WPSA 2016: Foundations of the Green State

Creating the Governmental Interest in the Environment: Progressive-Era Conservationism and Constitutional Change

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*Abstract*

*The expansion of governmental capacity to manage the United States’ natural resources between 1890 and 1930 is one of the most important strands in the development of the American administrative state. As in other policy areas, this expansion involved not only institutional and policy change but also significant developments in constitutional doctrine. But there is relatively little scholarship in either the APD literature or the history of conservation on the doctrinal development of governmental authority for conservation. This project aims to fill that gap. I address the questions: How did it become constitutional “common sense” that federal and state governments have broad authority to protect natural resources and the integrity of ecosystems in the interests of future generations? In justifying conservation policies before the courts, how were the state and national interests in the natural environment conceptualized? What options were on the table? Which ones were accepted and which ones rejected? This paper focuses on how this constitutional change played out in the area of wildlife conservation. I argue that conservationists tried out several different ways of conceptualizing the governmental interest in wildlife (first at the state level and then at the federal level): commercial interests, food security, a moral interest in animal welfare, aesthetics, diplomatic interests, and a common property interest in nonhuman nature were all forwarded, in public discourse and in legal argument. By the 1930s, a constitutional consensus was forged that wildlife conservation serves a range of legitimate government interests, that it is a matter of not only local but national concern, and that wildlife is not merely a commodity but a critical part of complex ecosystems that are themselves legitimate subjects for governmental protection.*

Introduction

The expansion of state and federal capacity to manage the United States’ natural resources between 1890 and 1930 is one of the most important strands in the development of the American administrative state. It is also, for environmental political theorists, an important milestone in the development of the “green state”: the state whose legitimacy rests in part on its ability to manage sustainably the ecological foundations of human society.[[1]](#footnote-1) The constitutional foundations for the modern American green state were laid during the first conservation movement. This paper investigates those foundations.

There is already a good deal of scholarship on the creation of the American administrative state, including the institutional and policy changes achieved by the early conservation movement. But little of this scholarship (in either the literature on APD or on the history of conservation) focuses on the doctrinal development of governmental authority for conservation. This paper is part of an effort to fill that gap. Specifically, I address the questions: How did it become constitutional “common sense” that federal and state governments have broad authority to protect natural resources and the integrity of ecosystems in the interests of future generations? In justifying conservation policies before the courts, how were the state and national interests in the natural environment conceptualized? What options were on the table? Which ones were accepted and which ones rejected? These questions speak directly to the constitutional foundations of the modern American “green state” because they address the basic rationale for government protection of the natural environment.

This paper focuses on the constitutional basis for early wildlife conservation policies. I argue that conservationists tried out several different ways of conceptualizing the governmental interest in wildlife (first at the state level and then at the federal level): Food security, commercial interests, a moral interest in animal welfare, aesthetics, diplomatic interests, and a common property interest in nonhuman nature were all forwarded, in public discourse and in legal argument. But in the years from 1900 to 1920, we can identify a major shift in legal discourse from characterizing wildlife as a source of food (the common property of the citizens of a state) to a more complex understanding of the social and economic value of wild animals to the nation as a whole. By the 1920s, a judicial consensus took shape that (1) several legitimate state interests could be served by wildlife protection, including (but not limited to) recreational, scientific, and commercial interests; (2) wildlife conservation was a matter of not merely local but national concern; and (3) wildlife could be treated not merely as commodities but as critical elements of complex ecosystems that are themselves legitimate subjects for governmental protection. Moreover, the constitutional debates leading up to this consensus marked out the path that doctrinal development would take in subsequent decades: the nineteenth-century legal framework supporting state fish and game laws would be transformed and the constitutional bases for federal wildlife policy would be established.

I. Conservation During the Lochner Era

The modern American administrative state was born during the Progressive Era, along with a set of new constitutional principles that legitimated it. To first-year law students, that early twentieth-century period of constitutional transformation is known as “the Lochner Era.” The standard story goes like this: In response to the increased pace of industrialization and urbanization at the end of the nineteenth century, Progressive-Era reformers campaigned for a host of new social policies requiring the expansion of the government’s administrative capacity and role in regulating social relations and the economy. Although the Progressives won many legislative victories, the courts were reluctant to sanction policies that infringed on private property and contract relations, as well as those that threatened the traditional limited sphere of federal power and the distribution of power between the legislative and executive branches. This reluctance is epitomized by the 1905 Supreme Court decision, *Lochner v. New York*,[[2]](#footnote-2) striking down New York’s minimum hours legislation for bakeries. From 1900 to the 1930s, courts regularly used constitutional arguments to block efforts to improve labor conditions, restrain trusts and monopolies, and impose national standards on industry.[[3]](#footnote-3) That reluctance continued until the 1937 case *West Coast Hotel v. Parrish[[4]](#footnote-4)*, upholding a Washington minimum wage law, which marked the Supreme Court’s capitulation to the New Deal and the modern regulatory state. Scholarly debate over the Lochner Era generally focuses on whether the Court’s anti-regulatory decisions during this period reflected ideological commitments to laissez-faire capitalism (the traditional explanation), or (for *Lochner* revisionists) an attempt by the Court to harmonize the existing doctrinal framework with changing social and economic realities through conventional legal reasoning.[[5]](#footnote-5)

Conservation policy does not fit neatly into this narrative. If we shift our focus from welfare, labor, and business regulation to natural resource conservation, a different story emerges. Like other Progressive-Era initiatives, conservation policies posed major challenges to private property rights and to states’ rights, and were politically contentious.[[6]](#footnote-6) But courts gave more support to conservation measures than they did to other innovative social policies of the era, and most constitutional issues surrounding conservation were settled by 1920. Three major constitutional battles over conservation policy were waged in the federal courts, concerning the Forest Service’s authority to impose grazing fees, federal protection for migratory birds, and whether state game laws restricted federal wildlife management on public lands. Opposition to these policies, either in the lower courts or by other government actors, was significant. But in all three cases, the conservationists won decisive victories in the Supreme Court. The era witnessed only one Supreme Court decision restricting federal authority over natural resources (the 1907 *Kansas v. Colorado[[7]](#footnote-7)* decision) and one restricting state authority to protect the environment (the 1922 *Pennsylvania Coal Company v. Mahon[[8]](#footnote-8)* decision*)*. Neither of these decisions significantly undermined federal or state conservation efforts.[[9]](#footnote-9) The most ambitious conservation policy of the era—the Tennessee Valley Authority—was upheld in 1936, a full year before the “switch in time” that usually marks the judicial acceptance of other New Deal policies.[[10]](#footnote-10)

It’s not my aim here to explain this favorable judicial response to conservation policy, but my research does suggest some hypotheses. First, government authority over natural resources had a broader legal foundation and longer history than its authority over labor and business. Second, conservation policy benefitted from the authority of environmental science, backed by the growing scientific reputation of the U.S. Department of Agriculture.[[11]](#footnote-11) Third, the conservation movement had a great deal of help from the creative lawyering of a handful of well-placed lawyers.[[12]](#footnote-12) These hypotheses support the *Lochner* revisionists who see the judges of this era not as a simple ideological actors but as legal professionals attempting to harmonize the existing legal framework with changing social and economic conditions. Given the different legal framework in conservation policy than in business or labor policy, we’d expect to see different results. Indeed, the constitutional framework for natural resource conservation was not the same as the framework governing other areas of Progressive policy reform. Property concepts were more prominent, and conservationists drew on emerging ecological science to develop new arguments concerning the relationship between the natural environment and commerce. These arguments were critical to the constitutional foundation for the contemporary green state.

This doctrinal evolution was incremental and happened largely before 1937. Gains were consolidated after that point, but most of the major initiatives at the federal and state level were already in place. Here I focus on one thread of this story, the development of the governmental interest in the protection of wildlife. The doctrinal story of forest and water conservation is a little different, as is the story of dealing with interstate pollution—but similar arguments were in play in all three areas, and in fact all three areas of doctrinal development converged in the leading case on federal authority over wildlife, the 1920 *Missouri v. Holland* decision.

I. The state interest in wildlife during the nineteenth century

Fish and game laws have a long history in the United States, but declining stocks of fish and game in the 1870s prompted a movement to expand and strengthen those laws. In addressing the general public and policy makers, these nineteenth-century conservationists forwarded three principal arguments for government protection of wildlife. The most prominent emphasized the commodity value of fish and game. Specifically, conservationists argued that stronger game laws were necessary to protect a valuable food source, particularly for the poor. Historian John Cumbler documents the frequent use of this argument in midcentury legislative debates; the idea of protecting fishing as a recreational sport did not become common until the very end of the century.[[13]](#footnote-13)

However, support for wildlife conservation came also from the animal welfare movement, led by Henry Bergh, who founded the American Society for the Prevention of Cruelty to Animals in 1866. Bergh gave most of his attention to protecting domestic animals, but humane societies did attempt to end some of the more egregious hunting practices by prosecuting hunters under the new anti-cruelty laws.[[14]](#footnote-14) They also participated in the fight to end the feather trade, countering the view of birds as commodities with an ethic of kindness toward animals as a basis for legislative restrictions on hunting.

A third important thread in the popular case for wildlife protection focused on the valuable services that wild animals, and particularly birds, offered to farmers. This was a frequent topic of discussion in magazines directed at farmers. Historian Richard Judd notes that farmers who contributed to these magazines recognized that birds played an important role in farming and had much to say about the agricultural value of birds.[[15]](#footnote-15) Scientists, particularly at the U.S. Department of Agriculture, promoted and informed this popular discourse. Since the 1850s, a small group of scientists working in the Division of Agriculture within the Patent Office had been studying the role of birds and other predators in agriculture. Concerned that farmers typically viewed birds simply as a nuisance that ate their crops, they gathered data to demonstrate that many birds provided a valuable service to farmers by eating destructive insects. The Department of Agriculture took up this research in the 1880s. C. Hart Merriam, head of the new Division of Economic Ornithology and Mammology within the USDA, was particularly concerned to educate farmers and legislators on the valuable role of predators like hawks, owls, weasels, minks, and coyotes in agriculture. The Division produced numerous bulletins and reports identifying insectivorous birds and estimating their economic impact. The USDA thus became a strong advocate repealing bounties on predators and for laws protecting nongame birds––and their case rested almost entirely on the economic value that insectivorous birds and other predators provided to agriculture.[[16]](#footnote-16) Although this was ultimately an economic argument, it differed from the arguments about food security and commodity value in that it rested on ecological science, and focused on wildlife as providers of what today we would call “ecosystem services.” As we will see, that argument proves to be particularly important in making the constitutional case for federal wildlife protection.

In sum, nineteenth-century conservationists developed a number of arguments for wildlife protection, appealing to a variety of different interests. But when we turn to litigation over fish and game laws, we see a much more limited set of arguments being forwarded. In court, defenders of game laws had to adapt their arguments to the existing legal framework for justifying government regulation. Thus the dominant rationale for state protection of wildlife in the nineteenth century rested on property concepts: Judicial decisions characterized wildlife as common property, owned collectively by the people of the state for their use as a food source. That property right constituted the chief foundation for state game laws.

According to the 19th century legal framework governing wildlife, fish and game cannot be privately owned; rather, they are held in trust by the state for the benefit of the state’s citizens. This is the public trust doctrine. The leading case is the 1821 decision by the New Jersey Supreme Court in *Arnold v. Mundy,* 6 N.J.L. 1. Arnold owned property in Perth Amboy on the Raritan River, which included an oyster bed, planted by Arnold, extending below the ordinary low water mark. Mundy brought a small fleet of skiffs and gathered the oysters, and Arnold sued for trespass. The court was thus presented with the question of how far a riparian property owner’s control over the riverbed extended. Judge Kirkpatrick concluded that the oyster bed did not belong to Arnold. “The air, the running water, the sea, the fish, and the wild beasts” are all part of the “common property” of the nation. Title to this property is “to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people.”[[17]](#footnote-17) In other words, the sovereign holds title to the “common property” as a trustee for the people of the state. Judge Kirkpatrick further suggested that this property cannot be sold by the sovereign; its enjoyment by the public is a “natural right with cannot be infringed or taken away.”[[18]](#footnote-18) Subsequently, several nineteenth-century decisions extended this reasoning from fish to terrestrial game.

Characterizing the state’s interest in fish and game as a common property right supported, against constitutional objections, legislative efforts to restrict hunting and fishing and protect habitat, even on private lands; to restrict the hunting and fishing rights of out-of-state residents; and to destroy the interstate markets in game. It supported, in fact, a degree of local community control over wildlife that contrasts quite strikingly with the laissez-faire ideology that was increasingly influencing other areas of law.[[19]](#footnote-19)

The main policy argument supporting this judicial deference to fish and game regulations was that wild fish and game were a major source of food, especially for the poor. Indeed, this food security rationale is the only policy argument that consistently shows up in judicial decisions. For example, the court in *Cottrill v. Myrick*, 12 Me. 222, supported Massachusetts’ protection of salmon, shale, and alewives on the grounds that “they were much relied upon, as among the means of subsistence.”[[20]](#footnote-20) In the 1868 Indiana case, *Gentile v. State*, 29 Ind. 409, the court upheld restrictions on fishing methods even on private riparian owners because fish “are valuable for food,” so “the public has an interest in their protection and growth.”[[21]](#footnote-21) The 1873 U.S. Supreme Court case *Holyoke v. Lyman*, 82 U.S. 500, which concerned the legislature’s authority to require that a dam owner build a fish passageway, began with a strong reminder that “rivers, though not navigable even for boats or rafts, and even smaller streams of water, may be and often are regarded as public rights, subject to legislative control, … as the source for furnishing a valuable supply of fish, suitable for food and sustenance.”[[22]](#footnote-22)

By the 1890s, though, this food security argument was creating difficulties for the conservation effort. Leading conservationist George Bird Grinnell had concluded by 1894 that markets in game were a major factor in the decline of wildlife, and that the conservation movement should therefore abandon the notion that hunting and fishing could provide a regular, cheap source of food. Historian John Reiger points to an important editorial in *Forest and Stream* in which Grinnell argues that “for the vast and overwhelming multitude of the people of the continent game is no longer in any sense an essential factor of the food supply.” On the contrary, it has become a luxury: “the day of wild game as an economic factor in the food supply of the country has gone by.” This was, as Reiger notes, a revolutionary shift in conservation strategy. Grinnell called for states to prohibit selling game altogether—a complete destruction of the market in game meat.[[23]](#footnote-23)

At the same time, conservationists were realizing that state-level conservation efforts, although expanding, were still failing to prevent overhunting and habitat destruction. Accordingly, they started to shift their efforts to the federal level. This shift brought a new set of constitutional problems into play, and required reformers to develop a new set of rationales for protecting wildlife. Those rationales that could no longer rest entirely, or even significantly, on the role of fish and game in the American diet.

Of course, there were other policy arguments that might have been used in legal argument to defend conservation measures. As mentioned, the animal welfare movement participated in the campaign to restrict bird hunting, and they managed to persuade a few courts to apply anti-cruelty laws to hunting practices. It is thus imaginable that our wildlife conservation regime, like our protections for domestic animals, might have come to rest on humanitarian principles. But the occasional application of anti-cruelty laws to hunting proved to be anomalous in American law—most courts concluded that they protected only domestic animals––and the animal welfare movement remained largely independent of the wildlife conservation movement. Humanitarian arguments thus would not be a major theme in the judicial discourse concerning wildlife conservation.

A second argument, however, did become more prominent in public and policy discourse as the constituency for conservation changed toward the end of the nineteenth century. Increasingly, conservationists focused on serving sportsmen—the wealthier segment of society that hunted and fished for sport. That focus led them to highlight the economic value of recreational fishing and hunting to the state’s economy.[[24]](#footnote-24) This new conception of wildlife quickly found its way into judicial reasoning over state-level wildlife policy, displacing the food security rationale.

II. Evolution of the state interest in wildlife

During the first decades of the twentieth century, courts increasingly upheld state wildlife laws as valid exercises of the police power aimed at regulating access to opportunities for fishing and hunting. At the same time, we also see a gradual recognition by courts that fishing and hunting are not the only interests served by wildlife—that states have interests, as well, in protecting nongame species.

Granted, because state authority over wildlife was so well-established by 1900, there are few cases from the Progressive Era discussing in detail the nature of the state’s interest in protecting wild animals. Indeed, even while other state regulatory efforts were being successfully challenged under the Due Process and Equal Protection Clauses (as in the notorious *Lochner* case), state wildlife regulations continued to receive deference from the courts. But the New York Supreme Court did have an opportunity to consider the nature of the state’s interest in wildlife in *Barrett v. State of New York*, 220 N.Y. 423 (1917).

The plaintiff in *Barrett* was challenging the constitutionality of New York’s successful program to reintroduce beavers to the Adirondacks. Barrett complained that the beavers were damaging his property, and argued that the law prohibiting hunting them was unconstitutional—that it was an unreasonable exercise of the police power because the state had no legitimate interest in protecting a destructive animal. He also sought compensation for the damage done by the beavers.

 The New York Court of Appeals rejected both claims. In explaining why the government had a legitimate interest in the beaver, the court faced a novel problem: Until recently, game laws were aimed at protecting populations of game so that people could continue to hunt them. But New York prohibited the hunting of beavers altogether. Since they could not be hunted for recreation, food, or their pelts, the court could not draw on any of the usual rationales for state wildlife protection. What was the state’s interest in protecting an animal from being used by humans at all?

According to the court, “The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved, not for its use but for its beauty.”

The same thing may be said of the beaver. They are one of the most valuable of the fur-bearing animals of the state. They may be used for food. But apart from these considerations their habits and customs, their curious instincts and intelligence place them in a class by themselves. Observation of the animals at work or play is a source of never-failing interest and instruction.[[25]](#footnote-25)

In short, the court endorses the absolute prohibition on hunting beavers because they are particularly interesting. Natural history—the opportunity to study their habits—is enough of a public benefit to justify the state law.

The court went on to reject the claim for damages, and *Barrett* is most often cited for this rule against landowners seeking damages from the government for destruction caused by protected animals. But I would suggest that it is even more significant for affirming the government’s interest in protecting animals simply for their beauty and scientific interest. Subsequent twenieth-century decisions on the state’s interest in wildlife have followed *Barrett* in concluding that protecting wildlife can serve a broad range of aesthetic, scientific, and other values beyond merely food or recreation. The federal interest, however, has been more difficult to define.

III. The Federal Interest in Wildlife

Between 1900 and 1920, during the campaign for federal migratory bird protection, conservationists developed several arguments supporting federal authority to protect wildlife. Led by sportsmen, naturalists, and a strong contingent of women engaged in progressive reform, the bird conservation movement organized around the Audubon Society (founded by George Bird Grinnell in 1886) and the American Ornithological Union (formed in 1883). Leaders of the movement included William Hornaday of the New York Zoological Society (and author of *The Extermination of the American Bison* and *Our Vanishing Wildlife*) and the influential members of the Boone and Crockett Club. They targeted in particular commercial bird hunting and the feather trade, as well as advocating closed seasons and restrictions on hunting methods.[[26]](#footnote-26) The campaign resulted in the 1900 Lacey Act, supporting state-level game laws, and then the Weeks-McLean Act of 1913, which authorized the Secretary of Agriculture to establish national closed seasons on migratory birds. The Weeks-McLean law was declared unconstitutional in several (but not all) cases in the lower courts. The State Department, however, was also working on a treaty with Great Britain to protect migratory birds, and conservationists thought that this treaty would allow Congress to legislate in this area. The treaty was concluded on December 8, 1916. Congress enacted the Migratory Bird Treaty Act in July 1918, supplanting the Weeks-McLean Act, and the Supreme Court upheld the new federal law in *Missouri v. Holland* in 1920.

The bird conservation movement marked an important shift in the principal policy arguments underlying wildlife conservation. The defenders of birds deemphasized the argument that wild game should be preserved as a cheap source of food for the poor. Instead, they began the work of decommodifying wildlife: Although sportsmen continued to support ethical hunting, many of the bird conservationists made strong appeals to humanitarian principles, offering the ideal of animal friendship and appreciation for the beauty of birds as an alternative to the hunter/prey relationship. These humanitarian appeals show up frequently in popular discourse and even legislative arenas. But by far the most common policy argument in legislative discourse was the claim that birds provided economically valuable services to the country by eating insects that can damage agriculture and forests.

For example, in the 1913 congressional debate over the Weeks-McLean Act, Senator McLean read into the record the report of the House Committee on Agriculture, which concluded that the economic rationale for the bill was twofold. First, it mentioned that “[t]he game birds yield a considerable and an important amount of highly valued food, and if given adequate protection will be a constant valuable asset.” But it had a great deal more to say about the insectivorous migratory birds, which

destroy annually thousands of tons of noxious weed seed and billions of harmful insects.These birds are the deadliest foe yet found of the boll weevil, the gypsy and brown-tailed moths, and other like pests. The yearly value of a meadow lark or a quail in a 10-acre field of cotton, corn, or wheat is reckoned by experts at $5. The damage done to growing crops in the United States by insects each year is estimated, by those who have made the matter a special study, at about $800,000,000.[[27]](#footnote-27)

McLean also included a long excerpt from the Senate Committee report, going into much greater detail about the economic value of insectivorous birds. That report relied heavily on the USDA research and concluded with this interesting statement about the ecological relationships among plants, birds, and insects that the bill was trying to protect:

All of the foregoing evidence goes to demonstrate the existence of a natural economic relation between these three orders of life. There is a sort of interdependence, and the existence of each one is dependent upon the existence of the others. But for the vegetation the insects would perish, and but for the insects the birds would perish, and but for the birds the vegetation would be utterly destroyed by the unchecked increase of insect destroyers.[[28]](#footnote-28)

In fact, most of McLean’s comments in favor of the bill focused on birds’ role in eating insects and destroying weeds, citing William Hornaday and several other scientists who described in detail the “special work” that each family of birds performs in the fields and forests.[[29]](#footnote-29) Proponents of the bill in the House debates also relied heavily on research showing the economic value of birds to farmers––such as an entire article by Professor de Loach of the University of Georgia entitled “The Economic Value of Birds to the Farmer.”[[30]](#footnote-30) By the time the federal law reached the courts, the argument that birds were critical to checking destructive insects was commonplace. This argument would turn out to be the most important rationale in judicial decisions as well.

The Weeks-McLean Act was challenged frequently in court, and three constitutional arguments were developed to support it.[[31]](#footnote-31) First, President Roosevelt endorsed the theory that the President had inherent power to protect the country’s resources. Second, lawyers for the administration tried to extend public trust doctrine, arguing that migratory birds could not be owned by any individual state, so ownership must lie in the national government. Finally, they also attempted to persuade courts to treat migratory birds as articles of interstate commerce, so that they could draw on the commerce power.

None of these arguments succeeded; in several high-profile cases, federal courts struck down the Weeks-McLean Act as exceeding Congress’ authority. But after the Migratory Bird Treaty was signed, Congress enacted the Migratory Bird Treaty Act, which superceded the Weeks-McLean Act. This was the law at issue in Missouri v Holland.

*Missouri v. Holland[[32]](#footnote-32)* arose out of the arrest of two Missouri citizens for violating federal game regulations. The defendants argued that the law was an unconstitutional infringement on the powers reserved to the state under the Tenth Amendment, and the state of Missouri intervened as well, asking the court to enjoin the federal game warden, Ray Holland, from enforcing the Act. Missouri claimed standing either because it had a property interest in the birds, or a quasi-sovereign interest in protecting the natural environment, under the parens patriae doctrine.[[33]](#footnote-33)

The Act was upheld by the lower court under the treaty power, and Missouri appealed. There were four briefs submitted to the Supreme Court: in addition to Missouri and the federal government, Kansas submitted an amicus brief supporting Missouri, relying heavily on the public trust doctrine (which held that wildlife was owned by the state). On the other side, the Association for the Protection of the Adirondacks submitted a brief, written by Louis Marshall, offering a creative argument that the federal government could regulate migratory birds under the Art IV Property Clause, because the birds were vital to the health of the national forests and other public lands. The U.S. brief relied mostly on the treaty power, but also raised the same arguments it had tried below: That migratory birds were either the property of the United States or articles in interstate commerce.

But what’s most interesting about *Missouri v. Holland* is that it reflects the constitutional “common sense” that there was a strong governmental interest in protecting wildlife. While they disagreed about whether that responsibility lay with the state or federal government, everyone assumed that the government had a sovereign (or quasi-sovereign) interest in wildlife. Their chief disagreement (beyond the central question of the limits of the treaty power) was in how they conceptualized this governmental interest. The attorneys for Missouri and Kansas continued to rely on the nineteenth-century legal framework that characterized wildlife as property. But Missouri’s reliance on the parens patriae doctrine, Marshall’s Property Clause argument, and the United States’ argument that protecting wildlife was a valid subject of international negotiation all depend on an emerging understanding of wildlife as particularly dynamic and important elements of natural ecosystems. That understanding is reflected, as well, in Justice Holmes’ opinion for the Court.

First, Holmes accepted Missouri’s argument that it had standing to intervene in the case due to its quasi-sovereign interest, under the parens patriae doctrine; he mentioned but offered no opinion on its property interest in the birds. He then addressed the treaty power: The power to make treaties is expressly delegated to the federal government, so the only question is whether there is some implicit limitation on that treaty power. Whatever such limits may be, Holmes opined, they are not the same as the limits on Congress’ authority to legislate in domestic matters:

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.[[34]](#footnote-34)

Holmes goes on to conclude that because the treaty did not contravene an express prohibition in the Constitution, the only question was whether “it is forbidden by some invisible radiation from the general terms of the [Tenth Amendment](http://www.lexisnexis.com/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T22880293719&homeCsi=6443&A=0.22958560635093983&urlEnc=ISO-8859-1&&citeString=U.S.%20CONST.%20AMEND.%2010&countryCode=USA" \t "_parent).”[[35]](#footnote-35) Does the treaty invaded state authority, as Missouri claimed? Here he questioned the nineteenth-century framework governing wildlife conservation:

No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.[[36]](#footnote-36)

In other words, he rejected the State’s claim to own the wildlife at all—just as the United States brief had asked him to. But further, he suggests that the United States can’t assert a property right in wildlife either. Indeed, he seems to be saying that migratory animals cannot be owned at all.

With the states’ property rights dismissed, we are left with only the state’s regulatory authority at stake:

[W]e cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself. As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim.[[37]](#footnote-37)

Holmes cited several cases holding that treaties overrode state laws, and concluded with a strong statement of the national interest in this treaty:

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.[[38]](#footnote-38)

Thus, Holmes concisely undermined the nineteenth century legal framework on which the Missouri and Kansas briefs depended: The state’s authority over wildlife rests on its regulatory authority rather than on the state’s property interest; the governmental interest in wildlife rests not solely on its commodity value but on its critical role in protecting agriculture and forest ecosystems; and that economic interest concerns the nation as a whole. The guiding principle underlying the whole opinion is the emerging conception of nature not as property but as a system that supports the national economy. Indeed, the parens patriae argument suggests that the natural environment could carry other, non-economic, values in which state governments, at least, had an interest (as *Barrett* and other cases on the states’ interest affirmed). But at the very least, Holmes’ opinion suggest that the economic value of nature reached well beyond its commodity value: Under a proper understanding of ecological science, the natural environment must be considered a vital part of the national economy and therefore a proper subject for international negotiation.

In sum, by the 1920s, the legal discourse around wildlife protection had been transformed. Instead of characterizing wildlife as a source of food, courts started to embrace a more complex understanding of the social and economic value of wild animals to the nation as a whole. By the 1920s, a judicial consensus took shape that (1) several legitimate state interests could be served by wildlife protection, including (but not limited to) recreational, scientific, and commercial interests; (2) wildlife conservation was a matter of not merely local but national concern; and (3) wildlife could be treated not merely as commodities but as critical elements of complex ecosystems that are themselves legitimate subjects for governmental protection. This consensus inform important cases in the 1920s and New Deal era (including *Hunt v. US*, 278 U.S. 96 (1928) which affirmed federal authority over wildlife on federal lands, and *Cochrane v. U.S.*, 92 F2d 623 (7th Cir 1937), upholding the MBTA under the Commerce Clause.) The constitutional debates leading up to this consensus marked out the path that doctrinal development would take in subsequent decades.

1. Robyn Eckersley, The Green State (Boston: MIT Press, 2004). [↑](#footnote-ref-1)
2. 198 U.S. 45 (1905). [↑](#footnote-ref-2)
3. For example, state and federal courts struck down the legislation in 38% of the 151 cases challenging labor protections between 1873 and1937. Julie Novkov, Constituting Workers, Protecting Women (Ann Arbor: Univ. of Michigan Press, 2001), pp. 29-30. [↑](#footnote-ref-3)
4. 300 U.S. 379 (1937). [↑](#footnote-ref-4)
5. Novkov, Constituting Workers, Protecting Women, pp. 1-11. [↑](#footnote-ref-5)
6. See Michael McCarthy, Hour of Trial (Norman: Univ. of Oklahoma Press, 1977). [↑](#footnote-ref-6)
7. 206 U.S. 46 (1907) [↑](#footnote-ref-7)
8. 260 U.S. 363 (1922) [↑](#footnote-ref-8)
9. Donald Pisani does see the federal government’s loss in *Kansas v. Colorado* as a major obstacle to federal water reclamation efforts, but federal authority over navigable rivers did grow unabated in the 1920s and 1930s. Pisani, Water, Land, and Law in the West (Lawrence: Univ. Press of Kansas, 1996), p. 47-49. [↑](#footnote-ref-9)
10. Ashwander v. TVA, 297 U.S. 288 (1936). [↑](#footnote-ref-10)
11. Daniel Carpenter, The Forging of Bureaucratic Authority (Princeton: Princeton Univ. Press, 2001). [↑](#footnote-ref-11)
12. Barry Cushman, Rethinking the New Deal Court, 80 Va. L. Rev. 201 (1994). [↑](#footnote-ref-12)
13. John Cumbler, Reasonable Use (Oxford: Oxford Univ. Press, 2001), pp. 95-96. [↑](#footnote-ref-13)
14. E.g., Waters v. People, 23 Colo. 33 (1896). [↑](#footnote-ref-14)
15. Richard Judd, Common Lands, Common People (Cambridge: Harvard Univ. Press, 1997), pp. 79-85. [↑](#footnote-ref-15)
16. James Tober, Who Owns the Wildlife? (Westport, CT: Greenwood Press, 1981), pp. 85-88. [↑](#footnote-ref-16)
17. 6 N.J.L. at 148. [↑](#footnote-ref-17)
18. 6 N.J.L. at 150-51. [↑](#footnote-ref-18)
19. The local control was hampered by weak enforcement mechanisms, however. See Ann-Marie Szymanski, “Wildlife Protection and the Development of Centralized Governance in the Progressive Era,” in Statebuilding from the Margins, ed. Carol Nackenoff and Julie Novkov (Philadelphia: Univ. of Pennsylvania Press, 2014), pp. 140-170; Richard Judd, Common Lands, Common People (Cambridge: Harvard Univ. Press, 1997), pp. 174-76. [↑](#footnote-ref-19)
20. 12 Me. at 229 (1835).. [↑](#footnote-ref-20)
21. 29 Ind. at 417. [↑](#footnote-ref-21)
22. 82 U.S. 500, at 506. [↑](#footnote-ref-22)
23. John Reiger, American Sportsmen and the Origins of Conservation (New York: Winchester Press, 1975), p. 71. [↑](#footnote-ref-23)
24. Cumbler, Reasonable Use, pp. 95-96; Judd, Common Lands, Common People, p. 184; Reiger, American Sportsmen, passim. [↑](#footnote-ref-24)
25. 220 N.Y. at 428. [↑](#footnote-ref-25)
26. Kurt Dorsey, The Dawn of Conservation Diplomacy (Univ. of Washington Press, 1998), pp. 165-191; Tober, Who Owns the Wildlife, pp. 165-214. [↑](#footnote-ref-26)
27. Congressional Record, 62nd Cong., 3rd Sess., 1913, 49, pt. 2:1484-85. [↑](#footnote-ref-27)
28. Id., p. 1486. [↑](#footnote-ref-28)
29. Id., pp. 1486-87. [↑](#footnote-ref-29)
30. Congressional Record, 62nd Cong., 3rd Sess., 1913, 49, pt. 5: 4332. [↑](#footnote-ref-30)
31. A good account of the constitutional arguments surrounding the migratory bird laws is found in Charles Lofgren, *Missouri v Holland in Historical Perspective*, 1975 Sup Ct. Rev. 77-122. [↑](#footnote-ref-31)
32. 252 U.S. 416 (1920). [↑](#footnote-ref-32)
33. In the leading case, *Missouri v. Illinois*, 180 U.S. 208 (1901), the Supreme Court ruled that it had jurisdiction to hear a tort suit by Missouri seeking to enjoin Illinois from discharging sewage into the Des Plaines River (and thus into the Mississippi River). There was no question that a state could sue another state to protect its property rights, but the court held that its interests extended further: “If the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.” In such cases, the state is acting as “parens patriae”—the guardian or protector of its citizens. This quasi-sovereign interest would be formulated thus by Justice Holmes in *Georgia v. Tennessee Copper Co*, 206 U.S. 230 (1907), in which Georgia sued the copper company to abate the noxious gas from its factories in Tennessee: “This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.” [↑](#footnote-ref-33)
34. 252 U.S. at 433, quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903). [↑](#footnote-ref-34)
35. 252 U.S. at 434. [↑](#footnote-ref-35)
36. Id. [↑](#footnote-ref-36)
37. Id. [↑](#footnote-ref-37)
38. 252 U.S. at 435. [↑](#footnote-ref-38)