters in the West 15 (address to the Cal. Bar Ass'n Aug. 9, 1922)).

149. 200 Cal. at 101, 252 P. at 615 (quoting Miller & Lux Corp. v. Madera Canal & Irrigation Co., 155 Cal. 59, 65, 99 P. 502, 512 (1909)).

150. *See supra* text accompanying note 91.

151. 200 Cal. at 120, 252 P. at 623.

might be—was a reasonable use in traditional riparian terms, hence requiring protection of the court against taking without compensation.[152] But the heart of the majority view was the reassertion of riparian rights as the court had long defined them in regard to flowing waters. Legislative discretion and claims of public rights could not be accepted. Unheeded, in the conference room at least, though not in public councils, was the eloquent dissent of Justice Shenk, who provided a classic disquisition on public rights defined in terms of changing conditions and their social imperatives. In the last analysis, Justice Shenk rested his view on the needs associated with the "growth and prosperity of the state" that were now so dependent on flood control, systematic irrigation of croplands, and provision of electrical power.[153]

I discuss the history of the *Herminghaus* case at such length not solely because of its interesting doctrinal content. The case is equally interesting for its political dynamics and context. These aspects of its history illustrate vividly how misleading it can be to apply mechanistic, preconceived categories or models in historical interpretation. Recall the exploitation model, discussed earlier,[154] which portrays the legal system as using rule of law concepts as a cynically contrived cover for processes that exploit the poor and dispossessed to the benefit of the wealthy and powerful. Yet here in *Herminghaus* the state's supreme court—a court demonstrably willing at that time to abridge important private property rights in the name of expanding public rights and pursuit of the public good—was now taking a stand in favor of vested rights on behalf of a landed proprietor.

Herminghaus, controlling twenty miles of riverfront and thousands of acres, was no dispossessed or poor outcast; Herminghaus was an agrarian interest representative of an order (the cattle ranching fraternity) quickly being crowded out by a new power structure. And what legal actor could have better represented the *new* economic order than an electrical power company clearly destined to exercise vast private authority in an industrializing, urbanizing Southern California?

Allied with the power company, moreover, was Miller & Lux Corp., whose shift across the riparian-public rights legal barrier confounds any simplistic interpretation of their role.[155] Moreover, the *amici* who joined the losers in this case included the Attorney General of the United States, the Federal Bureau of Reclamation, and a small

152. *Id.* at 105, 252 P. at 617.

153. *Id.* at 123-24, 252 P. at 624-25 (Shenk, J., dissenting).

154. *See supra* text accompanying notes 57-58.

155. I am indebted on this point, as to the significance of *Miller & Lux Corp.* and its "switch" in this litigation, to the work of M. Miller, *supra* note 82, and M. Miller, Law, Land, and Water in California: The Case of Miller & Lux (Agricultural History Center, University of California, Davis, Working Paper Series No. 7, 1981) (on file with the *California Law Review*).

host of state irrigation districts and local agencies. Where is the locus of power? Where are the poor and powerless? And who are the favored Establishment? And if the full weight of the governmental bureaucracy, state and federal, and emergent agribusiness was clearly on the side of the power company, then why did they not win their victory in court? Even if the exploitation model is exaggerated, and we ought to expect, instead, to find simple pragmatism and "instrumentalist" judicial reasoning, why did the court's majority decision reject the pragmatic arguments for economic development?

All this is confounding enough. But to make the plot even thicker, Southern California Edison and its combination of private sector and public sector Establishment allies won their cause two years later: The law was reversed, and a "reasonable use" requirement was definitively imposed upon riparian rights. Water in California was brought under the police power in the new administrative mode, under an "expert" regulatory agency; and the *Herminghaus* doctrine was set aside.

It would be satisfying, if we wanted to save the exploitation or a similar model of legal process, to say that the judges collapsed under pressure from the interests. That is not, however, how the reversal happened. *It was by resort to a popular referendum that the law was changed.* The California constitution was amended, after a sustained and well-orchestrated open battle; and what one editor called "[t]he age-old battle of the water hole, halted temporarily when the *Herminghaus* decision became the basic water law of California,"[156] was resolved with the adoption of article XIV, section 3.[157]

It may be naive to suppose that a referendum invariably will produce a true reading of the "popular will." Especially in the light of more recent experience in California, when millions of dollars have

156. Bakersfield Californian, Oct. 18, 1928, at 2, col. 2 (emphasis added).

157. CAL. CONST. art. XIV, § 3 (adopted Nov. 6, 1928). The § reads in part:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

It is important to note that the arguments of Nelson, *supra* note 60, and of Horwitz, *supra* note 58, as to conspiratorial judges and as to exploitative effects of common law and constitutional decisions, rest on evidence that pertains mainly to the nineteenth century. The 1928 referendum is cited here a historical case for testing hypotheses about exploitation or judicial style: and it is conceded that referenda and initiatives became part of the structural framework of lawmaking only in the Progressive era, after the turn of the century. As I understand the Horwitz and Nelson arguments, however, they assert that the "formalistic" jurisprudence of the notoriously property-minded, conservative era in the history of American courts—embracing 1928, certainly, as indeed it embraced the 1920's decade generally—had its parallels, as to results, in judicial styles of the earlier periods. I do not, therefore, think it does violence to terms of the debate over American judicial history to focus as is done here on a late-1920's situation in state law.

been poured into referendum fights on such issues as environmental regulation and, for that matter, water law reform,[158] it can be argued that when a "money issue" is on the referendum ballot, the most intensively focused and highly financed propaganda efforts occur; and perhaps there is commensurate *distortion*, rather than enlightenment, of public understanding.[159] Yet the *Herminghaus* questions of "rule" versus "policy," of vested rights and competing doctrines, were settled in a way that fused public rights concepts in theory with "popular sovereignty" in practice: the people changed the constitution. Neither the judges, nor the rich and the powerful, nor even the legislature, finally ruled on this matter; it was the electorate who decided.

Accepting the process by which its earlier decision had been overruled, the state supreme court later reflected upon the purpose of the Water Amendment referendum. It was, the court concluded, "an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource . . . ."[160] The court had felt "impelled" in *Herminghaus*, said the justices, "to adhere to the long-established rule of *Lux v. Haggin*"; hence the resort to an amendment had become necessary.[161] There, in a juridical nutshell, was the final doctrinal meaning of a referendum fight that had mobilized in favor of the Water Amendment the owners (including thousands of small farmers) of 3.5 million acres of irrigated lands, the managers of both private and municipal power companies, the water-administration technocrats and their social-reformer irrigationist allies, the urban chamber of commerce types, the raisin packers and other agribusiness interests, the bankers, and others—including the Federal Power Commission chairman, who threatened to press suit on behalf of the federally licensed power company—against vestigial riparianism in California law.[162]

158. For example, the proposed 1982 amendment (defeated) that sought to bring underground water under the same principle of public use and control as CAL. CONST. art. XIV, § 3 had applied to flowing waters; and other ballots in recent years, such as those on limited-smoking areas (opposed with enormous sums spent by the tobacco industry) or littering with bottles (opposed by brewers, bottlers, and wholesaling and retailing interests).

159. *See generally* Lee, *California*, in REFERENDUMS, A COMPARATIVE STUDY OF PRACTICE AND THEORY 87, 110-17 (D. Butler & A. Ranney eds. 1978).

160. Chow v. City of Santa Barbara, 217 Cal. 673, 700, 22 P.2d 5, 16 (1933).

161. *Id.*

162. The discussion of leadership in the referendum fight is based on a larger study, now in progress, of plebiscitary politics and resource law in California, being conducted by the author with Berta Schweinberger. A leadership roster for the statewide organization supporting Amendment No. 27 (the Water Amendment) is given in the L.A. Times, Aug. 8, 1928, § 2, at 9, col. 1.

The alliance of social reformers, often committed to a utopian and communitarian view of benefits to be derived from irrigation-based community organization and farming, with hard-nosed real estate developers and with the technocracy in the reclamation field, is a subject of interest that transcends the present account. On this intriguing feature of California (and Western) reform history, see especially Conkin, *The Vision of Elwood Mead*, 34 AGRIC. HIST. 88 (1960); Pisani, *Reclamation and Social Engineering in the Progressive Era*, 57 AGRIC. HIST. 46 (1983).

How the legal historian ought to apply (or derive) explanatory models from such a welter of doctrine, ideology, interest group and geographic conflict, and claims of "consensus" and "public interest"—let alone derive from that congeries, in turn, the meaning of "public rights" theory in the light of political realities—is baffling to say the least.

CONCLUSION

I do not mean to conclude this view of the California case history with a counsel of despair. Sense can be made of it; patterns can be found. But they are patterns of complexity and tension, in the law just as in society; and room has to be left for inconsistency, paradox, what Marxists term "contradictions," and what Professor Hurst has termed "drift and default."[163]

The foregoing empirical foray into our legal history reveals courts mobilizing and articulating rules—including formulations concerning public rights—manifestly in the service of policy. Other rules were held to, most tenaciously, by courts against urgent social and political pressures. Judges sometimes fashioned rules so as to assert claims of the public good against governmental power; they deployed other rules, regarding the police power for instance, in order to justify the exercise of governmental authority in derogation of vested rights. Throughout, one finds judicial formulations of rules that are not as clear or distinguishable from one another as a systematic jurisprudence would dictate—nor, I am certain, so coherent as judges themselves would have liked.

What can be concluded is that to understand the historical record, in the judicial confrontation of the problem of rule versus policy, one must take account not only of pragmatic concerns and vested rights; one must also contend with public rights. In a sense, the concept of public rights is a precursor, or pretechnocratic progenitor, of what we now call the "public interest." The concept of public interest came to mean the definition of public good by a process dissociated from ordinary politics—generally through the enshrinement of "expert" technical opinion, through the mechanisms of independent commission structures as a fourth branch of government.[164] Prior to the advent of modern administrative agencies and bureaucracies of public sector pol-

Professor Pisani's forthcoming history of water law in California is expected to deal in depth with the impact of this alliance upon law and policy in the West.

163. J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM, *supra* note 46, at 74-75; Scheiber, *supra* note 47, at 749.

164. On the troubled subject of "public interest" concepts, see Hughes, *Rules, Policy and Decisionmaking*, 77 YALE L.J. 411 (1968); Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958); McCraw, *Regulation in America: A Review Article*, 49 BUS. HIST. REV. 159 (1975); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

icy specialists and technicians, however, the state courts frequently undertook to formulate and advance claims on behalf of the public; they derived such claims of public rights from the common law tradition, and they used judicial power in ways that gave vigor to a regulatory tradition in American law alongside the better known pragmatic and vested rights doctrinal legacies.

As California's experience exemplifies, this was neither a monolithic pattern nor a simple process. The courts sometimes validated, but also occasionally constrained, legislative authority—and by the 1880's, in the irrigation era, legal process had already begun to involve public sector technocrats. By the early twentieth century, plebiscitary processes (referenda and initiatives) further complicated the development and testing of public claims. Throughout, the courts struggled to integrate public rights concepts with rule of law, just as they had integrated notions of vested rights and instrumentalism. Nor is there any obvious chronological divide to be found between pre- and post-Civil War judicial styles.[165]

In none of the evidence we have examined here, moreover, do we find a linear process of industrial interests over agricultural, or dominant pragmatism, or dominant concern with vested rights; nor do we find consistent application and priority, in the value system, of public rights. Justice Holmes warned that one who seeks legal rules definable with mathematical precision is a person destined to discover only "penumbras" and not well-delineated logical realms.[166] The "stratosphere of icy certainty"[167] cannot be reached. That rarified intellectual navigating space is beyond our ken. The same may be true, I have to say, of both the public rights concepts that bore on rule and policy in our history, and of the interpretive models that historians have devised to explain the record of legal process itself in the United States.

165. *See supra* text accompanying note 62. Professor Samuel Beer provides a brilliant analysis of "public sector politics," the process by which governmental technocrats initiate and dominate policy debate, in modern American legal process. *See* Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 15-18 (1978); Beer, *The Modernization of American Federalism*, PUBLIUS, Fall 1973, at 49, 74-80.

166. Danforth v. Groton Water Co., 178 Mass. 472, 476-77, 59 N.E. 1033, 1034 (1901):

> It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power.

167. Address by Justice Hughes (Am. Law Inst., May 7, 1936).